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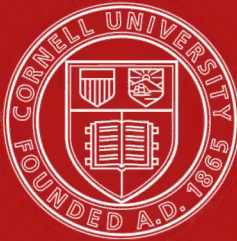
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A TREATISE
ON
THE SYSTEM OF EVIDENCE IN TRIALS
AT COMMON LAW

VOLUME IV.

A
TREATISE
ON THE SYSTEM OF
EVIDENCE
IN
TRIALS AT COMMON LAW
INCLUDING
THE STATUTES AND JUDICIAL DECISIONS
OF ALL JURISDICTIONS OF THE
UNITED STATES

BY
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IN FOUR VOLUMES

VOLUME IV.

BOSTON
LITTLE, BROWN, AND COMPANY
1905

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CONTENTS

VOLUME IV.

List of Latest Statutes and Reports Consulted xi

TOPIC B. — PRIVILEGED COMMUNICATIONS.

CHAPTER LXXIX.

SUB-TOPIC I. — CONFIDENTIAL COMMUNICATIONS IN GENERAL.

- | | |
|--|---|
| <p>§ 2285. General Principle of Privileged Communications.</p> | <p>§ 2286. Sundry Confidential Communications not privileged; Clerks, Trustees, etc.
§ 2287. Same: Telegrams.</p> |
|--|---|

CHAPTER LXXX.

SUB-TOPIC II. — COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

- | | |
|--|--|
| <p>2290. History.
2291. Policy.
2292. General Principle; Statutory Definitions.
1. "Where legal advice of any kind is sought,"
§ 2294. Privilege is irrespective of Litigation begun or contemplated; History of the doctrine.
2295. Same: General Principle and Policy.
2296. Same: Advice for Non-Legal Purposes.
2297. Same: Advice in Conveyancing or Drafting.
§ 2298. Same: Advice in a Criminal or Fraudulent Transaction.
2. "From a professional legal adviser in his capacity as such,"
§ 2300. Persons having Legal Knowledge, but not Admitted to Practice.
2301. Attorneys' Clerks and other Agents.
2302. Client's Belief in the Attorney's Status.
2303. Consultation in Attorney's Capacity.
2304. Time of Consultation; Rejection of Retainer by Attorney.
3. "The communications relevant to that purpose,"
§ 2306. Communications, distinguished from Acts; Client's Conduct and Appearance.
§ 2307. Same: Production of the Client's Documents.
§ 2308. Same: Testimony to Contents of Documents.
§ 2309. Same: Testimony to Possession, Existence, and Execution of Documents.
§ 2310. Relevancy or Necessity of the Communication.
4. "Made in Confidence,"
§ 2311. Communications must be Confidential; Presence of a Third Person; Sundry Applications of the Principle.</p> | <p>§ 2312. Communications to Opponent or his Attorney, or in Opponent's Presence; Joint Attorney.
§ 2313. Identity of Client or Purpose of Suit.
2314. Execution of a Will or Deed.
2315. Same: Attorney as Attesting Witness.
5. "By the client,"
§ 2317. Privilege not applicable to Knowledge acquired from Other Persons, unless as Agents of the Client; Who are Agents.
§ 2318. Documents of the Client existing before Communication; General Liability to Discovery, distinguished.
§ 2319. Same: Conflict of the foregoing Principles illustrated.
§ 2320. Communications by the Attorney to the Client.
6. "Are at the client's instance permanently protected,"
§ 2321. Privilege is the Client's, not the Attorney's, nor the Party's; Who may claim.
§ 2322. Inference from Claim of Privilege; Judge to determine Privilege.
§ 2323. Protection continues, though Relation of Client and Attorney be ended.
7. "From disclosure by himself or by the Legal Adviser,"
§ 2324. Testimony by the Client or by the Attorney.
§ 2325. Indirect Disclosure by the Attorney.
2326. Third Persons overhearing.
8. "Except the client waive the protection,"
§ 2327. Waiver, in general; Voluntary Testimony as a Waiver.
§ 2328. Waiver by Joint Clients, Agents, Assignees.
§ 2329. Waiver by a Deceased Client's Representative.</p> |
|--|--|

CONTENTS.

CHAPTER LXXXI.

SUB-TOPIC III. — COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

1. In general.

- § 2332. Policy.
- § 2333. History.
- § 2334. Marital Disqualification and Anti-Marital Privilege, distinguished; Statutory Enactments.
- 2. Scope of the Testimony Privileged.
- § 2336. Knowledge obtained in Confidence, Express or Implied.
- § 2337. Communications, not Acts.

§ 2338. Exceptions and Distinctions.

3. Persons Prohibited and Entitled.

- § 2339. Third Persons overhearing; Documents obtained by Third Persons.
- § 2340. Who may Claim the Privilege; Waiver.

4. Cessation of the Privilege.

- § 2341. Death; Divorce; Separation; Invalid Marriage.

CHAPTER LXXXII.

SUB-TOPIC IV. — COMMUNICATIONS BY AND TO JURORS.

§ 2345. General Principles involved.

A. PETIT JURY.

1. Privileged Communications Rule.

§ 2346. Scope of the Principle.

2. Parol Evidence Rule.

- § 2348. General Principle.
- § 2349. (a) Jurors' Motives, Beliefs, Misunderstandings, Intentions, and the like, as Immaterial.
- § 2350. Same: Examining the Jury before Discharge, to ascertain the Grounds of Verdict.
- § 2351. (b) Issues of the Trial, as Material.
- § 2352. (c) Irregularities and Misconduct, as Material; Jurors Impeaching their Verdict; History of the Rule.
- § 2353. Same: Policy of the Rule.
- § 2354. Same: State of the Law in Various Jurisdictions; Qualifications of the Rule.

- § 2355. (d) Mistake in Recording or Delivering the Verdict.
- § 2356. Same: Explaining the Verdict's Meaning; Mistake as to its Legal Effect; Retiring to Reconsider.

3. Arbitrators' Awards.

- § 2358. Foregoing Principles applied to Arbitrators' Awards.

B. GRAND JURY.

1. Privileged Communications Rule.

- § 2360. History and General Principle.
- § 2361. (a) Privilege of Grand Jurors; Secrecy of Vote and Opinion.
- § 2362. (b) Privilege of Witnesses before Grand Jury; General Principle.
- § 2363. Same: Instances of Cessation of Privilege.

2. Parol Evidence Rule.

- § 2364. Grounds for Indictment; Illegal Evidence; Required Number of Votes, etc.

CHAPTER LXXXIII.

SUB-TOPIC V. — STATE SECRETS AND OFFICIAL DOCUMENTS.

- § 2367. Several Principles discriminated.
- § 2368. (a) Tortious Liability of the Executive.
- § 2369. (b) Constitutional Subjection of the Executive to Judicial Process.
- § 2370. (c) Testimonial Privilege of the Executive not to be a Witness.
- § 2371. (d) Testimonial Privilege of the Executive not to Attend Court.

- § 2372. Same: Ambassadors, Consuls, Judges.
- § 2373. (e) Irremovability of Official Records.
- § 2374. (f) Privilege for Communications by Informer to Government.
- § 2375. (g) Privilege for Secrets of State and Official Communications.
- § 2376. Same: Who determines the Necessity for Secrecy.

CHAPTER LXXXIV.

SUB-TOPIC VI. — COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.

- § 2380. History and Policy; Statutes.
- § 2381. (a) Confidentiality of Communications; (1) Implied Confidence; Burden of Proof; Third Persons' Testimony.
- § 2382. Same: (2) Professional Character of the Consultation.
- § 2383. (b) Communications Necessary for Prescription.
- § 2384. (c) Information, Active and Passive.
- § 2385. (d) Criminal Cases.

- § 2386. (e) Whose is the Privilege; Claim of Privilege; Inference from Claim.
- § 2387. (f) Termination of the Privilege; Death.
- § 2388. Same: Waiver, in general; Express and Implied Waiver.
- § 2389. Same: Waiver by Bringing Suit; by Testifying; by Former Waiver.
- § 2390. Same: Waiver by Calling the Physician; by using "Proofs of Death."
- § 2391. Same: Waiver by Deceased Patient's Representative.

CONTENTS.

SUB-TOPIC VII.—COMMUNICATIONS BETWEEN PRIEST AND PENITENT.

- | | |
|---|---------------------------------------|
| <p>2394. History; No Privilege at Common Law.
2395. Statutes recognizing the Privilege.</p> | <p>2396. Policy of the Privilege.</p> |
|---|---------------------------------------|

CHAPTER LXXXV.

PART IV.—PAROL EVIDENCE RULE (CONSTITUTION OF LEGAL ACTS).

INTRODUCTION.

- § 2400. Parol Evidence Rule, not a Rule of Evidence.
§ 2401. Parol Evidence Rule, a group of Rules defining the Constitution of Legal Acts; Four Subdivisions of the Subject.
A. CREATION OF LEGAL ACTS.
§ 2404. General Principle; Intent and Expression; Subject, Tenor, and Delivery.
§ 2405. History of the Principle.

1. Subject, Tenor, Delivery, in General.

- § 2406. (a) Subject must concern Legal Relations; Transactions of Jest, Friendship, Charity, and Pretence.
§ 2407. (b) Terms must be Definite; Terms Implied from Conduct; Document Void for Uncertainty.
§ 2408. (c) Act must be Final; (1) Delivery, as applied to Deeds; Conditions Precedent; Escrows.
§ 2409. Same: (2) Delivery, as applied to Negotiable Instruments.
§ 2410. Same: (3) Delivery, as Applied to Contracts in general; Conditions Precedent and Subsequent; Assent of Third Persons; Blanks; Dates.
§ 2411. Same: (4) Publication as applied to Wills.

2. Intent and Mistake, as Affecting Subject, Tenor, and Delivery.

- § 2413. Intention and Mistake in General; Modern Test of Reasonable Consequences, applied to Expressed Intent.
§ 2414. (A) Intent not to be Bound at all.
§ 2415. (B) Terms of an Act; (a) Signing a Completed Document; (1) Individual Mistake, not known to or induced by the Second Party.
§ 2416. Same: (2) Individual Mistake known to or induced by the Second Party.
§ 2417. Same: (3) Mutual Mistake; General Principle.
§ 2418. Same: Mutual Mistake as affecting Bona Fide Holders for Value.
§ 2419. Same: (b) Signing a Document having Blanks or Capable of Alteration; Writing one's Name not as a Signature.
§ 2420. (C) Delivery of a Document; Escrow; Deeds or Negotiable Instruments delivered to Bona Fide Holders, contrary to Intent of Maker.
§ 2421. Unilateral Acts; Foregoing Principles applied to Wills and Ballots.

3. Voidable Acts.

- § 2423. Motive as making an act Voidable; Mistake, Fraud, Duress, Infancy, and Insanity.

B. INTEGRATION OF LEGAL ACTS (VARYING THE TERMS OF AN INSTRUMENT).

- § 2425. General Theory of the Rule against Varying the Terms of an Instrument.
§ 2426. History of the Rule.

1. Integration of Unilateral Acts.

- § 2427. Official Documents (Surveys, Appointments, Assessments, etc.).

2. Integration of Bilateral Acts.

- § 2429. No Integration at all; Casual Memoranda.
§ 2430. Partial Integration; General Test for Applying the Rules; "Collateral Agreements."
§ 2431. Same: Incorrect Tests; (a) "Varying the Terms of the Writing;" (b) "The Writing is the Sole Criterion;" (c) Fraud, in Pennsylvania.
§ 2432. Receipts and Releases; Bills of Lading.
§ 2433. Recital of Consideration in a Deed.
§ 2434. Warranty in a Sale; Insurance Warranties.
§ 2435. Agreements not to Sue, or not to Enforce, or to hold Conditional only.
§ 2436. Agreements of Counterclaim, Set-off, Renewal, or Mode of Payment.
§ 2437. Agreement to hold a Deed Absolute as Conditional only; Agreement to hold in Trust.
§ 2438. Agreement to hold as Agent or Surety only.
§ 2439. Fraud.
§ 2440. Trade Usage and Custom.
§ 2441. Novation, Alteration, and Waiver; Subsequent Agreements.
§ 2442. Miscellaneous Applications of the Rule to admit or exclude "Collateral" Agreements.
§ 2443. Rule applied to Negotiable Instruments; General Principle.
§ 2444. Same: (a) Agreements affecting the Express Terms of the Document.
§ 2445. Same: (b) Agreements affecting the Implied Terms.
§ 2446. Rule binding upon the Parties to the Document only.
§ 2447. Burden of Proof; Who must Produce the Document.

3. Integration Required by Law.

- § 2450. At Common Law: (1) Judicial Records.
§ 2451. Same: (2) Corporate Acts and Records; (3) Negotiable Instruments.
§ 2452. Under Statutes; (1) Wills; (2) Ballots; (3) Insurance Policies.
§ 2453. Conclusive Certificates, distinguished.

C. SOLEMNIZATION OF LEGAL ACTS.

- § 2454. Writing as a Formality; Statute of Frauds.
§ 2455. Same: Discharge and Alteration of Specialties, etc.
§ 2456. Other Formalities than Writing; Signature, Seal, Attestation, Registration, Stamp.

D. INTERPRETATION OF LEGAL ACTS.

- § 2458. General Nature of Interpretation; Standard and Sources of Interpretation.

CONTENTS.

- | | |
|---|--|
| <p>§ 2459. Same: "Intention" and "Meaning," distinguished.</p> <p>1. Standard of Interpretation.</p> <p>§ 2461. General Principle; Four Standards, — Popular, Local, Mutual, Individual.</p> <p>§ 2462. Rule against "Disturbing a Plain Meaning," or, Forbidding Explanation except of Ambiguities; History and General Principle.</p> <p>§ 2463. Same: Application of the Rule to Wills, Deeds, etc.</p> <p>§ 2464. Usage of Trade or Locality, when to apply.</p> <p>§ 2465. Parties' Mutual Understanding; Identifying a Description.</p> <p>§ 2466. Individual Party's Meaning; (1) Deeds and Contracts.</p> | <p>§ 2467. Same: (2) Wills.</p> <p>2. Sources of Interpretation.</p> <p>§ 2470. General Principle: All Extrinsic Circumstances may be Considered.</p> <p>§ 2471. Exceptions for Declarations of Intention.</p> <p>§ 2472. Same: (1) Exception for Equivocation or Latent Ambiguity.</p> <p>§ 2473. Same: Blanks and Patent Ambiguities.</p> <p>§ 2474. Same: (2) Exception for Erroneous Description.</p> <p>§ 2475. Same: (3) Exception for Rebutting an Equity (Legacies and Advancements).</p> <p>§ 2476. <i>Falsa Demonstratio non Nocet</i>; General Principle.</p> <p>§ 2477. Same: Application to Deeds and Wills.</p> <p>§ 2478. Sundry Rules; Interpretation of Statutes.</p> |
|---|--|

CHAPTER LXXXVI.

BOOK II. — BY WHOM EVIDENCE MUST BE PRESENTED (BURDEN OF PROOF; PRESUMPTIONS).

TITLE I. — GENERAL THEORY.

- | | |
|---|---|
| <p>§ 2483. Production of Evidence by the Parties.</p> <p>§ 2484. Evidence sought by the Judge <i>ex mero motu</i>; Questions to Witnesses by the Judge.</p> <p>§ 2485. Burden of Proof; (1) First Meaning: Risk of Non-persuasion.</p> <p>§ 2486. Same: Test for this Burden; Negative and Affirmative Allegations; Facts peculiarly within a Party's Knowledge.</p> <p>§ 2487. Burden of Proof: (2) Second Meaning: Duty of Producing Evidence.</p> <p>§ 2488. Same: Test for this Burden.</p> <p>§ 2489. Shifting the Burden of Proof.</p> <p>§ 2490. Presumptions; Legal Effect of a Presumption.</p> <p>§ 2491. Same: Presumptions of Law and Presumptions of Fact.</p> | <p>§ 2492. Same: Conclusive Presumptions; Rebuttable Presumptions.</p> <p>§ 2493. Same: Conflicting Presumptions; Counter Presumptions.</p> <p>§ 2494. Same: <i>Prima facie</i> Evidence; Sufficient Evidence for the Jury; Scintilla of Evidence.</p> <p>§ 2495. Same: Direction of a Verdict, Motion for a Nonsuit, and Demurrer to Evidence, distinguished.</p> <p>§ 2496. Same: Waiver of Motion by subsequent Introduction of Evidence.</p> <p>§ 2497. Measure of Persuasion; (1) Proof beyond a Reasonable Doubt; Rule for Criminal Cases.</p> <p>§ 2498. Same: (2) Proof by Preponderance of Evidence; Rule for Civil Cases.</p> |
|---|---|

CHAPTER LXXXVII.

TITLE II. — BURDENS AND PRESUMPTIONS IN SPECIFIC ISSUES.

- | | |
|---|--|
| <p>§ 2500. Sanity: (1) Testamentary and other Civil Causes; Suicide.</p> <p>§ 2501. Same: (2) Criminal Causes.</p> <p>§ 2502. Undue Influence and Fraud: (1) Testamentary Causes.</p> <p>§ 2503. Same: (2) Confidential Relations of Grantee or Beneficiary.</p> <p>§ 2504. Same: (3) Fraudulent Conveyances against Creditors.</p> <p>§ 2505. Marriage: (1) Consent, from Cohabitation or Ceremony.</p> <p>§ 2506. Same: (2) Capacity, as affected by Intervening Death, Divorce, or Marriage.</p> <p>§ 2507. Negligence and Accident: (1) Contributory Negligence.</p> <p>§ 2508. Same: (2) Loss by Bailee.</p> <p>§ 2509. Same: (3) Defective Machines, Vehicles, and Apparatus.</p> <p>§ 2510. Same: (4) Death by Violence.</p> <p>§ 2511. Crimes: (1) Innocence, Malice, Guilt, etc.</p> <p>§ 2512. Same: (2) Self-Defence, Alibi.</p> <p>§ 2513. Same: (3) Possession of Stolen Goods.</p> <p>§ 2514. Same: (4) Capacity (Infancy, Intoxication, Coverture).</p> <p>§ 2515. Ownership: (1) Possession of Land and Personality.</p> <p>§ 2516. Same: (2) Possession of Negotiable Instrument.</p> <p>§ 2517. Payment: (1) Lapse of Time.</p> | <p>§ 2518. Same: (2) Possession of Instrument.</p> <p>§ 2519. Execution and Contents of Document: (1) Letters and Telegrams.</p> <p>§ 2520. Same: (2) Execution of Deeds (Delivery, Date, Seal).</p> <p>§ 2521. Same: (3) Ancient Documents.</p> <p>§ 2522. Same: (4) Lost Grant or other Document.</p> <p>§ 2523. Same: (5) Lost Will (Contents and Revocation).</p> <p>§ 2524. Same: (6) Spoliation of Documents.</p> <p>§ 2525. Same: (7) Alteration of Documents.</p> <p>§ 2526. Gifts (Wife's Separate Estate, Child's Advancement).</p> <p>§ 2527. Legitimacy.</p> <p>§ 2528. Chastity; Child-bearing.</p> <p>§ 2529. Identity of Person (from Name, etc.).</p> <p>§ 2530. Continuity; (1) in general.</p> <p>§ 2531. Same: Life and Death.</p> <p>§ 2532. Same: Survivorship.</p> <p>§ 2533. Seaworthiness.</p> <p>§ 2534. Regularity; (1) Performance of Official Duty and Regularity of Proceedings.</p> <p>§ 2535. Same: (2) Appointment and Authority of Officers.</p> <p>§ 2536. Similarity of Foreign Law.</p> <p>§ 2537. Contracts.</p> <p>§ 2538. Statute of Limitations.</p> <p>§ 2539. Malicious Prosecution.</p> |
|---|--|

CONTENTS.

CHAPTER LXXXVIII.

BOOK III.—TO WHOM EVIDENCE MUST BE PRESENTED (LAW AND FACT; JUDGE AND JURY).

- | | |
|--|--|
| § 2550. Admissibility of Evidence.
§ 2551. Sufficiency of Evidence.
§ 2552. Negligence.
§ 2553. Reasonableness.
§ 2554. Same: Malicious Prosecution. | § 2556. Construction of Documents.
§ 2557. Criminal Intent.
§ 2558. Foreign Law.
§ 2559. Local Law. |
|--|--|

CHAPTER LXXXIX.

BOOK IV.—OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED.

TITLE I.—JUDICIAL NOTICE.

- | | |
|---|---|
| 1. General Principles. | |
| § 2565. Theory of Judicial Notice.
§ 2566. Anomalous Meanings.
§ 2567. Effect of Judicial Notice; (1) not Con-
clusive.
§ 2568. Same: (2) Notice must be requested;
Pleading a Statute.
§ 2569. Same: (3) Judge may investigate.
§ 2570. Judicial Notice by the Jury's own
Knowledge. | § 2574. Political Facts: (1) International Affairs;
Seals of State.
§ 2575. Same: (2) Domestic Political Organiza-
tion; Boundaries, Capitals, etc.
§ 2576. Same: (3) Domestic Officials, their Identi-
ty and Authority; Genuineness of Offi-
cial Documents.
§ 2577. Same: (4) Elections, etc.
§ 2578. Judicial Proceedings: (1) Officers and
Rules of Court.
§ 2579. Same: (2) Records of Proceedings.
§ 2580. Notorious Miscellaneous Facts: (1) Com-
merce and Industry.
§ 2581. Same: (2) Geography and Natural
Science.
§ 2582. Same: (3) Sundries. |
| 2. Specific Facts Noticed. | |
| § 2572. Laws: (1) Domestic Statutes and Ordi-
nances.
§ 2573. Same: (2) Foreign Law. | |

CHAPTER XC.

TITLE II.—JUDICIAL ADMISSIONS.

- | | |
|--|---|
| § 2588. Theory of Judicial Admissions.
§ 2589. Distinction between Judicial Admissions,
Pleadings, and Estoppels.
§ 2590. Effect of Judicial Admissions: (1) Con-
clusive upon the Party making.
§ 2591. Same: (2) Exclusive of Evidence by the
Party benefiting.
§ 2592. Same: (3) Validity as a Waiver of Un-
constitutionality or other Illegality. | § 2593. Same: (4) Effect on Subsequent Trials.
§ 2594. Form and Tenor of the Admission; Who
is authorized.
§ 2595. Sundry Classes of Admissions: (1) Gen-
uineness of a Document.
§ 2596. Same: (2) Testimony of an Absent
Witness, admitted to avoid a Continu-
ance. |
|--|---|

TABLE OF STATUTES CITED	3633
TABLE OF CASES	3671
INDEX	3845

LIST OF STATUTORY COMPILATIONS AND LATEST REPORTS AND STATUTES CONSULTED.

I. STATUTES.

The titles and dates of the compilations of statutes referred to in this work, and the years of the latest session laws consulted in its preparation, are shown in the table below. In a few jurisdictions new official revised compilations have been made since the material was originally collected for this work, but the usual (and culpable) lack of a table of cross-references in the new revision to the former numbering has made it impracticable in this work to insert the new numbering in every instance; for Massachusetts, however (where a perfect table is published), and for South Carolina, the citations to the revisions of 1902 have been added. The large number of statutory citations (some nine thousand in all) made any further collation of the new numbering impracticable; and the examination of the session laws, to date of printing, made it reasonably certain that the legislative changes would all be represented, under one or another form of citation:

Jurisdiction.	Title and Date of Compilation Used.	Date of Latest Session Laws Examined.
ENGLAND	1903
CANADA :		
<i>Dominion</i>	Revised Statutes 1886	1902
<i>British Columbia</i>	Revised Statutes 1897	1903
<i>Manitoba</i>	Revised Statutes 1902	1903
<i>New Brunswick</i>	Consolidated Statutes 1877	1903
<i>Newfoundland</i>	Consolidated Statutes 1892	1903
<i>Northwest Territories</i>	Consolidated Ordinances 1898	1903
<i>Nova Scotia</i>	Revised Statutes 1900	1903
<i>Ontario</i>	Revised Statutes 1897	1903
<i>Prince Edward Island</i>	¹	1902
UNITED STATES : ²		
<i>Alabama</i>	Code 1897	1901
<i>Alaska</i>	Carter's Laws of Alaska 1900 (U. S. St. 1900, March 3 and June 6)	1903
<i>Arizona</i>	Revised Statutes 1887; Penal Code 1887	1903
<i>Arkansas</i>	Sandels and Hill's Digest of Statutes 1894	1903
<i>California</i>	Codes 1872; Deering's Supplements 1889, Pomeroy's edition of 1901 ³	1902
<i>Colorado</i>	Mills' Annotated Statutes 1891, Supplement 1896, and Code of Civil Procedure 1896	1902
<i>Columbia (District)</i>	Abert and Lovejoy's Compiled Statutes 1894; Code 1901 (U. S. St. 1901, c. 854)	1903
<i>Connecticut</i>	General Statutes 1887	1903
<i>Delaware</i>	Revised Statutes 1893	1903

¹ There being no compilation here, and the Evidence Act of 1889 having codified most of the rules, no complete search was made for statutes prior to 1889, except that those of 1873 and 1887, dealing with evidence, were collated with that of 1889.

² The Legislatures in most States meet biennially, so that the laws of 1902 were in such cases sometimes the latest. In Alabama the laws of 1903 had not come to hand in January, 1904.

³ A note on the validity of the Commission's amendments of 1901 will be found in § 488.

LIST OF COMPILATIONS CONSULTED.

Jurisdiction.	Title and Date of Compilation Used.	Date of Latest Session Laws Examined.
UNITED STATES:		
<i>Florida</i>	Revised Statutes 1892	1903
<i>Georgia</i>	Code 1895; Van Epps' Supplement 1900	1903
<i>Hawaii</i>	Penal Laws 1897; Revised Civil Laws 1897	1901
<i>Idaho</i>	Revised Statutes 1887; Constitution 1899	1903
<i>Illinois</i>	Revised Statutes 1874, Hurd's edition of 1898	1903
<i>Indiana</i>	Thornton's Revised Statutes 1897	1903
<i>Indian Territory</i> . ¹		
<i>Iowa</i>	Ebersole's Annotated Code 1897	1902
<i>Kansas</i>	Webb's General Statutes 1897	1903
<i>Kentucky</i>	Carroll's Statutes 1899, and Codes of Civil and Criminal Procedure 1895, edition of 1900	1902
<i>Louisiana</i>	Saunders' Revised Civil Code 1888; Garland's Revised Code of Practice 1894 and Supplement 1900; Wolff's Revised Laws 1897; Constitution 1898	1902
<i>Maine</i>	Public Statutes 1883, Supplement 1895	1903
<i>Maryland</i>	Poe's Public General Laws 1888; Supplement 1900	1902
<i>Massachusetts</i>	Public Statutes 1882; Revised Laws 1902	1903
<i>Michigan</i>	Miller's Compiled Laws 1897	1903
<i>Minnesota</i>	Wenzell, Lane, and Tiffany's General Statutes 1894	1903
<i>Mississippi</i>	Thompson, Dillard, and Campbell's Annotated Code 1892	1902
<i>Missouri</i>	Revised Statutes 1899	1903
<i>Montana</i>	Sanders' Codes and Statutes 1895	1903
<i>Nebraska</i>	Brown and Wheeler's Compiled Statutes 1899	1903
<i>Nevada</i>	Baily and Hammond's General Statutes 1885	1903
<i>New Hampshire</i>	Public Statutes 1891	1903
<i>New Jersey</i>	General Statutes 1896	1903
<i>New Mexico</i>	Compiled Laws 1897	1903
<i>New York</i>	Birdseye's Revised Statutes 1896	1903
<i>North Carolina</i>	Code 1883; Long and Lawrence's Amendments 1897	1903
<i>North Dakota</i>	Revised Codes 1895	1903
<i>Ohio</i>	Bates' Annotated Revised Statutes 1898	1902
<i>Oklahoma</i>	Statutes 1893	1903
<i>Oregon</i>	Hill's Codes and General Laws 1892	1903
<i>Pennsylvania</i>	Pepper and Lewis' Digest 1896	1903
<i>Philippine Islands</i> . ²		
<i>Porto Rico</i> . ²		
<i>Rhode Island</i>	General Laws 1896	1903
<i>South Carolina</i>	Revised Statutes 1893; Code 1902	1903
<i>South Dakota</i>	Grantham's Statutes 1899	1903
<i>Tennessee</i>	Shannon's Annotated Code 1896	1903
<i>Texas</i>	Revised Civil Statutes 1895; Penal Code 1895; Code of Criminal Procedure 1895	1903
<i>United States</i>	Revised Statutes 1878, Supplements 1891, 1895	1903
<i>Utah</i>	Revised Statutes 1898	1903
<i>Vermont</i>	Statutes 1894	1902
<i>Virginia</i>	Code 1897, Supplement 1898	1903
<i>Washington</i>	Ballinger's Annotated Codes and Statutes 1897	1903
<i>West Virginia</i>	Code 1891, third edition	1903
<i>Wisconsin</i>	Sanborn and Berryman's Statutes 1898	1903
<i>Wyoming</i>	Revised Statutes 1887	1903

¹ Governed by Federal and Arkansas statutes, and by Indian law, not here considered.
² These laws are not here considered, being chiefly of Spanish origin.

LIST OF LATEST REPORTS CONSULTED.

II. REPORTS.

Most of the citations of decisions rendered since 1893 have been taken from the reports published in the National Reporter System, as they appeared in weekly numbers. For all decisions reported since the beginning of that System, the duplicate citation has been added, to include both the Official Report and the National Reporter, — most of these duplicate citations being furnished through the courtesy of the West Publishing Company, the remainder added by the author from the Blue Books. As the printing progressed, the duplicate citations of the Official Reports appearing from time to time were obtained from the Third Labels and inserted in the proof. Thus it happens that in the earlier parts of the book most of the citations of decisions of 1903 are to the National Reporters only.

The printing of these present volumes began in January, 1904, and occupied a full year; it was therefore desirable to set a definite point of time for the ending of citations (instead of inserting current late cases in the latter portions of the book only), in order that those who use the book may know where to begin in bringing the later citations down to the date of their consultation. The point taken was therefore that volume of the different National Reporters which ended nearest to January, 1904; this ranged (dating by the weekly issues) between November, 1903, and March, 1904. Substantially, then, the citations come down to the beginning of 1904. The latest volumes of Reporters consulted were as follows :

Atlantic Reporter, vol. 55.
Federal Reporter, vol. 125.
Northeastern Reporter, vol. 68.
Northwestern Reporter, vol. 96.
Pacific Reporter, vol. 73.

Southern Reporter, vol. 35.
Southeastern Reporter, vol. 45.
Southwestern Reporter, vol. 76.
Supreme Court Reporter, vol. 23.

and of Official Reports not covered by the National Reporter System :

District of Columbia Appeals, vol. 21.

Hawaii, vol. 13.

The latest volumes of English and Canadian Reports consulted were as follows :

England, Law Reports 1903.
Canada (Dominion), vol. 32.
British Columbia, vol. 10, pt. 1.
Manitoba, vol. 12.
New Brunswick, vol. 34.

Newfoundland, vol. 5.
Northwest Territories, vol. 5, pts. 1, 2.
Nova Scotia, vol. 35.
Ontario, Law Reports, vol. 5.
Prince Edward Island, vol. 2.

The reports of the Appellate (intermediate) Courts in Colorado, Illinois, Indiana, Kansas, New York (Supreme Court), and Texas, have not been cited, except on interesting matters for which there is scanty authority; partly because their rulings are not final, and partly because in some jurisdictions they are expressly made not binding as precedents. The trial rulings of Federal District Courts since the creation of the Circuit Court of Appeals have also been left unnoticed to a similar extent.

III. CITATION OF THIS TREATISE.

Citations of other parts of this treatise are made herein by number of section (§) and number of note. The notes are numbered continuously within each section.

Between the chapters, and between main subdivisions of each chapter, there are from one to five (occasionally more) numbers omitted; so that the series of numbers does not read consecutively at those points. This is not an inadvertence, nor a sign of materials omitted; but merely a mechanical expedient which became indispensable in working upon a bulky manuscript. In the course of inserting the cross-references (some ten thousand), a great number of the references obviously had to be made, during the progress of the work, to portions of the text yet unwritten; and it therefore became necessary to give to these topics reference-numbers beforehand. In order to allow for occasional additions of topics in the course of the work, these blanks were left in the series. A reference to the California Codes will show that this expedient is not without precedent.

EVIDENCE

IN

TRIALS AT COMMON LAW.

PART III: RULES OF EXTRINSIC POLICY.

TITLE II, SUB-TITLE III (*continued*): TESTIMONIAL PRIVILEGE.

TOPIC B: PRIVILEGED COMMUNICATIONS.

SUB-TOPIC I: CONFIDENTIAL COMMUNICATIONS IN GENERAL.

CHAPTER LXXIX.

§ 2285. General Principle of Privileged Communications.	not Privileged: Clerks, Trustees, Bankers, Newspapers, etc.
§ 2286. Sundry Confidential Communications	§ 2287. Same: Telegrams.

§ 2285. **General Principle of Privileged Communications.** Looking back at the principle of Privilege, as an exception to the general liability of every person to give testimony to all facts inquired of in a court of justice, and having in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception (*ante*, §§ 2192, 2197), four fundamental conditions may be predicated as necessary to the establishment of a privilege against the disclosure of communications between persons standing in a given relation. (1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.¹

These four conditions being present, a privilege should be recognized; and not otherwise. That they are present in most of the recognized privileges is plain enough; and the absence of one or more of them serves to explain

¹ 1851, Wigram, V. C., in *Russell v. Jackson*, 9 Hare 387, 391 ("The rule does not rest simply upon the confidence reposed; . . . it seems to rest, not upon the confidence itself, but upon the necessity of carrying it out").

why certain privileges have failed to obtain the recognition sometimes demanded for them. In the privilege for communications between Attorney and Client, for example, all four are present; and the doubt which Bentham has raised as to the policy of that privilege fixes upon the only condition therein open to dispute, namely, the fourth. In the privilege for communications between Husband and Wife, all four conditions are again present; and the chief variance of judicial opinion in defining the privilege (*i. e.* in holding, as some do, that the protection extends to all communications, or, as others do, to confidential communications only) is due to a question as to the fulfilment of the first condition. In the privileges for communications between Jurors and between Informer and Government, the four conditions are clearly present. In the privilege (denied at common law) for communications between Physician and Patient, the fallacy of recognizing it lies in the incorrect assumption that the second condition is generally present. In the privilege (also denied at common law) for communications between Priest and Penitent, the objection to its recognition has probably lain in a tacit denial of the third condition. In the privilege (sometimes urged) for communications sent by telegraph, the reluctance to recognize it has apparently been due to a perception that no one of the four conditions is thoroughly fulfilled. These four conditions must serve as the foundation of policy for determining all such privileges, whether claimed or established.

§ 2286. **Sundry Confidential Communications not privileged; Clerks, Trustees, etc.** In general, then, the *mere fact that a communication was made in express confidence*, or in the implied confidence of a *confidential relation*, does not create a privilege. This rule is not questioned to-day.¹ No pledge of privacy, nor oath of secrecy,² can avail against demand for the truth in a court of justice:

1888, *Parnell Commission's Proceedings*, 103d day, Times' Rep. pt. 28, pp. 19 ff.; Mr. John O'Connor, M. P., once an active Fenian, was under examination as to his transactions in 1879 with various persons concerned in the Fenian brotherhood; in refusing to speak upon those matters, he said in explanation: "I may as well tell you that I do not intend to admit to you who were associated with me in these transactions. I was bound to these people by an obligation that they accepted in good faith, and I am not going to betray them." . . . Counsel: "Did you see Devoy at the end of 1878 or the beginning of 1879?" Witness: "I must decline to answer"; Counsel: "I submit, my lord, that I have a right to press this question"; President Hannen: "I have explained several

¹ With the following cases should be compared those cited *ante*, §§ 2211-2215, involving disclosures of secret topics, irrespective of communications: 1811, Berkeley Peerage Trial, Sherwood's Abstract, 41 (general principle); 1838, *Greenlaw v. King*, 1 Beav. 137, 145 ("persons in the most closely confidential relation are bound to disclose communications made to them"); 1867, *Hopkinson v. Burghley*, L. R. 2 Ch. App. 447 (letter to defendant, with confidential communication from a third person, held not privileged); 1881, *Jessel, M. R.*, in *Wheeler v. Le Marchant*, L. R. 17 Ch. D. 675, 681 (general

principle); 1897, *Cox v. Montague*, 24 C. C. A. 364, 78 Fed. 845 (general principle).

² 1834, *R. v. Shaw*, 6 C. & P. 373 (communication under oath of secrecy to a fellow-prisoner in jail); 1836, *R. v. Thomas*, 7 id. 346 (confession under a promise of secrecy); 1898, *Owens v. Frank*, 7 Wyo. 457, 53 Pac. 282 (communication made in confidence between members of the Masonic order). The rule that a confession obtained by fraud is nevertheless admissible (*ante*, § 841) also illustrates the principle.

times that these excuses which are made for not giving evidence are not for a moment tenable in a court of justice. That a man has bound himself by an illegal oath in connection with an illegal association cannot of course be recognized as an excuse. But we have a delicate task to perform, and I do not propose at present to take the measures which are in my power." After a subsequent refusal to answer other questions, *Counsel*: "What is your objection?" *Witness*: "It is an objection to break my oath. It is a regard for an obligation that I respect, even though others may not respect it"; President *Hannen*: "Are you a Protestant or a Roman Catholic?" *Witness*: "A Roman Catholic"; President *Hannen*: "Do you mean to assert that your Church justifies a refusal to give evidence on the ground that you have taken the illegal oath of an illegal society?" *Witness*: "I have not studied the theology of the matter"; President *Hannen*: "Nor the morality?" *Witness*: "I know what my code of honor is, my lord, and I intend to adhere to it."

Accordingly, a confidential communication to a clerk,³ to a trustee,⁴ to a commercial agency,⁵ to a banker,⁶ to a journalist,⁷ or to any other person not holding one of the specific relations hereafter considered, is not privileged from disclosure.⁸

But this was not always so. In the trials of the 1600s, the obligations of honor among gentlemen (and the English bench and bar were peculiarly

³ 1824, *Webb v. Smith*, 1 C. & P. 337 (an articulated clerk, held compellable to disclose a matter learned in the employer's business, but not "specially entrusted as a matter of secrecy"); 1809, *Corps v. Robinson*, 2 Wash. C. C. 388 (the head clerk of the defendant, compelled to testify to confidential matters; "it has never been considered an objection which the witness can make"). *Contra*: 1a. Code 1897, § 4608 (privilege established for a "stenographer or confidential clerk of any person, who obtains such information by reason of his employment"; the amendment, which practically abolishes this, is quoted *post*, § 2292). Compare the privilege for *trade secrets*, *i. e.* for the facts of the business, as distinguished from communications (*ante*, § 2212).

⁴ *Jones v. Manchester*, quoted *infra*. Compare Mr. J. Buller's two statements, quoted *infra*. But a trustee, so far as identified with a party, was privileged from discovery, before modern legislation: *ante*, § 2218.

⁵ 1894, *Shauer v. Alterton*, 151 U. S. 607, 617, 14 Sup. 442.

⁶ 1826, *Loyd v. Freshfield*, 2 C. & P. 325, 329 (clerk of a banker compelled to state the figures of a depositor's balance); 1897, *Hannum v. McRae*, 17 Ont. Pr. 567, 18 id. 185 (bank manager must attend with the bank's books on subpoena; even the English statute allowing a party to prove them by copy — quoted *ante*, § 1223 — does not create a privilege not to disclose the accounts of customers; though that statute is not in force in Ontario; good opinion by MacLennan, J.).

⁷ 1888, Parnell Commission's Proceedings, 52d day, *Times*' Rep. pt. 14, p. 18 (ruled that a newspaper had no privilege to withhold the name of a contributor); 1895, *U. S. v. Edwards*, *U. S. v. Shriver*, D. C., reported, with Senator Edmunds' brief, in *Smith's Digest of Precedents of Privilege of Congress*, 1894, pp. 828, 848, 856 ("Such a rule [of privilege] would be in viola-

tion of a sound public policy"); 1897, *People v. Durrant*, 116 Cal. 179, 48 Pac. 75 ("Considering that Miss C. was a newspaper reporter, . . . the claim scarcely merits comment"); 1897, *Ex parte Lawrence*, ib. 298, 48 Pac. 124 (reporter's refusal to disclose information to a legislative committee, held improper).

The following enactment, as detestable in substance as it is crude in form, will probably remain unique: Md. St. 1896, c. 249 ("No person engaged in, connected with, or employed on a newspaper or journal shall be compelled to disclose in any legal proceeding or trial, or before any committee of the Legislature or elsewhere, the source of any news or information procured or obtained by him for or published in the newspaper on and in which he is engaged, connected with or employed").

⁸ The following statutes are anomalous: Mich. Comp. L. 1897, §§ 8612, 8615 (where an unmarried woman is with child or has "lived with a man and has been considered as his wife," "or for other good reason . . . deemed to be sufficient by the judge of probate, desires to keep the exact date of the marriage a secret, to protect the good name of herself and the reputation of her family," the probate judge may issue "without publicity a marriage license," and "all knowledge of any facts" about it coming to the judge, officials, physicians, and witnesses "shall be deemed to be privileged communications"); Can. Rev. St. 1886, c. 93, § 17 (bridge company's return of bridge-casualties, to be privileged communications); N. Sc. Rev. St. 1900, c. 99, § 307 (railway company's returns of casualties, expenditures, etc., to be "privileged communications, and shall not be evidence in any court whatsoever"). For a taxpayer's return of property to the assessor, see *post*, § 2374, under the head of communications to Government, with which perhaps the above Canadian statutes might be classed.

dominated by that standard) were often put forward as a sufficient ground for maintaining silence.⁹ By the middle of the 1700s it seemed as though this notion would prevail, at any rate in certain worthy cases.¹⁰ The same point of view is also plain at that time in the treatment of the privilege for attorney and client, which was then supposed to rest upon the honorable obligations of the attorney, rather than upon objective considerations of policy (*post*, § 2290). But a stricter view of justice finally dominated, and in the notorious *Duchess of Kingston's Case* the older point of view was definitely abandoned and the new one thoroughly promulgated:

1776, *Duchess of Kingston's Case*, 20 How. St. Tr. 586; bigamy; trial by the House of Lords; to prove the first and disputed marriage, the question was asked of Lord Barrington, an old friend of the accused: "Did you ever hear from the lady at the bar that she was married to Mr. Hervey"? Lord Barrington: "If anything has been confided to my honor, or confidentially told me, I do hold, with humble submission to your lordships, that as a man of honor, as a man regardless of the laws of society, I cannot reveal it." Then the Duchess released Lord Barrington from every obligation of honor; and the Solicitor-General, not to be outdone, declared that he would ask no more questions; but several lords insisted on their right to continue the questioning; Lord Camden: "I hope that your lordships, sitting in judgment on criminal cases — the highest and most important that may affect the lives, liberties, and properties of your lordships — that you shall not think it befitting the dignity of this high Court of justice to be debating the etiquette of honor at the same time when we are trying lives and liberties. My lords, the laws of this land — I speak it boldly in this grave assembly — are to receive another answer from those who are called to depose at your bar, than to be told that in point of honor and of conscience they do not think that they acquit themselves like persons of that description

⁹ 1613, *Countess of Shrewsbury's Case*, 12 Rep. 94 (before a council, including the Chancellor, Chief Justices, and Chief Baron; the Countess, being "required to declare her knowledge" concerning the escape of Lady Arabella Stuart, refused, for one reason, because "she had made a rash vow that she would not declare anything in particular touching the said points"; but she was adjudged in contempt, since "rash and illegal vows make not an excuse"; and the subject's very oath of allegiance binds her "without being demanded, to reveal to the king what she knows concerning the premises, upon which great mischief may happen to the king and the realm"; possibly in a civil case the conclusion might have been different); 1673, *Jones v. Countess of Manchester*, 1 Ventr. 197 (the Earl of Manchester, brother to the plaintiff, had the key of a box, held by a stranger, and containing her deeds; the box was in court, but the earl refused to surrender the key, being a trustee for his sister, claiming that "it would be a breach of the trust reposed in him, which he held sacred and inviolable"; but Lord Hale told him, though they could not compel him there to do it, yet the law required it; "for though it is against the duty of a counsellor or solicitor, etc., to discover the evidence which he who retains him acquaints him with, yet a trustee may and ought to produce writings, etc."). Lord Kenyon's allusion (in *Wilson v. Rastall*, 4 T. R. 753, 758) to the testimony of Lord Howard against Lord Russell, in 1683 (9 How. St. Tr. 611), as an example of compelling

the revelation of confidences, seems not to be founded on anything in the report of the trial.

¹⁰ 1676, *Bulstrode v. Letchmere*, Freem. Ch. 5 ("the Lord Chancellor made it a doubt if a thing were revealed under the condition of secrecy to one that was not a barrister, whether or no he would oblige him to answer"); 1682, *Lord Grey's Trial*, 9 How. St. Tr. 127, 175 (information against several persons for carrying off and debauching Lady Henrietta Berkeley; Lady Henrietta testified for the defendant that she left her parents' house voluntarily; on being asked who was with her, she answered, "I shall not give any account of that, for I will not betray anybody for their kindness to me; . . . I will not break my vow to them"; Mr. J. Dolben: "If they ask you of anybody in the information, . . . you must tell if it were any of them, but you are not bound to tell if it were any one else"; L. Henrietta: "No, it was none of them"); 1722, *Layer's Trial*, 16 id. 93, 245 (Lord North and Grey: "It is a little hard for a man of honour to betray conversation, what passed over a bottle of wine in discourse; but since your lordship requires it, I must submit"); 1767, *Buller, Trials at Nisi Prius*, 284 (a naked trust does not disqualify the trustee as interested; "however, a trustee shall not be a witness to betray the trust"; citing a ruling of L. C. J. Holt's that a broker of offices should not be received to testify to the occasion of giving a bond, "because it appeared he was privately entrusted to make the bargain by both parties, and to keep it secret").

when they declare what they know"; Duke of *Richmond*: "I do not look on a witness at the bar to be the witness of the counsel or of the prisoner, but the witness of the House"; Lord Barrington still refusing, the Lords adjourned to discuss the point of law, and it was announced to him that "it is the judgment of this House that you are bound by law to answer all such questions as shall be put to you."

1777, *Hotham*, B., in *Hill's Trial*, 20 How. St. Tr. 1362 (to the jury, commenting on the testimony of an informer who disclosed the defendant's secrets): "The defendant certainly thought him his friend, and he [the defendant] therefore did disclose all this to him. Gentlemen, one has only to say further, that if this point of honor was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honor. If the man is a legal witness, you are bound to receive his testimony, giving it, however, that weight only which you think it deserves."

The "point of honor" thus disappeared forever as a motive for recognizing a privilege. But its expiry was undoubtedly viewed with reluctance by many;¹¹ and traces of its later survival across the water were to be noticed for some time thereafter.¹²

§ 2287. **Same: Telegrams.** That the relation between the telegram-transmitter and the telegram-sender, and the confidence of the communication as between them, are sufficient to establish a privilege against the operator's disclosure has been supported by a few distinguished judicial names:

1874, *Bramwell*, B., in the *Stroud Election Case*, 2 O'M. & H. 107, 112: "I really think that for the public good there ought to be no power of compelling the production of these documents. It is the necessary consequence that persons who correspond by telegram are obliged to repose confidence in the Crown, and I believe it will be for the public good if it is found that that is a confidence that the Crown cannot be compelled to violate. Inconvenience might arise in many cases. It might arise in the case of a confidential communication between attorney and client, or husband and wife; therefore we must look to the general principle."

1890, *Cooley*, J., *Constitutional Limitations*, 6th ed., p. 371, note: "The telegraph is used as a means of correspondence, and as a valuable and in many cases an indispensable substitute for the postal facilities; and the communication is made, not because the party desires to put the operator in possession of facts, but because transmission without it is impossible. It is not voluntary in any other sense than this, that the party makes it rather than deprive himself of the benefits of this great invention and improvement. The reasons of a public nature for maintaining the secrecy of telegraphic communication are the same with those which protect correspondence by mail; and though the operator is not a public officer, that circumstance appears to us immaterial. He fulfils an important public function; and the propriety of his preserving inviolable secrecy in regard to communications is so obvious that it is common to provide statutory penalties for disclosure. If on grounds of public policy the operator should not voluntarily disclose, why do not the same considerations forbid the Courts compelling him to do so?"¹

¹¹ 1792, *Wilson v. Rastall*, 4 T. R. 753, 759 (Buller, J.): "The privilege is confined to the cases of counsel, solicitor, and attorney; . . . it is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded."

¹² 1782, *Morris v. Vanderen*, 1 Dall. 64 (testimony of a clerk, who acted as scrivener of deeds for his employer, offered, but withdrawn

on objection made); 1792, *Mills v. Griswold*, 1 Root 383 ("what the defendant had told him in confidence," held subject to disclosure; the distinction being between "communications which are voluntary" and those which are "necessary in the course of business, as of a client to his attorney"); 1796, *Calkins v. Lee*, 2 id. 363 (similar).

¹ See also the learned jurist's more elaborate exposition in his article (1879) on Inviolability

These arguments have been adequately met in the following passages :

1869, *Dublin Election Case*, 1 O'M. & H. 270, 271 : " Mr. Sanger, the telegraph-officer, when called as a witness to produce the telegrams, said, ' My lord, before I produce these telegrams, I must object to their production. We have always looked upon a telegram as sacred, and we think that this decision of your lordship will shake the confidence of the public in the telegraph.' Mr. Justice Keogh said that the opinion of the telegraph company as to this could make no difference. The telegrams were produced. . . . Mr. Justice Keogh in his judgment said further as to this : ' Telegrams are nothing but electric letters, written by the candidates or their agents to electors. If such letters were in the pockets of the electors, or if copies of them were in desks of the candidates, the petitioners of course would have a right to insist upon their production ; and there is no reason why, because they are transmitted along a wire instead of being written on paper with pen and ink, they should have any greater protection.' "

1851, *King, P. J.*, in *Henislaw v. Freedman*, 2 Pars. Eq. Cas. 274 : " If we adopt this [alleged] construction of the law, the telegraph may be used with the most absolute security for purposes destructive to the well-being of society, — a state of things rendering its absolute usefulness at least questionable. The correspondence of the traitor, the murderer, the robber, and the swindler, by means of which their crimes and frauds could be the more readily accomplished and their detection and punishment avoided, would become things so sacred that they never could be accessible to the public justice, however deep might be the public interest involved in their production. For the result of the principle contended for is that the seal of secrecy is placed on all telegraphic communications, as well in courts of justice as elsewhere, and that they are to be classed with privileged communications, such as those between husband and wife, counsel and client. . . . The law is jealous of extending the circle of persons excused or interdicted from giving testimony. Parents are required to testify against children, children against parents, brothers against brothers, friends against friends. Communications by letter, made under the deepest obligations of friendship, affection or honor, still must be produced, if deemed necessary to the ascertainment of the truth and the administration of justice by the public tribunals. To this great end of social organization, all secondary causes are required to give way." ²

1879, Mr. *Henry Hitchcock*, in *The Inviolability of Telegrams*, 5 South. L. Rev. N. S. 473, 491 : " The offence which this section [of the postal statutes] proscribes is not the disclosure of the contents, nor even primarily the opening or reading of private letters. It consists in taking out of the mail, before its delivery to the person to whom directed, any letter, postal-card, or packet. . . . It is evident, therefore, that the intent and policy of the postal statutes is to protect and assure, not so much the secrecy of private correspondence, as the due fulfilment of a trust voluntarily undertaken by the government in respect of its safe and prompt delivery. It has undertaken this mode of serving the public, and invites the public confidence in such service ; therefore it will punish any violation of the confidence so invited, any interference with its execution of that trust, not sanctioned by law. But, in respect of telegrams transmitted by private companies, the United States have undertaken no trust or duty, nor invited any confidence whatever. The postal statutes, therefore, not only do not protect the secrecy of telegrams, directly or by intendment, but they are founded on reasons which, so far as the government is concerned, furnish no argument, even by analogy, for their protection. . . . The argument from the confidential character of telegrams as between the parties to them, and the expressed or implied pledge of secrecy by the telegraph companies, is still less satisfactory. It assumes that the law respects as privileged, without regard to their contents or relevancy to the pending issues, all communications which the parties to them intend

of Telegraphic Correspondence, 18 Amer. Law C. J., in *State v. Litchfield*, 58 Me. 267, 270 Reg. N. S. 65. (1870).

² Similar reasoning is used by Appleton,

shall be secret or confidential. It must amount to this, or to nothing. But it is perfectly well settled that no communication, however confidential, or growing out of personal, social, or business relations however intimate, is for that reason protected from disclosure on the witness-stand, unless it fall within one of the special and limited classes which the law itself makes privileged for reasons of public policy. In truth, all these arguments amount simply to the claim that private telegraphic messages, *as such*, without reference to their contents, constitute a new class of privileged communications. . . . How can it be said that if A, wishing to communicate with B, chooses to transmit his thoughts by electric telegraph instead of by oral or written message, he thereby creates or enters into a relation with B which it is the paramount interest of society itself to protect, by making privileged and inviolable every communication transmitted in that manner, without reference to its contents, even at the expense of the regular administration of justice? Such a rule, if prescribed at all, must be uniform; every communication sent by telegraph must be privileged, as is every communication between attorney and client, or husband and wife. But why should a given message, which, if orally communicated or delivered through the mail, would be subject to compulsory disclosure, become a privileged communication if sent by telegraph? This would be discriminating, not in the interest of the parties concerned, or of society at large, but of the business of the telegraph companies. Public policy, in respect of what communications shall be privileged, has nothing to do with the mode of their transmission, nor with the motive of its selection, nor with the desire of either or both parties for secrecy, but solely with the consequences to society at large of permitting or prohibiting their disclosure in aid of justice. In order, therefore, to support the claim that telegraphic messages, as such, should be held privileged communications, it must be shown that unless they are, the electric telegraph cannot be generally made available as a medium of communication, and also that this consequence would be more injurious to society than the denial to the Courts of this means of attaining the truth. But the former proposition is untrue, as experience demonstrates; and as to the latter, the unquestionable danger of abuse is to be met by applying, not by perverting, sound legal principles. On the other hand, the immensely increased facilities for crime, and the grave obstructions to public justice which would result from placing telegraphic messages, as such, on the list of privileged communications, are forcibly stated by the Court in the cases already cited, of the *State v. Litchfield* and *Henislaw v. Freedman*."

A sufficient answer, when all is said, to those who advocate this privilege, is that the very first condition of a privilege (*ante*, § 2285) is lacking, namely, the intention to keep the message secret in the hands of the transmitter. It is given to him for the sole purpose of being delivered to some one else; and that some one else is not only compellable to disclose it in court, but (for aught that appears) may freely and honorably publish it to others at any time. In short, there is no ultimate and absolute confidentiality in a telegram, but only a mediate and relative secrecy. Since the law need not respect its privacy in its ultimate state, there is no reason for respecting the intermediate stage. Were the telegram addressed to an attorney, in whose hands it would become privileged, the situation would be different; but there the doctrine of agency, as applied to the client's privilege, suffices to protect,³ without creating a new privilege.

In *England*, the privilege for telegrams was at first repudiated,⁴ but after

³ *Post*, § 2301.

⁴ 1869, *Coventry Case*, 1 O'M. & H. 97, 104 (privilege denied for telegrams sent by a pri-

vate company); *Bridgewater Case*, ib. 112, 114; *Dublin Election Case*, ib. 270, 271 (same; quoted *supra*).

the Government's assumption of telegraphic service in 1868,⁵ it was for a while conceded.⁶ Subsequently, this attitude was abandoned, and now no privilege appears to be recognized.⁷ In *Canada* and the *United States*, no Court has yet given any recognition to the privilege.⁸

It may be added that precisely the same considerations apply to the transmission of messages by *letter-post*. But the Governmental conduct of that service has seemed to complicate that question, and it can better be considered in connection with the privilege for other communications to the Government (*post*, § 2375).

⁵ 1868, St. 31 & 32 Vict. c. 110, § 20 (forbids disclosure of telegrams by officials); 1869, St. 32 & 33 Vict. c. 73, § 23 (provides that nothing shall relieve an officer of the post from any liability which before existed for telegraph company to produce communications in a court of law when duly required).

⁶ 1874, Taunton Case, 2 id. 16, 72; Stroud Case, ib. 107, 110 (production not required, partly because of lack of power, because the documents "are in the custody of her Majesty," and partly because of policy; quoted *supra*); Bolton Case, ib. 138, 140 (here required only because the contents had been otherwise disclosed).

⁷ 1880, Harwich Case, 3 O'M. & H. 61, 62, 44 L. T. N. S. 187 (Lush, J., treated the Bolton case as overruling the prior two, and thought that when the Legislature "transferred the telegraphs to the Post-Office, they intended that the public should be just as well off as they were before"); 1881, *Re Smith*, L. R. Ir. 7 Ch. D. 286 (order for production of telegrams by the Post-Office authorities, granted).

⁸ *Can.*: 1861, *Re New York, Newf. & L. Tel. Co.*, 2 Morris Newf. 575 (telegraphic messages in the hands of the operator are not privileged, in spite of his oath under the statute forbidding disclosure); 1862, Waddell's Case, 8 Jur. N. S. 181 (Newfoundland; telegraph operator, not privileged from disclosing dispatches, even under a statute forbidding their wilful disclosure); 1888, *Re Dwight v. Macklam*, 15 Ont. 148, 154 (careful opinion by Boyd, C.); 1870, *Leslie v. Hervey*, 15 Low. Can. Jur. 9 (a telegraph company is not privileged to withhold dispatches received, in spite of a statute forbidding disclosure; "the right of this third party to compel the disclosure of all facts bearing on the subject-matter of the suit takes pre-

cedence, for the time, of the general right, subject to the law's limitations, which belongs to every man to prevent his private affairs being enquired into by others"); *U. S.*: 1880, *Woods v. Miller*, 55 Ia. 168, 7 N. W. 484 (a statute prohibiting the disclosure of telegraphic messages does not prevent their production as evidence under an order of court); 1870, *State v. Litchfield*, 58 Me. 267 (a telegraph company is not privileged to withhold dispatches received); 1880, *Ex parte Brown*, 72 Mo. 83, 91 (telegrams in possession of a telegraph company, not privileged); 1851, *Henislaw v. Freedman*, 2 Pars. Eq. Cas. 274, Pa. Com. Pl. (a telegraph company held not privileged to withhold messages received by it, even under a statute expressly forbidding its operators to disclose dispatches without the consent of sender or receiver; quoted *supra*); 1876, *Kehoe's Trial* (Molly Maguires), Pa., West's Rep. 128 (statute construed not to privilege telegrams); 1876, Dec. 20, Louisiana Elections, Congressional Record, 44th Cong. 2d sess. vol. 5, pt. 2, pp. 325-330 (the House adopted the following resolution: "That there is nothing in the law rendering a communication transmitted by telegraph any more privileged than a communication made orally or in any other manner whatever"); 1877, *Barnes' Case*, ib. pp. 452-455, 602-608, 678, 694 (rule applied to enforce production of telegrams in the hands of a telegraph operator at New Orleans); 1882, *U. S. v. Hunter*, 15 Fed. 712 (relevant telegrams must be produced); 1874, *National Bank v. National Bank*, 7 W. Va. 544, 546 (telegraph company not privileged to withhold telegrams from defendant; the whole privilege repudiated).

A statute forbidding disclosure unless "lawfully directed" (*e.g.* Can. Rev. St. 1886, c. 134, § 3) obviously does not create a privilege.

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

SUB-TOPIC II: COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.

CHAPTER LXXX.

- § 2290. History of the Privilege.
- § 2291. Policy of the Privilege.
- § 2292. General Principle; Statutory Definitions.

1. "Where legal advice of any kind is sought"

- § 2294. Privilege is irrespective of Litigation begun or contemplated; History of the Doctrine.
- § 2295. Same: General Principle and Policy.
- § 2296. Same: Application to Advice sought for Sundry Non-Legal Purposes; Consultation with Prosecuting Attorneys.
- § 2297. Same: Application to Advice in Conveyancing.
- § 2298. Same: Application to Advice in a Criminal or Fraudulent Transaction.

2. "From a professional legal adviser in his capacity as such,"

- § 2300. Persons having Legal Knowledge, but not admitted to Practice.
- § 2301. Attorney's Clerks and other Agents.
- § 2302. Client's Belief in the Attorney's Status.
- § 2303. Consultation in Attorney's Capacity.
- § 2304. Time of Consultation; Rejection of Retainer by Attorney.

3. "The communications relevant to that purpose,"

- § 2306. Communications, distinguished from Acts; Client's Conduct, Appearance, Abode, etc.
- § 2307. Same: Production of the Client's Documents.
- § 2308. Same: Testimony to Contents of Documents.
- § 2309. Same: Testimony to Possession, Existence, and Execution of Documents.
- § 2310. Relevancy or Necessity of the Communication.

4. "Made in confidence"

- § 2311. Communications must be Confidential; Confidentiality not presumed; Presence of a Third Person; Sundry Applications of the Principle.

- § 2312. Communications to the Opponent or his Attorney, or in Opponent's Presence; Joint Attorney.

- § 2313. Identity of Client or Purpose of Suit.
- § 2314. Execution of a Will or Deed; Temporary Confidentiality.

- § 2315. Same: Attorney as Attesting Witness.

5. "By the client,"

- § 2317. Privilege not applicable to Knowledge acquired by the Attorney from Third Persons, unless as Agents of the Client; Who are Agents.

- § 2318. Documents of the Client existing before Communication; General Liability to Production by Discovery, distinguished.

- § 2319. Same: Conflict of the foregoing Principles, illustrated.

- § 2320. Communications by the Attorney to the Client.

6. "Are at his instance permanently protected"

- § 2321. Privilege is the Client's, not the Attorney's, nor the Party's; Who may Claim.

- § 2322. Inference from Claim of Privilege; Judge to determine Privilege.

- § 2323. Protection continues, though Relation of Client and Attorney be ended.

7. "From disclosure by himself or by the legal adviser,"

- § 2324. Testimony by the Client or by the Attorney.

- § 2325. Indirect Disclosure by the Attorney.

- § 2326. Third Persons overhearing.

8. "Except the client waive the protection."

- § 2327. Waiver in general; Voluntary Testimony as a Waiver.

- § 2328. Waiver by Joint Clients, Agents, Assignees.

- § 2329. Waiver by a Deceased Client's Representative.

§ 2290. **History of the Privilege.** The history of this privilege goes back to the reign of Elizabeth, where it already appears as unquestioned;¹ and it

¹ 1577, *Berd v. Lovelace*, Cory 88 (solicitor exempted from examination touching the cause); 1580, *Dennis v. Codrington*, ib. 143 (on a motion to examine one Oldsworth, "touching a

is therefore the oldest of the privileges for confidential communications. Inasmuch as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s (*ante*, § 1364), and as testimonial compulsion does not appear to have been generally authorized until the early part of Elizabeth's reign (*ante*, § 2190), it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commended itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion.

But the theory of its exclusion, in those days, was very different from that of modern times. It was an objective, not a subjective one,—a consideration for the oath and the honor of the attorney, rather than for the apprehensions of his client. How significant the “point of honor” was, until the end of the 1700s, in almost securing other exemptions from testimonial disclosure, has been already seen (*ante*, § 2286). Clearly the attorney and the barrister are under a solemn pledge of secrecy, not less binding because it is implied and seldom expressed. “The first duty of an attorney,” it has been said, “is to keep the secrets of his clients.”² If the “point of honor” was to be recognized at all as a ground for exemption, then surely the attorney fell within this exemption. And no doubt this was, in the beginning, and so long as any countenance was given to that general doctrine, the theory of the attorney's exemption.

That doctrine, however, finally lost ground, and by the last quarter of the 1700s, as already noticed (*ante*, § 2286), was entirely repudiated. The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy; nor was there any moral delinquency or public odium in breaking one's pledge under force of the law. Doubtless the attorney's exemption would have fallen at the same time with the others of like origin, had not a new theory, ample to sustain and even to enlarge it, by that time come to be recognized. That new theory looked to the necessity of providing subjectively for the client's freedom of apprehension in consulting his legal adviser (*post*, § 2291), and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law. The new theory begins to appear

matter in variance, wherein he hath been of counsel, it is ordered he shall not be compelled by subpoena or otherwise to be examined upon any matter concerning the same, wherein he the said Mr. Oldsworth was of counsel, either by the indifferent choice of both parties or with either of them by reason of any annuity or fee”); 1580, *Kelway v. Kelway*, ib. 127 (solicitor of plaintiff to be examined for defendant, “upon any interrogatory which shall not be touching the secrecy of the title or of any other matter which he knoweth as solicitor only”); 1642, *Onbie's Case*, March pl. 136 (“a lawyer who was of counsel may be examined upon oath as to the matter of agreement, not to the validity of an assurance, or to matter of counsel”); 1654, *Roll, C. J.*, in *Waldron v. Ward*, Style 449 (“He is not bound

to make answer for things which may disclose the secrets of his client's cause”); 1664, *Sparke v. Middleton*, 1 Keb. 505 (counsel required in testifying to tell only “such things as he either knew before he was of counsel or that came to his knowledge since by other persons”); 1673, *Legard v. Foot*, Rep. temp. Finch 82 (attorney privileged); 1693, *Anon.*, *Skinner* 404 (counsel privileged).

A few other rulings of the 1600s will be found in the ensuing sections.

² 1836, *Gaselee, J.*, in *Taylor v. Blacklow*, 3 Bing. N. C. 249. This conservative character is said to have been the original of Dickens' judicial fossil, Mr. Justice Stareleigh, who presided in *Bardell v. Pickwick*.

in the early 1700s, coexists with the older one for half a century,³ and then, upon the latter's disappearance, begins for the first time to be much dwelt upon and thoroughly developed. One consequence of this tardy origin was that the detailed rules of this privilege (oldest though it really was) were still in the formative stage in the first half of the 1800s. Another and most unfortunate one was that, by reason of the inconsistency of the two theories, in some of their practical applications, the older notion, so far as represented in precedents, struggled along for some time by the side of the newer one, like two powerful streams debouching into the same channel; and until the domination of the newer one was finally established throughout its boundaries, a turbid and confused volume of rulings abounded. Probably in no rule of evidence having so early an origin were so many points still unsettled until the middle of the 1800s.

The history of the changes of detailed rule that were made necessary by the supervention of the newer theory can better be followed under their separate heads. But it is worth while to sum up here the chief marks of difference. (1) In the first place, under the original theory, the privilege did not at all exempt the *client himself*. The pledge of secrecy had not been taken by him, and therefore the "point of honor" was not his to make.⁴ This, to be sure, was a consequence of little practical moment, except in answering a bill of discovery in chancery; for all through that period the party was privileged in common-law courts from testifying in the trial of civil cases (*ante*, § 2217). As the newer theory developed, the client began to be exempted from making discovery of communications relating to the very case at bar; but in this stage the matter still stood as late as the first quarter of the 1800s.⁵ Even up to that period it had to be insisted from the bar that "the privilege is that of the client and not of the attorney." The earliest judicial pronouncement in this form appears to have been made before 1700;⁶ but it passed unheeded. Mr. Justice Buller, about 1767, repeats that "it is the privilege of the client and not of the counsel or attorney," but complains that "it is mistaking it for the privilege of the witness that has sometimes led judges into the suffering of such a witness to be examined."⁷ Then, when Lord Eldon, in 1801, declares it to be "the privilege of the client and the public,"⁸ the new theory begins to bear fruit.⁹

³ The following passage shows the mingling of the two: *Ante* 1726, Gilbert, Evidence, 136: "After the retainer, they are considered as the same person with their clients, and are trusted with their secrets, which without a breach of confidence cannot be revealed, and without such sort of confidence there could be no trust or dependence on any man, nor any transacting of affairs by the ministry or mediation of another; and therefore the law in this case maintains such sort of confidence inviolable."

⁴ *Post*, § 2321.

⁵ *Post*, § 2294. The much-cited opinion in *Greenough v. Gaskell*, in 1833, which to-day seems to declare nothing but commonplaces,

was in that generation a leading case because of its bearing on this stage of development.

⁶ L. C. J. North, in *Lea v. Wheatley*, 1679, cited in 20 How. St. Tr. 574, note.

⁷ *Trials at Nisi Prius*, 284.

⁸ *Wright v. Mayer*, 6 Ves. Jr. 281.

⁹ The persistence of the older notion is seen as late as 1826; Alexander, C. B., in *Preston v. Carr*, 1 Y. & J. 175, 178: "I cannot accede to the proposition which has been contended for, that the privilege of an attorney is the privilege of the client, to the extent that the client himself may avail himself of that privilege to avoid discovering communications which have passed between him and his solicitor."

(2) In the next place, the attorney's exemption was by the original theory limited to communications received since the beginning of the *litigation at bar* and for its purposes only. The point of honor would protect him thus far; but it was gradually falling into disfavor as the 1700s progressed (*ante*, § 2286), and it would not be recognized further than could be helped. "When the cause is ended," says Chief Baron Bowes in 1743, "he is then only to be considered, with respect to his former employer, as one man to another; and then the breach of trust does not fall within the jurisdiction of this Court; for the Court can't determine what is honor, but what is law."¹⁰ Under the influence of the newer theory, an extension of the attorney's exemption of course took place, to include communications made, first, during any other litigation,¹¹ next, in contemplation of litigation, next, during a controversy but not yet looking to litigation, and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy. But this gradual extension occupied (in England, at least) nearly a hundred years of judicial annals; and the shackles of the earlier precedents were not finally thrown off until the decade of 1870.¹² (3) It followed also, under the original theory, that the privilege could be *waived by the attorney*. Since only the attorney's honor is involved, the Court would not always attempt to judge its standards or to enforce them, if the attorney himself was willing to risk his conscience and his reputation. "The Court can't determine what is honor," said Chief Baron Bowes, in 1743.¹³ Sir John Strange, Master of the Rolls, a decade later,¹⁴ when pressed to exclude an attorney's deposition, "who ought not to betray the secrets of their clients," left it to the attorney to do as he pleased; "it is a very right rule; but as he himself has not objected to it, the Court has nothing to do with it." Such liberty, no doubt, was seldom exercised by attorneys; but they clearly had it, under the older theory; and this also took some time in disappearing.

It is plain, then, that the newer theory met the older one at several points of conflict; and it is no wonder that the development of the new and the ousting of the old came to be a process of many decades, and brought a residuum of trouble and confusion into the precedents of the 1800s.

§ 2291. **Policy of the Privilege.** The policy of the privilege has been plainly grounded, since the latter part of the 1700s, on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; and hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory. In short, all four of the ele-

¹⁰ *Annesley v. Angelsea*, 17 How. St. Tr. 1229.

¹¹ The cases of *DuBarré v. Livette*, Peake N. P. 77 (1791) and *Wilson v. Rastall*, 4 T. R. 753 (1792) seem to have been the first to recognize this. *Wilson v. Rastall* is another of the cases which meant a great deal to their generation, but are now landmarks of forgotten struggles.

¹² In 1873, in *Minet v. Morgan*, L. R. 8 Ch. 361, 366, L. C. Selborne said, in commenting on counsel's citation of the earlier rulings, "The law has now attained to a footing which made me a little surprised to hear the matter reopened now."

¹³ Quoted *supra*.

¹⁴ *Winchester v. Fournier*, 2 Ves. Sr. 445, 447.

ments already noted (*ante*, § 2285) as essential to such a privilege are here deemed to exist. The policy has been expounded and defended from all points of view in the following passages:

1743, *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1225; Mr. Recorder (arguing for the privilege): "My lord, formerly persons appeared in court themselves; but as business multiplied and became more intricate and titles more perplexed, both the distance of places and the multiplicity of business made it absolutely necessary that there should be a set of people who should stand in the place of suitors, and these persons are called attornies. Since this has been thought necessary, all people and all courts have looked upon that confidence between the party and attorney to be so great that it would be destructive to all business if attornies were to disclose the business of their clients. In many cases men hold their estates without titles; in others, by such titles, that if their deeds could be got out of their hands, they must lose their fortunes. When persons become purchasers for valuable considerations, and get a deed that makes against them, they are not obliged to disclose whether they have that deed. Now, if an attorney was to be examined in every case, what man would trust an attorney with the secret of his estate, if he should be permitted to offer himself as a witness? If an attorney had it in his option to be examined, there would be an entire stop to business; nobody would trust an attorney with the state of his affairs. The reason why attornies are not to be examined to anything relating to their clients or their affairs is because they would destroy the confidence that is necessary to be preserved between them. This confidence between the employer and the person employed, is so sacred a thing, that if they were at liberty, when the present cause was over that they were employed in, to give testimony in favour of any other person, it would not answer the end for which it was instituted. The end is, that persons with safety may substitute others in their room; and therefore if you cannot ask me, you cannot ask that man; for everything said to him, is as if I had said it to myself, and he is not to answer it." *Mouteney, B.*; "Mr. Recorder hath very properly mentioned the foundation. . . . that an increase of legal business, and the inabilities of parties to transact that business themselves, made it necessary for them to employ (and as the law properly expresses it, *ponere in loco suo*) other persons who might transact that business for them; that this necessity introduced with it the necessity of what the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it safe for clients to communicate to their attornies all proper instructions for the carrying on those causes which they found themselves under a necessity of intrusting to their care."

1833, *L. C. Brougham, in Greenough v. Gaskell*, 1 Myl. & K. 98, 103: "The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection (though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially to medical advisers). But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counsellor half his case."

1876, *Jessel, M. R., in Anderson v. Bank*, L. R. 2 Ch. D. 644, 649: "The object and meaning of the rule is this: That as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of

his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

1833, *Shaw, C. J.*, in *Hatton v. Robinson*, 14 Pick. 416, 422: "This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed."

1895, *Emery, J.*, in *Wade v. Ridley*, 87 Me. 368, 32 Atl. 975: "An order of men, honorable, enlightened, learned in the law, and skilled in legal procedure, is essential to the beneficent administration of justice. The aid of such men is now practically indispensable to the orderly, accurate, and equitable determination and adjustment of legal rights and duties. While the right of every person to conduct his own litigation should be scrupulously respected, he should not be discouraged, but rather encouraged, in early seeking the assistance or advice of a good lawyer upon any question of legal right. In order that the lawyer may properly perform his important function, he should be fully informed of all facts possibly bearing upon the question. The person consulting a lawyer should be encouraged to communicate all such facts without fear that his statements may be possibly used against him."

1837, *Anon.* ("C."), in *The Law Magazine*, XVII, 68, *Production of Cases prepared for the Opinion of Counsel*: "[1] One great object of our legal system is that the rights of all persons shall be submitted with equal force to our courts of justice. . . . Let the person be who he may, strong or weak, learned or unlearned, wise or foolish, a man of influence and invested with authority, or destitute of means and utterly helpless, his claims are equally to be laid before the judge with all the power of advocacy of which they are susceptible. To accomplish this object, the first indispensable requisite is, that the client shall state to his legal advisers *all* the facts of his case. Very few clients can perceive wherein their strength lies. They must state *the whole* to the legal adviser, and leave him to form his own judgment. By this means the balance is adjusted. The weakness of the client finds a compensation in his lawyer's strength: the looseness of thought, carelessness and inaccuracy of the one, in the precision and subtlety and judgment of the other; and thus every man's case is brought with nearly equal ability and chance of success under the consideration of the judge. But how will a client venture to lay before his counsel a statement of all the facts of his case, if that very statement may hereafter be evidenced against him? There will be an end to equality, if one person has an advantage over another, because he is sufficiently cunning in the law to know what may, and what may not, be safely revealed to counsel. Such equality never can exist, unless client and counsel are completely identified, and their communications held to be as impervious to judicial investigation, as if they never had been uttered. [2] It is a received axiom, that every man knows the law. The axiom works but little injustice, because every man can ascertain the law by consulting a lawyer. But then the condition, upon which this power of ascertaining the law will rest, is, that he may make the inquiry without incurring any danger. The communication must be privileged to the utmost extent, or it will not be made. Thus it will be one consequence of the rule, that the law will be in no way open to the community at large; to them it will be a sealed book; and this axiom, from which every decision, in a greater or less degree, derives its justification in point of morality, will work very grievous injury. . . . [3] We would ask whether the advocates of this rule

have seriously considered the fearful relation which it will create between a lawyer and his client. We are not so utopian as to suppose that, in the long lists of our profession, names will not be found of lawyers treacherous to their clients, of men who '*scire volunt secreta domus atque inde timeri.*' Such lawyers, if this rule is to prevail, will have their clients at their mercy, and may at any moment contrive their ruin. . . Many of our readers will recollect the passage in Mr. Bentham's work upon 'Judicial Evidence,' in which he maintains the propriety of compelling lawyers to disclose the secrets of their clients. In the note upon this passage in Mr. Dumont's very pertinent remark: 'Admit this opinion of Mr. Bentham, it is said, and the accused have no longer counsel; they are surrounded by agents of justice and the police, against whom they ought to be so much the more upon their guard, as no man of a noble or elevated mind would stoop to such an employment. They are so many spies and informers placed round the accused. This is to suppress the defence entirely, . . . [4] Our limits confine us to only one more argument bearing upon the subject before us. Mr. Preston once said, that out of thirty questions submitted for his consideration, not more than one found its way into a court of justice. Indeed, the adjustment of disputes by the opinion of counsel takes place so far more frequently than by a suit or trial, that it may be said to form in this country the practical administration of civil justice. . . . 'The greatest trust,' says Lord Bacon, 'between men and men, is the trust of giving counsel. For in other confidences men commit the parts of life; their lands, their goods, their children, their credit, some particular affair; but to such as they make their counsellors they commit the whole, by how much the more they are obliged to all faith and integrity.' The condition upon which alone this counsel can be given requires particular attention. The lawyer must have the *whole* of his client's case, or he cannot pretend to give any useful advice. Upon a partial statement of facts he may judge correctly, and yet give his opinion in favour of a claim, which, if he had known all the circumstances, he would have perceived to be unjust, and which a court of justice upon full investigation at once overthrows. That the whole will not be told to counsel unless the privilege is confidential, is perfectly clear. A man who seeks advice, seeks it because he believes that he may do so safely; he will rarely make disclosures which may be used against him; rather than create an adverse witness in his lawyer, he will refuse all private arbitration, and take the chance of a trial. We submit, that any rule which tends to prevent the settlement of quarrels by such arbitration will work an enormous evil. Our judges ought to pause before they sanction the received rule upon the production of cases, which, as it interferes with the communication between client and counsel, renders it dangerous to adopt this course, so easy and so safe, so free from vexation, and satisfactory to all honourable minds."¹

Can these plausible reasonings be questioned? Is there lacking no one of those four essential elements (*ante*, § 2285) for a privilege against disclosing communications? Rarely indeed has any question been made of the soundness of this privilege. Nevertheless, how much there is to be said in answer can hardly be appreciated until we have heard the incisive arguments of Bentham, who stands out, with Lord Langdale and Chief Justice Appleton, as the only eminent names enrolled in our annals in radical opposition to the privilege:

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. IX, pt. IV, c. 5 (Bowring's ed., vol. VII, pp. 474 ff.): "When, in consulting with a law adviser, attorney or advocate, a man has confessed his delinquency, or disclosed some fact which, if stated in court,

¹ The reasons in favor of the privilege have also been set forth, impartially but forcefully, by Edward Livingston (*circa* 1823), in his *Introductory Report to the Code of Evidence*

(Works, ed. 1872, I, 459-467), in a passage which, next to the one last quoted, is perhaps the best of all treatments of the subject.

might tend to operate in proof of it, such law adviser is not to be suffered to be examined as to any such point. The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? [1] Oh, because 'to betray a trust is treachery; and an act of treachery is an immoral act.' . . . If the law adviser, of his own motion, the law neither commanding nor forbidding him, were to offer his testimony for the purpose of promoting the conviction of his client, the imputation of treachery would have, if not a good ground, at any rate a better, a more plausible ground. But the question is not, whether the lawyer shall thus offer his testimony; but, whether the law shall command it, or authorize him, nay force him, to refuse it. . . . [2] But if such confidence, when reposed, is permitted to be violated, and if this be known (which, if such be the law, it will be,) the consequence will be, that no such confidence will be reposed. Not reposed? Well; and if it be not, wherein will consist the mischief? The man by the supposition is guilty; if not, by the supposition there is nothing to betray: let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have anything to fear from it. That it will often happen that in the case supposed no such confidence will be reposed, is natural enough: the first thing the advocate or attorney will say to his client, will be, 'Remember that, whatever you say to me, I shall be obliged to tell, if asked about it.' What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present. . . . [3] 'A counsel, solicitor, or attorney, cannot conduct the cause of his client, (it has been observed) 'if he is not fully instructed in the circumstances attending it; but the client' (it is added) 'could not give the instructions *with safety*, if the facts confided to his advocate were to be disclosed.' Not with safety? So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in the event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit? The argument employed as a reason against the compelling such disclosure, is the very argument that pleads in favour of it. . . . [4. It has been argued² by a defender of this privilege that the guilty are entitled to be protected to a certain extent; that supposed policy has been thus phrased:] 'Even in the few instances where the accused has intrusted his defender with a full confession of his crime, we hold it to be clear that he may still be lawfully defended. The guilt of which he may be conscious, and which he may have so disclosed, he has still a right to see distinctly proved upon him by legal evidence. . . . Human beings are never to be run down like beasts of prey, without respect to the laws of the chase. If society must make a sacrifice of any one of its members, let it proceed according to general rules, upon known principles, and with clear proof of necessity; "let us carve him as a feast fit for the gods, not hew him as a carcass for the hounds."'. . . In reading the above declaration, one is at a loss to discover what it is which the writer is aiming at. Does he really think that, all other things being the same, a system of procedure is the better, for affording to criminals a chance of escape? If this be his serious opinion, there is no more to be said; since it must be freely admitted that, reasoning upon this principle, there is no fault to be found with the rule. If it be your object not to find the prisoner guilty, there cannot be a better way than refusing to hear the person who is most likely to know of his guilt, if it exist. The rule is perfectly well adapted to its end; but is that end the true end of procedure? This question surely requires no answer. But if the safety of the innocent, and not that of the guilty, be the object of the reviewer's solicitude, — had he shown how an innocent man could be endangered by his lawyer's telling all he has to tell, he would have delivered something more to the purpose than any illustration which the subject of carcasses and

² By Mr. (later L. C. J.) Denman, in the *Edinburgh Review*, March, 1824, reviewing the original French edition of Mr. Bentham's treatise. The answering argument, following the above

quotation, is by Mr. J. S. Mill, who edited his master's treatise, but is conceived in the best Benthamic spirit and is worthy of the context.

hounds could yield. If he can be content for one moment to view the question with other than fox-hunting eyes, even he must perceive that, to the man who, having no guilt to disclose, has disclosed none to his lawyer, nothing could be of greater advantage than that this should appear; as it naturally would if the lawyer were subjected to examination. . . . The denunciation which follows against hunting down human beings without respect for the laws of the chase, is one of those proofs which meet us every day, how little, as yet, even instructed Englishmen are accustomed to look upon judicature as a means to an end, and that end the execution of the law. They speak and act, every now and then, as if they regarded a criminal trial as a sort of game, partly of chance, partly of skill, in which the proper end to be aimed at is, not that the truth may be discovered, but that both parties may have fair play: in a word, that whether a guilty person shall be acquitted or punished, may be, as nearly as possible, an even chance. . . . Whence all this dread of the truth? Whence comes it that anyone loves darkness better than light, except it be that his deeds are evil? Whence but from a confirmed habit of viewing the law as the enemy of innocence — as scattering its punishments with so ill-directed and so unsparing a hand, that the most virtuous of mankind, were all his actions known, could no more hope to escape from them, than the most abandoned of malefactors? Whether the law be really in this state, I will not take upon myself to say; sure I am, that if it be, it is high time it should be amended. But if it be not, where is the cause of alarm? In men's consciousness of their own improbity. . . . [5] Thus much in vindication of the proposed rule [abolishing the privilege]. As for its advantages, they are to be sought for not so much in its direct, as in its indirect, operation. The party himself having been, as he ought to be, previously subjected to interrogation, his lawyer's evidence, which, though good of its kind, is no better than hearsay evidence, would not often add any new facts to those which had already been extracted from the lips of the client. The benefit which would arise from the abolition of the exclusionary rule, would consist rather in the higher tone of morality which would be introduced into the profession itself. A rule of law which, in the case of the lawyer, gives an express licence to that wilful concealment of the criminal's guilt, which would have constituted any other person an accessory in the crime, plainly declares that the practice of knowingly engaging one's self as the hired advocate of an unjust cause, is, in the eye of the law, or (to speak intelligibly) in that of the law-makers, an innocent, if not a virtuous practice. But for this implied declaration, the man who in this way hires himself out to do injustice or frustrate justice with his tongue, would be viewed in exactly the same light as he who frustrates justice or does injustice with any other instrument. We should not then hear an advocate boasting of the artifices by which he had trepanned a deluded jury into a verdict in direct opposition to the strongest evidence; or of the effrontery with which he had, by repeated insults, thrown the faculties of a *bonâ fide* witness into a state of confusion, which had caused him to be taken for a perjurer, and as such disbelieved. Nor would an Old Bailey counsel any longer plume himself upon the number of pickpockets whom, in the course of a long career, he had succeeded in rescuing from the arm of the law. The professional lawyer would be a minister of justice, not an abettor of crime."³

1844, Lord Langdale, in *Flight v. Robinson*, 8 Beav. 22, 36: "I own that it is difficult for me to comprehend how it is possible to apply to such cases the rules which are applied to cases totally different. An innocent man, falsely accused of fraud, will scarcely be desirous of concealing the facts, which he may have stated to his legal adviser for the purpose of obtaining legal protection to which he is justly entitled. A man engaged in a scheme of fraud will be very unwilling to disclose the statement of facts, which he may have made to his legal adviser for the purpose of better enabling him to conceal or to secure and enjoy the fruits of his fraud; and it is a question, which I would willingly submit to the consideration of those who have to decide upon cases of this kind, whether the interests of society and of justice, or the honour and utility of the legal profession, which are

³ Mr. Bentham's arguments will be found Chief Justice Appleton of Maine, *Evidence*, c. X, paralleled in the treatise (1860) of his disciple, p. 161.

so closely bound up with those interests, are more or less likely to be promoted, by the author of the fraud being compelled to disclose, or permitted to conceal, the fact of his own admissions contained in such a statement of facts."

At first sight the Benthamic argument seems irresistible. It always comes back to this, that the deterring of a guilty man from seeking legal advice is no harm to justice, while the innocent man has nothing to fear and therefore will not be deterred. In answer to this, nevertheless, three suggestions are to be made, the least weighty of which may be first noticed :

(1) There is in civil cases often *no hard-and-fast line between guilt and innocence*, which will justify us as stigmatizing one or the other party and banning him from our sympathy. In land-titles, for example, the one claimant has perhaps bought in good faith a title resting on a chain of conveyances reaching back to a Government grant, which itself involves a Mexican *alcalde's* authority ; while the other claimant has bought from an occupier who has apparently gained title by adverse possession. The decision of the contested right will depend on some abstract rule of law which produces its effect far back in the tangle of documents, and is wholly irrespective of the personal merits of the claimant's conduct. There *is* no moral right or wrong, in a concrete sense, for either of them. Such was, and still is to some extent, the status of all land-litigation in England, where registration of deeds was practically not observed. We are therefore not necessarily abetting crime or other moral delinquency when we permit the concealment of the party's admissions to his attorney.

(2) Even assuming that the party against whom the law would decide is, by virtue of the illegality (technical or otherwise) of his cause, not to be considered as worthy of aid or encouragement, nevertheless, in a great part of civil litigation, it does not happen that *all the acts and facts on one side have been wholly right* and lawful and all of those on the other wholly wrong and unlawful. There is more commonly a mixture of these qualities, in infinitely varying proportions. Hence we cannot assume that the operation of the supposed deterrent influences upon the client's mind will be as simple as is supposed in Bentham's abstract argument. In other words, it does not commonly happen that A, by reason of the state of his case, will have no fear at all of disclosure, while B, by the same reason, will have all the fear. In a large proportion of cases, each will have something to fear. The consequence would be (if the quantity of unfavorable data in his case be large enough to exercise an influence) that a person who has a partly good cause would often be deterred from consultation by virtue of the bad part or of the part that might possibly (to his notion) be bad. Now the abstinence from seeking legal advice in a good cause is by hypothesis an evil which is fatal to the administration of justice ; and even Bentham does not go so far as to question this hypothesis. It should be added that the client's attitude in criminal cases (where we may assume that, if guilty, he is wholly and indivisibly guilty) need not be taken as justifying Bentham's argument in that class of cases ; because the communications will there be in effect self-

criminating admissions; and, if they could be obtained from the attorney, the same evils would follow which, as has been seen (*ante*, § 2251), constitute the chief reason for forbidding compulsory self-crimination, — namely, the tendency of the prosecution to degenerate into a reliance upon that mode of proof to the neglect of others. Moreover, it seems more likely that, if the privilege were abolished, guilty persons would no less than before seek legal aid, but would merely refrain from self-criminating confidences; so that the prosecution would not gain at all thereby, while the defendant's adviser would lose the opportunity of exercising that discretion which he sometimes has.

(3) Even assuming, for civil cases, the negative of the foregoing argument — *i. e.* assuming that in any cause one party's case is wholly right and the other's wholly wrong —, still, so far as the wrongdoer is consequently deterred from seeking legal advice, that result is not, as Bentham would have it, an unmixed good; for it does not follow that "a guilty person would not in general derive quite so much assistance from his law adviser, in the way of concerting a false defence, as he may do at present." This does not follow except on the assumption that every legal adviser invariably proceeds, on request, to assist, by litigation or otherwise, the unjust causes that may be laid before him by his clients. How far this assumption is true varies no doubt with the individual and the locality. But there are at least many fraternities of the bar among whom are many practitioners who do not pursue such a course. Either they decline the cause utterly, in heinous cases (and even the privilege as it exists would not protect them if they consented to concert with the client a fraud or a crime), or they persuade the client that the cause is hopeless to support, or they secure a settlement with the opponent in which the client's interests are satisfied to the extent that there is any moral justice in them. To guarantee for clients of unjust causes a freedom of consultation with legal advisers cannot be deemed an evil except to the extent that the bar is unprincipled; and in that condition more radical remedies are needed.

(4) The consideration of "treachery," so inviting an argument for Bentham's sarcasms, is after all not to be dismissed with a sneer. It is impalpable and somewhat speculative; but it has a validity nevertheless. It is well emphasized by M. Dumont.⁴ If the counsellor were compellable to disclose, "no man," says that very disciple of Bentham, "of a noble or elevated mind would stoop to such an employment."⁵ Certainly the position of the legal adviser would be a delicate and disagreeable one; for it must be repugnant to any honorable man to feel that the confidences which his relation naturally invites are liable at the opponent's behest to be laid open through his own testimony. He cannot but feel the disagreeable inconsistency of being at the

⁴ In the passage above quoted.

⁵ V. C. Knight-Bruce, in *Pearse v. Pearse*, 1 DeG. & Sm. 25: "And surely the meanness and the mischief of prying into a man's confidential consultations with his legal adviser, the general evil of infusing reserve and dissimulation,

uneasiness and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a prize to pay for truth itself."

same time the solicitor and the revealer of the secrets of the cause. This double-minded attitude would create an unhealthy moral state in the practitioner. Its concrete impropriety could not be overbalanced by the recollection of its abstract desirability. If only for the sake of the peace of mind of the counsellor, it is better that the privilege should exist.

After all, the loss to truth is comparatively small, in modern times. It was much greater in the period when the civil party's own privilege of silence was still in force; for then his admissions to his attorney would have constituted a distinct and substantial addition to the available sources of proof. But now that he can be freely interrogated and called to the stand by the opponent and made to disclose on oath all that he knows, it is evident that the disclosure of his admissions made to his attorney would add little to the proof, except so far as the client is a person capable of perjuring himself when interrogated in court.

Nevertheless, the privilege remains an anomaly. Its benefits are all indirect and speculative; its obstruction is plain and concrete. Even the answers to Bentham's argument concede that it is accurate and well-founded in its application to a certain proportion of cases. It is worth preserving for the sake of a general policy; but it is none the less an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.⁶

§ 2292. **General Principle; Statutory Definitions.** The phrasing of the general principle, so as to represent all its essentials, but only essentials, and to group them in natural sequence, is a matter of some difficulty. The following form seems to accomplish this: (1) *Where legal advice of any kind is sought* (2) *from a professional legal adviser in his capacity as such*, (3) *the communications relevant to that purpose*, (4) *made in confidence* (5) *by the client*, (6) *are at his instance permanently protected* (7) *from disclosure by himself or by the legal adviser*, (8) *except the client waives the protection*. These various parts will be taken up in the above order.

It may here be noted that the privilege has in many jurisdictions been embodied in statutes.¹ These have seldom helped to settle any mooted point;

⁶ 1828, Best, C. J., in *Broad v. Pitt*, 1 M. & M. 233, 3 C. & P. 518 ("The privilege is an anomaly, and ought not to be extended"); 1831, Shaw, C. J., in *Foster v. Hall*, 12 Pick. 89, 97 ("This rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly").

¹ *Eng.*: for a discussion of the attorney's privilege as affected by the Bankruptcy Act of 1883, see Mr. G. W. Edwards' article in 33 Law Journ. 489 (1898); *Alaska* C. C. P. 1900, § 1036 (like Or. Annot. C. 1892, § 712, par. 2); *Ariz.* Rev. St. 1887, § 2039 (like Cal. C. C. P. § 1881); *Ariz.* Stats. 1894, § 2916 (5) ("an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent," is incompetent); *Cal.* C. C. P. 1872, § 1881 ("There are particular relations in which it is the policy of the law

to encourage confidence and to preserve it inviolate; therefore a person cannot be examined as a witness in the following cases: . . . 2. An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment"; amended by the Commissioners in 1901 by adding: "nor can an attorney's secretary, stenographer, or clerk, be examined, without the consent of his employer, concerning any fact the knowledge of which has been acquired in such capacity; but no communication is privileged under this subdivision when the same was made with the intention that it should be communicated to any person having an interest adverse to the client, or when the same was made in furtherance of a crime or fraud then being perpetrated or in contemplation of"); § 1882, added by amend-

but on the other hand they have seldom chanced to disfigure the common-law rule or to unsettle its logical development. Their phraseology is commonly

ment of the Commissioners in 1901 ("Consent to the giving of such testimony as is mentioned in section 1881 is conclusively implied in the following cases: 1, When the person who made any communication mentioned in that section testifies, without objection on his part, as to such communication or any part thereof, the person to whom such communication was made may be examined fully, in the same action or proceeding, as to such communication; 2, When a person employs an attorney to prepare his will, the attorney may, in any proceeding for the probate or revocation of probate of such will, testify, as to the contents of such will if lost or destroyed, and as to all information and instructions received by him from the testator, in the course of the preparation or execution of such will, and relating thereto; 3, When a husband or wife has become incompetent or is dead, the other spouse may, in an action or proceeding to which the guardian or personal representative of such incompetent or deceased person is a party, and with the consent of such guardian or personal representative, testify as to communications made by such incompetent or deceased person, but must not be compelled to so testify; 4, In an action brought by the beneficiary to recover on a policy of life insurance, taken out by the person whose life was insured, a physician or surgeon may, with the consent of the beneficiary, testify as to any information acquired by him in attending the deceased, but must not be compelled to so testify. Nothing in this section contained affects the right of the Court to admit any of the testimony mentioned in section 1881, when no objection is seasonably interposed thereto, or when the Court finds, as an inference from proper evidence, that the consent mentioned in that section has been given or implied"); for the validity of these amendments, see *ante*, § 488; *Colo.* Annot. Stats. 1891, § 4824 (like Cal. C. C. P. § 1881); § 4825 (waiver by consent, allowed, quoted *ante*, § 488); *Ga.* Code 1895, § 5198, par. 2 (communications "between attorney or counsel and client" are excluded); § 5199 ("communications to any attorney, or his clerk, to be transmitted to the attorney pending his employment, or in anticipation thereof," are inadmissible; "so the attorney cannot disclose the advice or counsel he may give to his client, nor produce or deliver up title-deeds or other papers, except evidences of debt left in his possession by his client; this rule does not exclude the attorney as a witness to any facts which may transpire in connection with his employment"); § 5271, Cr. C. § 1011, par. 5 ("No attorney shall be competent or compellable to testify in any court in this State, for or against his client, to any matter or thing, knowledge of which he may have acquired from his client, by virtue of his relations as attorney, or by reason of the anticipated employment of him as attorney, but shall be both competent and compellable to testify, for or against his client, as to any matter or thing, knowledge of

which he may have acquired in any other manner"; as to an attorney's testimony in general, under this statute, see the cases cited *ante*, § 1911); §§ 3947, 5288 (a witness need not disclose "the advice of his professional advisers, nor his consultation with them"); *Ida.* Rev. St. 1887, § 5958 (like Cal. C. C. P. § 1881); *Ind.* Rev. St. 1897, § 507 ("Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases," shall not be competent); *Ia.* Code 1897, § 4608 ("No practicing attorney, counselor, physician, surgeon, or the stenographer or confidential clerk of any person, who obtains such information by reason of his employment, minister of the gospel or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice or discipline. Such prohibition shall not apply to cases where the party in whose favor the same is made waives the rights conferred"); amended by St. 1900, 28th Gen. Ass. c. 125, § 1 (by inserting the word "such" before "person"); *Ky.* C. C. P. 1895, § 606, par. 5 ("No attorney shall testify concerning a communication made to him, in his professional character, by his client, or his advice thereon, without the client's consent"); *La.* Rev. Civ. C. 1888, § 2283 ("No attorney or counsellor at law shall give evidence of anything that has been confided to him by his client, without the consent of such client"); *Minn.* Gen. St. 1894, § 5662 ("There are particular relations [etc., as in Cal. Code] . . . Second, An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional duty"); amended by St. 1895, c. 31 (by adding "nor can any employee of such attorney be examined without the consent of such client as to any such communication or advice"); *Mo.* Rev. St. 1889, § 8925: ("The following persons shall be incompetent to testify: . . . third, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the consent of such client"); *Mont.* C. C. P. 1895, § 3163 (2) (like Cal. C. C. P. § 1881); *Nebr.* Comp. St. 1899, § 5902 ("The following persons shall be incompetent to testify: . . . fourth, an attorney, concerning any communication made to him by his client during that relation or his advice thereon, without the client's consent in open court or in writing produced in court"); § 5907 ("No practicing attorney, counsellor, physician, surgeon, minister of the gospel, or priest of any denomination, shall be allowed, in giving testimony, to disclose any confidential communication, properly intrusted to him in his professional capacity, and necessary and proper to enable him to discharge the functions of his

ignored by the Courts, as being merely an attempt to name and to embody the common-law privilege.

1. "Where legal advice of any kind is sought"

§ 2294. **Privilege is irrespective of Litigation begun or contemplated; History of the Doctrine.** Under the original theory of the privilege (*ante*, § 2290) the confidences of the client were respected only when given for the purpose of securing aid in litigation, and in the very litigation in which they were

office according to the usual course of practice or discipline"); § 5908 (preceding prohibition not to apply "to cases where the party in whose favor the respective prohibitions are enacted waives the rights thereby conferred"); *Nev. Gen. St.* 1885, § 3404 (substantially like *Cal. C. C. P.* § 1881); *N. Y. C. C. P.* 1877, § 835, as amended by Laws 1896, c. 564 ("an attorney or counselor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment; [L. 1896] nor shall any clerk, stenographer, or other person employed by such attorney or counselor be allowed to disclose any such communication or advice given thereon"); § 836, as amended by L. 1877, c. 416, L. 1891, c. 381, L. 1892, c. 514, L. 1893, c. 295, L. 1899, c. 53 ("The last three sections apply to any examination of a person as witness unless the provisions thereof are expressly waived upon the trial or examination by the . . . client; . . . But nothing herein contained shall be construed to disqualify an attorney in the probate of a will heretofore executed or offered for probate or hereafter to be executed or offered for probate from becoming a witness as to its preparation and execution in case such attorney is one of the subscribing witnesses thereto. . . . The waivers herein provided for must be made in open court on the trial of the action or proceeding and a paper executed by a party prior to the trial providing for such waiver shall be insufficient as such a waiver. But the attorneys for the respective parties may prior to the trial stipulate for such waiver and the same shall be sufficient therefor"); *N. C. Code* 1883, § 1349 (on a charge of "fraud upon the State," no answer shall be refused "because he came into the possession of such evidence or information by his position as counsel or attorney before the consummation of such fraud"); *N. D. Rev. C.* 1895, § 5703 (like *Cal. C. C. P.* § 1881); § 5704 ("If a person offers himself as a witness," it is a consent to his attorney's examination "on the same subject"); *Ok. Annot. Rev. St.* 1898, § 5241 ("The following persons shall not testify in certain respects: 1. An attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same sub-

ject"); *Ok. Stats.* 1893, § 335 ("The following persons shall be incompetent to testify: . . . Fourth, an attorney, concerning any communication made to him by his client in that relation, or his advice thereon, without the client's consent; . . . provided that, if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if [of ?] an attorney, clergyman or priest, physician or surgeon, on the same subject, within the meaning of the last three subdivisions of this section"); *Pa. St.* 1887, Pub. L. 158, § 2, P. & L. Dig., Witnesses § 5 ("Nor shall counsel be competent or permitted to testify to confidential communications made to him by his client, or the client be compelled to disclose the same, unless in either case the privilege be waived upon the trial by the client"); *S. D. Stats.* 1899, § 6544 (like *Cal. C. C. P.* § 1881); § 6545 (like *N. D. Rev. C.* § 5704); *Tenn. Code* 1896, § 5785 ("No attorney or counsel shall be permitted, in giving testimony against a client or person who consulted him professionally, to disclose any communication made to him as attorney by such person, during the pendency of the suit, before or afterwards, to his injury"); *Tex. Pen. C.* 1895, § 773 ("[All other persons are competent,] . . . except that an attorney at law shall not disclose a communication made to him by his client during the existence of that relationship, nor disclose any other fact which came to the knowledge of such attorney by reason of such relationship"); *Utah Rev. St.* 1898, § 3414 (like *Cal. C. C. P.* § 1881; adding "nor can an attorney's secretary, stenographer, or clerk be examined, without the consent of his employer, concerning any fact the knowledge of which had been acquired in such capacity"); *Vt. St.* 1894, § 5273 (officer of prison is not to testify to a communication between prisoner and counsel concerning preparation for trial); *Wash. C. & Stats.* 1897, § 5994 (like *Cal. C. C. P.* § 1881, inserting "or counselor"); *Wis. Stats.* 1898, § 4076 (like *N. Y. C. C. P.* § 835); *Wyo. Rev. St.* 1887, § 2589 ("The following persons shall not testify in certain respects: First, an attorney, concerning a communication made to him by his client in that relation, or his advice to his client; or a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject").

given. It is obvious, however, that this limitation would be wholly inconsistent with the modern theory of the privilege (*ante*, § 2291). That theory, however, was slow in making its logic felt. Even after it had become the acknowledged basis of the privilege, the abolition of the earlier limitations was not attained (in England, at least) until after nearly a century of rulings, in the course of which the expansion was gradually taking place.

(1) The first stage of expansion consisted in extending the privilege to the *attorney's testimony* concerning confidences made in *some other litigation*, now ended and not at bar. Up to the end of the 1700s these had generally been regarded as without the privilege,¹ although the broader view had begun to make headway.² It was next seen that the principle applied equally to communications made *in contemplation of a suit*,³ or even *after dispute arisen* though not directly with a view to litigation.⁴ Meantime, and while this was still the extreme limit of the orthodox view, it had been ruled that communications made in seeking *legal advice for any purpose* were within the principle of the privilege.⁵ Within a short time after Lord Tenterden's death this final step was judicially accepted, and has never since been doubted to be the law.⁶

(2) But this expansion had thus far affected only the compulsion of the attorney. The rule for the *client himself* was passing more tardily through an independent though parallel development. Originally, as already noticed (*ante*, § 2290), the privilege did not protect the client himself from the usual

¹ See the remarks of Bowes, C. B., in 1743, in *Annesley v. Anglesea*, quoted *supra*, § 2290. In the cases of the 1600s, there quoted, the plain inference is the same. In 1792, L. C. J. Kenyon, in *Duffin v. Smith*, Peake N. P. 108, referred to the privilege as covering only communications "for the purpose of his defence." In 1799, the same judge, in *Sloman v. Herne*, 2 Esp. 696, refused to compel an attorney to disclose a communication from clients in another cause, "the parties were virtually the same" being his ground of decision.

² It had been advanced in 1743 by Dawson, B., in *Annesley v. Anglesea*, *supra*. The first rulings seem to be the following: 1791, *Du Barré v. Livette*, Peake N. P. 77 (communications excluded, though the suit had ended); 1792, *Wilson v. Rastall*, 4 T. R. 753, 759 (Buller, J.: "In such a case it is not sufficient to say that the cause is at an end; the mouth of such a person is closed forever").

³ 1809, *Gainsford v. Grammar*, 2 Camp. 9 (communications before suit begun, privileged); 1819, *Wadsworth v. Hamshaw*, 2 B. & B. 5, note, Abbott, C. J. (communications as to a dissolution of partnership, not privileged, but only those "related to a cause existing at the time of the communication or then about to be commenced"); 1824, *Williams v. Mudie*, 1 C. & P. 158, Ry. & Mo. 34 (Abbott, C. J., held that "whatever is communicated for the purpose of bringing or defending an action is privileged, but not otherwise; . . . I have considered the subject a great deal, and my mind is made up upon it"); 1828, *Broad v. Pitt*, 3 C. & P. 518, 1 M. & M. 233, Best, C. J. (communications not

"made for the purpose of a suit or proceeding intended or apprehended," not privileged; here, the time of a deed's execution).

⁴ 1830, *Clark v. Clark*, 1 Mo. & Rob. 3 (L. C. J. Tenterden (Abbott) further expounded his view by recognizing the privilege for consultations "with respect to a matter then in dispute and controversy, although no cause was in existence with respect to it").

⁵ 1820, *Cromack v. Heathcote*, 2 B. & B. 4, Dallas, C. J. (communications as to drawing a deed, privileged; "I know of no such distinction as that arising from the attorney being employed or not employed in the cause").

⁶ 1833, *Greenough v. Gaskell*, 1 Myl. & K. 88, 101 (L. C. Brougham declared that, for attorneys, "it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation"); 1833, *Moore v. Terrell*, 4 B. & Ad. 870, 876 (Parke, J., declared that Tindal, C. J., Lyndhurst, L. C. B., and himself, were consulted by Brougham, L. C., in deciding *Greenough v. Gaskell*, and approved of it); 1833, *Doe v. Harris*, 5 C. & P. 592 (Parke, J., declared the limitation of *Williams v. Mudie* to have been recently repudiated by the Chancellor, consulting with the Chief Justices and Chief Baron; meaning the case of *Greenough v. Gaskell*); 1846, *Pearse v. Pearse*, 1 DeG. & Sm. 12, 25, 11 Jur. 52 (V. C. Knight-Bruce: "I suppose *Cromack v. Heathcote* to be now universally acceded to; . . . as far as any discovery by the solicitor or counsel is concerned, the question of the existence of any suit, claim, or dispute, is immaterial").

methods of discovery in equity. As the 1700s drew to a close, it came first to be conceded that "the privilege was that of the client." By this time, a recognition began to be given to the logical consequence that he could not be interrogated as to communications made *for the purpose of the litigation at bar*; yet the tradition was apparently still to the contrary.⁷ The case of *Preston v. Carr*, in 1826, was the last effort to preserve this tradition.⁸ It was thereafter immediately settled, by a series of nearly simultaneous rulings, that communications relative to the cause at bar, or even in contemplation of it, were protected from discovery by the client himself.⁹ The question then came to be whether communications made for *other litigations* were also to be privileged. At first even Lord Brougham hesitated to take this step;¹⁰ but Lord Abinger,¹¹ and then Lord Lyndhurst and his Vice-Chancellor,¹² made the advance. The further extension of the privilege to communications made *in contemplation* of any litigation was then speedily conceded.¹³ Here, however,

⁷ The early case of *Radcliffe v. Fursman*, in the House of Lords, in 1730 (2 Bro. P. C. 514), much relied upon for the narrower view, is obscurely reported as having compelled the client's discovery of admissions "stated in some case for the opinion of some counsel"; but it was apparently treated by Lord Eldon as practically ignoring the privilege for the client: 1801, *Wright v. Mayer*, 6 Ves. Jr. 280 (L. C. Eldon refused to compel the attorney to produce cases and opinions placed confidentially with him by the client, but intimated that by a motion for production on a bill of discovery against the client himself they could be produced, being "in her power, if in the custody of her attorney"); 1812, *Richards v. Jackson*, 18 id. 472 (L. C. Eldon on a bill of discovery compelled the client to produce his case stated, though not the counsel's opinion, following *Radcliffe v. Fursman* reluctantly; and said that in his experience that had been the practice).

⁸ 1826, *Preston v. Carr*, 1 Y. & J. 175 (Alexander, C. B.; the Exchequer compelled the production of two cases stated, apparently for the very litigation in hand).

⁹ 1827, *Hughes v. Biddulph*, 4 Russ. 190, L. C. Lyndhurst (letters passed between solicitor and client "in the progress of this cause, and with reference to this cause previously to its being instituted," held privileged); 1827, *Vent v. Pacey*, ib. 193, same judge (letter to a solicitor "with a view to taking the opinion of counsel upon the matter in question and which matter afterwards became the subject of the suit," privileged); 1830, *Garland v. Scott*, 3 Sim. 396 (privilege held to cover communications "passed in the progress of this cause, or with reference to this cause previously to its being instituted"); 1833, *Bolton v. Liverpool*, 1 Myl. & K. 95, 98, L. C. Brougham (a case protected when "laid before counsel in reference to or in contemplation of or pending the suit or action for the purpose of which the production is sought"; preceding cases examined, *Hughes v. Biddulph* approved); 1833, *Whitbread v. Gurney*, 1 Younge 541 (L. C. B. Lyndhurst applied the rule in *Bolton v. Liverpool*); 1837, *Nias v. R.*

Co., 3 Myl. & Cr. 355 (L. C. Cottenham; case and opinion concerning the very litigation, but made before bill filed, held privileged).

¹⁰ 1833, *Greenough v. Gaskell*, 1 Myl. & K. 88, 101, L. C. Brougham ("the authorities are that he [the client] must disclose the cases he has laid before counsel for their opinion, unconnected with the suit itself"; while as regards attorneys, "it does not appear that the protection is qualified by any reference to proceedings pending or in contemplation"; though the distinction "seems inconsistent"); 1836, *Meath v. Winchester*, 10 Bligh, N. S. 375 (Lord Brougham, referring to his ruling in *Greenough v. Gaskell*, spoke of the practice theretofore obtaining as "the inveterate and not now to be changed practice in courts of equity," and said that only the case of *Radcliffe v. Fursman*, a ruling of the House of Lords, prevented the overthrow of an illogical limitation now felt by all the judges to be utterly repugnant).

¹¹ 1836, *Knight v. Waterford*, 2 Y. & C. Ch. 22, 31, 41 (L. C. B. Abinger disapproved of the ruling in *Bolton v. Liverpool* in so far as it refused the privilege for cases stated in litigation prior to or other than the pending one; here intimating that the privilege extended to a brief filed in a suit in 1833).

¹² 1842, *Herring v. Cloberry*, 1 Phil. Ch. 91 (L. C. Lyndhurst's principle, quoted *infra*, § 2295, went this far); 1842, *Combe v. London*, 1 Y. & C. Ch. C. 631, 650, Shadwell, V. C. (cases prepared and opinions taken for litigations with other parties were protected, the issues being the same or related); 1843, *Hughes v. Garnos*, 6 Beav. 352 (correspondence in another suit, indirectly involved, held privileged); 1844, *Holmes v. Baddeley*, 1 Phil. Ch. 476, L. C. Lyndhurst (cases and opinions given for another suit with another party concerning the same property, and possibly raising a similar issue, held privileged; overruling Lord Langdale's decision below in 6 Beav. 521).

¹³ 1842, *Herring v. Cloberry*, *supra*; 1842, *Clagett v. Phillips*, 2 Y. & C. Ch. C. 82, Knight-Bruce, V. C. (communication privileged, if a dispute had arisen which "might terminate in

a stand was made by Lord Langdale, Master of the Rolls, the determined opponent of the privilege; he, with Vice-Chancellor Wigram, succeeded for a short space in restricting it at most to communications made *after dispute arisen*, though irrespective of litigation contemplated.¹⁴ But Lord Chancellor Lyndhurst was already on record, in *Herring v. Cloberry*, as favoring the final and broadest expansion to communications seeking *any legal advice* under all circumstances.¹⁵ For another twenty years this final step remained arguable.¹⁶ But logic prevailed; and after *Minet v. Morgan* there was no pretext for doubt as to the law in England.¹⁷ Thereafter, for the client and for the attorney the broad boundaries of the privilege were the same.

In the United States this lengthy controversy seems never to have found echoes. With the exception of one or two early rulings observing some of the original English limitations,¹⁸ the Courts seemed to gravitate naturally to the largest interpretation of the privilege.¹⁹ Mr. Justice Selden, of New

a suit"); 1844, *Flight v. Robinson*, 8 Beav. 22, 38, Lord Langdale, M. R. (cited *infra*). The supposed authority of *Radcliffe v. Fursman*, and the limitation, hitherto obtaining up to the 1830s, in tradition and practice, to consultations concerning the litigation in hand, was carefully discussed and strongly deprecated in 1837 and 1843, in two articles in the *London Law Magazine* (vol. 17, p. 51, and vol. 30, p. 107) which must have had much influence on professional opinion.

¹⁴ 1843, *Walsingham v. Goodricke*, 3 Hare 122, 125 (Wigram, V. C., after noting that prior decisions recognized the privilege for those communications only which were had after dispute arising, though not in contemplation of litigation, apparently declined to recognize it for those had "before any dispute arose"); 1843, *Woods v. Woods*, 4 id. 83 (Wigram, V. C., repeated his views as expressed in the prior case); 1844, *Flight v. Robinson*, 8 Beav. 22, 38 (Lord Langdale, M. R., restricted the privilege to communications taking place "either in the progress of the suit, or with reference to the suit previously to its commencement"); 1845, *Carpmael v. Powis*, 9 Beav. 16, 20 (Lord Langdale, as to his former denial of the privilege where "no litigation was contemplated," conceded that "this doctrine has been overruled"); 1845, *Reece v. Trye*, ib. 316 (Lord Langdale conceded that the protection was not confined to communications in contemplation of litigation; reluctantly acknowledging that his own view "has not been approved"); 1848, *Penraddock v. Hammond*, 11 id. 59 (similar to *Reece v. Trye*).

¹⁵ 1842, *Herring v. Cloberry*, 1 Phil. Ch. 91 (quoted *infra*, § 2295). This view had been advanced many years before, in a ruling little noticed: 1821, *Walker v. Wildman*, 6 Madd. 47 (Leach, V. C.; privilege held to apply not merely to "communications pending an action," but to every communication "for professional assistance").

¹⁶ 1846, *Pearse v. Pearse*, 1 DeG. & Sm. 12, 25, 11 Jur. 50 (V. C. Knight-Bruce declared that it was "not a disputable point" that "the

question of the existence or non-existence of any suit, claim, or dispute, is immaterial"; *Herring v. Cloberry* declared to state the rule correctly; 1855, *Manser v. Dix*, 1 K. & J. 451, 453 (Page-Wood, V. C., was perplexed by the prior rulings, and was inclined to draw the line at communications made with reference to a dispute, including possible as well as actual disputes, and therefore held as privileged a communication made regarding a supposed defect on the title, as being a consultation "against all possible claimants who may hereafter dispute the title"); 1859, *Lawrence v. Campbell*, 4 Drew. 485 (Kindersley, V. C., declared that "it is not now necessary, as it formerly was, . . . that the communications should be made either during or relating to an actual or even to an expected litigation"); 1866, *Jenkyns v. Bushby*, L. R. 2 Eq. 547 (case and opinion, prepared for defendant's predecessor for litigation as to the same property, held privileged).

¹⁷ 1873, *Minet v. Morgan*, L. R. 8 Ch. 361, 366 (L. C. Selborne reviewed the cases, and approved the broad principle of *Pearse v. Pearse*; "the law has now attained to a footing which made me a little surprised to hear the matter reopened now"); 1889, *Lowden v. Blakey*, L. R. 23 Q. B. D. 332 (*Minet v. Morgan* approved); 1891, *O'Shea v. Wood*, Prob. 287 (modern doctrine approved).

In Canada, the doubt in English practice was reflected in a contemporary ruling: 1865, *Macdonald v. Putman*, 11 Grant Ch. 258, 264 (communications from the client, held not privileged if not made pending or anticipating litigation; otherwise of the attorney; here the then English cases and their uncertainty were considered); 1874, *Hamelyn v. White*, 6 Ont. Pr. 143 (*Minet v. Morgan* followed; *Macdonald v. Putman* practically repudiated).

¹⁸ 1829, *Dixon v. Parmelee*, 2 Vt. 185, 188; 1845, *March v. Ludlum*, 3 Sandf. Ch. 35, 49 (Sandford, V. C., recognizes the privilege as applying "where there is a dispute," though no litigation actual or contemplated).

¹⁹ Besides the following rulings, the doctrine is of course now assumed in almost every opinion

York, alone raised his voice in opposition.²⁰ The reasons for this contrast, and for the easy acceptance of the broader rule with us, may be guessed without much risk of error. In the first place, there was not the same strong body of direct tradition to be overcome. The profession of the attorneys was in many of our colonies for a long time unrecognized; and there can hardly have been any inheritance of the old principle to stand in the way of the logic of the newer theory. But, more than this, the functions of counsel and attorney not having been with us maintained in separation, the chief occasion for the long-drawn-out English controversy was lacking, — namely, the existence of a complete written statement of facts by the party himself, available against him as an admission, in the form of a “case made for counsel,” customarily presented to the latter by the attorney for an opinion before venturing on litigation. This it was which, in English practice, formed the objective eagerly sought after by bills of discovery, and was only protected from disclosure by the bulwark of the present privilege. Most of the rulings in the long list already examined were concerned with demands for the production by the client of this key to his case; and under the rules of discovery (*ante*, §§ 1846, 1857, 2219) most of its parts must have been demandable except as they might fall within the present privilege.²¹ It is no wonder that the loss of such an advantage was so stubbornly contested by inquisitive opponents. In the United States, however, no “case” needed to be stated in this written form; for counsel and attorney were one. The client’s admissions to his adviser were likely to be made orally; and the chance of extracting from him a repetition of the same admissions by answers to interrogatories was of little value, compared to the opportunity of inspecting the unchangeable writing which he was obliged, in English practice, to commit to the counsel’s hands. All that was to be obtained by discovery, under the other practice, was the preëxisting documents of title or obligation, and these were not to be protected by the attorney-privilege.²¹ There was thus no appreciable motive for raising the distinctions which marked the successive stages of development in England, nor for struggling so long at each successive outpost in the extension of the privilege. The progress of its logic was unimpeded.

discussing the privilege at large: 1845, *State v. Marshall*, 8 Ala. 302, 306; 1860, *Bobo v. Bryson*, 21 Ark. 387; 1899, *Brown v. Butler*, 71 Conn. 576, 42 Atl. 654 (instructions as to drawing a bill of sale, excluded); 1856, *Johnson v. Sullivan*, 23 Mo. 474, 479; 1831, *Foster v. Hall*, 12 Pick. 89, 97 (see quotation *infra*, § 2295); 1833, *Hatton v. Robinson*, 14 id. 416, 421; 1848, *Bank of Utica v. Mersereau*, 3 Barb. Ch. 523, 592, *Walworth, C.*; 1859, *Williams v. Fitch*, 18 N. Y. 546, 551 (conversation relating to an affidavit for reducing an assessment, held privileged; as to the supposed limitation to judicial proceedings, “it appears to be now settled otherwise, and we think with great propriety”); 1871, *Britton v. Lorenz*, 45 id. 51, 57 (rule confirmed); 1874, *Yates v. Olmsted*, 56 id. 632 (same); 1881, *Root v. Wright*, 84 id. 72, 76

(the rule “extends to communications in reference to all matters which are the proper subject of professional employment”); 1834, *Beltzhoover v. Blackstock*, 3 Watts 20, 27 (“It is sufficient if the witness were consulted professionally and acted or advised as counsel”); 1891, *Alexander v. U. S.*, 138 U. S. 353, 359, 11 Sup. 350; 1832, *Durkee v. Leland*, 4 Vt. 612; 1856, *Coon v. Swan*, 30 id. 6, *semble*; 1873, *Earle v. Grout*, 46 id. 113, 125, *semble*; 1814, *Parker v. Carter*, 4 Munf. 273, 287.

²⁰ Quoted *post*, § 2295.

²¹ So far as the documents in such a “case” were not created for the purpose of communicating with the attorney, the limits of privilege still are important; they are examined *post*, § 2318.

§ 2295. **Same: General Principle and Policy.** It has been hitherto assumed that the logic of the modern theory of the privilege (*ante*, § 2290) leads inevitably to the broad scope of rule just noticed. But is this its inevitable result? Does the policy of securing subjective freedom of consultation for the client require us to guarantee that freedom as well for non-litigious as for litigious consultation? To argue that every right and obligation is potentially the subject of litigation is natural; but this, though abstractly true and sufficient, is hardly tangible enough to support so broad a claim of expansion. The case against expansion, from this point of view, has been made the most of in the following passage:

1864, *Selden, J., in Whiting v. Barney*, 30 N. Y. 330, 332: "As law-suits multiplied, and the modes of judicial proceeding became more complex and formal, it became necessary to have these suits conducted by persons skilled in the laws and in the practice of the courts. This necessity gave rise, at an early day, to the class of attorneys; to facilitate the business of the courts, it was important that these men should be employed. But as parties were not then obliged to testify in their own cases, and could not be compelled to disclose facts known only to themselves, they would hesitate to employ professional men, and make the necessary disclosures to them, if the facts thus communicated were thus within the reach of their opponent. To encourage the employment of attorneys, therefore, it became indispensable to extend to them the immunity enjoyed by the party. . . . If this was the true foundation of the rule, it would follow, that the protection is confined to communications made with a view to the conduct of a suit, or some judicial proceeding, and it goes most forcibly to confirm and strengthen the direct authority to which I have referred, that in the earlier cases, and while the origin of the rule was most likely to be kept in view, the doctrine would seem to have had this application. . . . But, unfortunately, there is another class of cases, still more numerous, which indicate a different doctrine, viz., that the privilege has no special relation to suits in court or judicial proceedings of any kind, but extends to every case where a member of the legal profession is consulted or employed *professionally*. . . . It seems to me, that enough has been adduced, to make it clear that the privilege in question is not founded upon any idea of the sacredness of confidential communications, whether made to an attorney or to any other person; nor upon any particular policy of the law which distinguishes the *general* business of an attorney from that of any other class in the community; but it was the result of that rule of the common law, which excused parties from testifying in their own cases, and of the necessity, for the convenience of the public, as well as the benefit of suitors, of having the business of the courts conducted by professional men. Whether, therefore, the recent legislation in this State, compelling parties to testify as witnesses in their own suits, shall be deemed to have removed the whole foundation of the rule, and terminated all necessity for its continuance or not, which may admit of some doubt, it follows, from the views here expressed, if correct, that the protection should only be held to extend to such communications as have relation to some suit or other judicial proceeding, either existing or contemplated."

The true answer to Mr. Justice Selden's argument is found by recurring to the basis of all privileges for communications (*ante*, § 2285). Their object is to protect the perfect working of a special relation, wherever confidence is a necessary feature of that perfect working. Now it cannot be denied that professional legal advice is as often needed for avoiding litigation as for carrying it on; still less can it be denied that the avowed ideal of the law, and the prudent custom of the profession, is to diminish litigation by so ordering

the affairs of clients that litigation is not needed to correct their plight. It is a truism that much of litigation is due to the very failure of clients to seek legal advice until a resort to the courts cannot be avoided. Thus the relation of client and legal adviser, and the freedom of entering into it, are of at least equal importance for matters that are still in the non-litigious stage; and the promotion of the relation in that stage tends to prevent its necessity in the further and less desirable stage. The best judicial opinion, therefore, when not opposed (as Lord Langdale was) to the privilege as a whole, has not hesitated to accept the reasoning which leads to the broad rule now universally accepted :

1833, *L. C. Brougham*, in *Greenough v. Gaskell*, 1 Myl. & K. 98, 102: "If the protection were confined to proceedings begun or in contemplation, then every communication would be unprotected which a party makes with a view to his general defense against attacks which he apprehends, although at the time no one may have resolved to assail him. But, were it allowed to extend over such communications, the protection would be insufficient if it only included communications more or less connected with judicial proceedings; for a person oftentimes requires the aid of professional advice upon the subject of his rights and liabilities with no reference to any particular litigation, and without any other reference to litigation generally than all human affairs have in so far as every transaction may by possibility become the subject of judicial inquiry."

1831, *Shaw, C. J.*, in *Foster v. Hall*, 12 Pick. 89, 98: "We are of opinion that although this rule of privilege, having a tendency to prevent the full disclosure of the truth, ought to be construed strictly; yet still, whether we consider the principle of public policy upon which the rule is founded, or the weight of authority by which its extent and limits are fixed, the rule is not strictly confined to communications made for the purpose of enabling an attorney to conduct a cause in court, but does extend so as to include communications made by one to his legal adviser, whilst engaged and employed in that character, and when the object is to get his legal advice and opinion as to legal rights and obligations, although the purpose be to correct a defect of title by obtaining a release, to avoid litigation by compromise, to ascertain what acts are necessary to constitute a legal compliance with an obligation, and thus avoid a forfeiture or claim for damages, or for other legal and proper purposes not connected with a suit in court."

§ 2296. **Same: Application to Advice sought for Sundry Non-Legal Purposes; Consultation with Prosecuting Attorneys.** Men do not gather grapes of thorns, nor figs of thistles; yet they may enter one and the same field and find diverse fruits. A lawyer is sometimes employed without reference to his knowledge and discretion in the law, — as where he is charged with finding a profitable investment for trust funds. So, too, one not a lawyer is sometimes asked for legal advice, — as where a policeman or a clerk of court is consulted. It is not easy to frame a definite test for distinguishing legal from non-legal advice. Where the general purpose concerns legal rights and obligations, a particular incidental transaction would receive protection, though in itself it were merely commercial in nature,¹ — as where the financial condition of a shareholder is discussed, in the course of a proceeding to enforce a claim against a corporation. But apart from such cases, the most that can

¹ 1855, *Maas v. Bloch*, 7 Ind. 202 (one part of a conversation being privileged, the rest not, the whole was held protected).

be said, by way of generalization, is that a matter committed to a professional legal adviser is *prima facie* so committed for the sake of the legal advice which may be more or less desirable for some aspect of the matter, and is therefore within the privilege, unless it clearly appears to be lacking in aspects requiring legal advice. Obviously, much depends upon the circumstances of individual transactions.²

The difficulty of drawing the line is noticeable in the case of complaints made to *prosecuting attorneys*. Under our system of criminal prosecution, the injured person does not usually, as in England at common law, employ the counsel, nor become liable for the costs; he may be obliged to make oath to the complaint, but he is in the criminal procedure no more than an informer and a witness. There is, therefore, nominally, for him no cause at issue and no need for legal advice. On the other hand, he may become liable for malicious prosecution, and may therefore desire legal advice before incurring any risk. His application to the prosecuting attorney will therefore usually not involve a request for legal advice in his own interest; yet conceivably it may:

1846, *Lockwood, J.*, in *Granger v. Warrington*, 8 Ill. 299, 308 (malicious prosecution: the defendant, being plaintiff in a suit for the taking of a horse, had gone to the prosecuting attorney of the county and made complaint preparatory to appearing before the grand jury; the attorney advised him that no indictment would lie): "The relation of client and attorney must exist. The party must consult the attorney in a matter in which his private interest is concerned, and make his statements to him with a view to enable the attorney correctly to understand his cause, so that he may manage it with greater

² Various instances are as follows: *England*: 1821, *Walker v. Wildman*, 6 Madd. 47 (Leach, V. C.; privilege held not applicable to employment "in matters not professional, as in a treaty for the purchase of an estate"); 1824, *Bramwell, v. Lucas*, 2 B. & C. 745 ("a question for information as to a matter of fact, as to a communication the attorney has made to others, where the communication might have been made by any other person as well as an attorney and where the character or office of attorney has not been called into action," is not privileged; here, a question by a bankrupt whether the state of things was such that he could attend his creditors' meeting without the prospect of arrest); 1836, *Turquand v. Knight*, 2 M. & W. 98 (consultation of an attorney for procuring a loan, held privileged); 1837, *Doe v. Watkins*, 3 Bing. N. C. 421 (communications by a person desiring to obtain a loan and seeking an attorney C., acting for a lender, held privileged; "C. was to assist professionally in raising the money for the applicant"); 1842, *Jones v. Pugh*, 1 Phil. Ch. 96 (bill by a judgment creditor against P. and his mortgagee, a solicitor; the solicitor, having taken mortgages for his clients in his own name, as an "ordinary part of a solicitor's duty to lay out money for his clients," was not compelled to disclose the names of his *cestuis que trustent*); *United States*: 1899, *Turner's Appeal*, 72 Conn. 305, 44 Atl. 310 (conversations in regard to the amount receivable from an estate,

etc., not privileged); 1895, *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. 165 (the contents of an insurance policy, the collection of the money, etc., as attorney, held privileged); 1904, *State v. Gosey*, 111 La. —, 35 So. 786 (consultation during trial, between a co-indictee, not on trial, and his counsel, as to the former's consenting to take the stand, held privileged); 1823, *Wilson v. Troup*, 2 Cow. 195, 205, 242 (privilege held applicable to an attorney, acting as a general business agent, so far as the communications concerned professional legal services; here, the foreclosure of a mortgage); 1862, *Flack v. Neill*, 26 Tex. 273, 276 (a "voluntary narrative of the circumstances attending a past transaction," held not privileged on the facts); 1800, *Heister v. Davis*, 3 Yeates 4 (privilege held not to cover the vendor's delivery of a bond to the attorney of the vendee and the latter's statement that he was satisfied with the security); 1849, *Moore v. Bray*, 10 Pa. St. 519, 523 (conversation in regard to a confession of judgment to cover liabilities, and a dispute arising therefrom, held privileged); 1896, *Mutual Life Ins. Co. v. Selby*, 19 C. C. A. 331, 72 Fed. 980 (consultation with an attorney in applying for a pension, excluded); 1900, *Burraston v. Bank*, 22 Utah 328, 62 Pac. 425 (attorney employed to "straighten out an account" by a man who could not read; statements not privileged).

skill; or if legal advice only is wanted, to enable the attorney the better to counsel him as to his legal rights. Did, then, Granger employ Curtiss as an attorney, either to investigate a question of law, in which his private interests were concerned, or to commence or to defend a suit in which he was a party? He clearly had no such object. He had no personal interest in the result at which Curtiss should arrive, and he did not expect to compensate him for his advice. Consequently the relation of client and attorney did not arise; and consequently the conversation was not privileged from being disclosed by Curtiss as a witness. Granger can be considered in no other light than a witness on the part of the people, communicating to the law officer of the government, his knowledge in relation to the commission of a supposed crime, and inquiring of that officer whether the facts thus communicated amounted to an offence. We think that no considerations of public policy require that the conversations between Granger and the State's attorney should be regarded as confidential and privileged."³

§ 2297. **Same: Application to Advice in Conveyancing.** A deed or other conveyance is drafted sometimes by the parties, sometimes by a real-estate broker, sometimes (as on the Continent, and formerly in England) by a notary or scrivener, and sometimes by an attorney-at-law. Though it necessarily affects rights and obligations, there is not necessarily a contribution of legal advice in its preparation. It is conceivable, therefore, that an attorney may be asked to draft a deed of a certain tenor, without any express reference to his knowledge of the law. On the other hand, he will undoubtedly use that knowledge, and his employer impliedly requests him to use it, in phrasing the instrument. The question thus arises whether the communications then made by his employer, although they may not in terms concern legal aspects of the transaction, are to be regarded as communications made in the course of an employment for legal advice.

This question has naturally received conflicting answers.¹ The tendency at first in England was to make a sharp distinction between services as a con-

³ The following rulings deal with this situation: 1846, *Granger v. Warrington*, 8 Ill. 299, 308 (injured party's consultation of a prosecuting attorney, with a view to complaint and indictment, held not privileged; quoted *supra*); 1873, *Oliver v. Pate*, 43 Ind. 132, 139 (consultation with a county prosecuting attorney, for instituting a prosecution, held privileged; the Court's reasoning, however, is substantially upon the principle applicable between informers and government officers, *post*, § 2374); 1877, *State v. Van Buskirk*, 59 Ind. 384, 388 (witness' testimony before a grand jury, in the prosecuting attorney's presence, held not a privileged communication to the latter); 1841, *Pierson v. Steertz*, 1 Morris Ia. 136 (consultation with an "acting magistrate," who "frequently gave advice and counsel" and "usually did the business of the defendant," held not privileged; here it concerned an alleged theft of timber); 1898, *Cole v. Andrews*, 74 Minn. 93, 76 N. W. 992 (consulting a county attorney as public prosecutor to institute a prosecution; not privileged); 1884, *Vogel v. Gruaz*, 110 U. S. 311, 314, 4 Sup. 12 (an injured person's consultation with a State's attorney with reference to securing an indictment, held privileged, but partly on

the ground of an informer's privilege, *post*, § 2374). Compare the privilege for communications between *government and informer* (*post*, § 2374), which is often here applicable, and the privilege for communications between *witness and grand jury* (*post*, § 2362).

¹ The early cases dealing with "scriveners" are hardly of any significance, inasmuch as the general principle of privilege tended at that time to include all confidential communications (*ante*, § 2286), and as the occupation of "scrivener," as distinguished from attorney-at-law, was then more common: 16—, *Morris and Clayton's Case*, cited *Freem. Ch. 5* ("that they, being but scriveners, should not have that privilege"); 1675, *Harvey v. Clayton*, 2 Swanst. 221, note (discovery of a mortgage; plea, that defendant "is a scrivener and trusted with men's estates," allowed, "for it may be a ruin to the defendant in his trade to discover it, for no man hereafter will employ him"); 1693, *Anon.*, *Skinner* 404 (*L. C. J. Holt*: "It seems to be the same law of a scrivener, . . . for he is a counsel to a man, with whom he will advise, if he be intrusted and educated in such way of practice; otherwise of a gentleman, parson, etc.").

veyancer and services as an attorney-at-law.² But this was probably due in part to the original limitation of the privilege to communications for the purpose of litigation (*ante*, § 2294); and since this limitation disappeared, the inclination has been to take the larger view of the privilege in the present respect also.³ In the United States, the drafting of a *will* has almost always been assumed (and naturally) to bring the testator's communications within the privilege.⁴ But for *deeds* and other instruments the privilege has been strictly construed, and where no legal problem has been expressly brought forward by the client, his communications concerning the mere drafting of the instrument have commonly been admitted.⁵ The circumstances of each

² 1730 (?), *South Sea Co. v. Dolliffe*, cited in 2 Atk. 524; *L. C. King* (attorney examined concerning the alteration before execution of a covenant drawn by him; demurrer overruled, "for that what he knew was as the conveyancer only"); 1743, *Vaillant v. Dodemead*, 2 Atk. 524, *L. C. Hardwicke* (attorney compelled to answer "concerning the proving of the deed of assignment"); 1792, *Duffin v. Smith*, *Peake N. P.* 108 (attorney compelled to testify to the consideration of a bond and mortgage, since it "does not come to his knowledge in the character of an attorney").

³ 1820, *Re Aitkin*, 4 B. & Ald. 47 (*Abbott, C. J.*: "Inasmuch as a conveyance requires knowledge of law, the trust is reposed by the client [in employing him for a conveyance] in the party in respect of his being an attorney"); 1828, *Broad v. Pitt*, 3 C. & P. 518 (*Best, C. J.*: "A man is not acting as an attorney when he is consulted about a deed"); 1833, *Doe v. Harris*, 5 id. 592, 594 (*Parke, J.*, held that "an application to draw a deed" was a professional consultation); 1846, *Carpmael v. Powis*, 1 Phil. Ch. 687, 692 (*L. C. Lyndhurst*; communications in regard to preparing a conveyance, fixing bids, etc., held privileged; "it is impossible to split the duties in that manner without getting into inextricable confusion; I consider them all parts of one transaction, the sale of an estate, and that a transaction in which solicitors are ordinarily employed by their clients"); 1889, *Lowden v. Blakey*, *L. R.* 23 Q. B. D. 332 (communication in regard to the drafting of an advertisement stating the result of a lawsuit, held privileged).

⁴ The cases are more conveniently examined *post*, § 2314, under another aspect of the principle.

⁵ *Ala.*: 1845, *State v. Marshall*, 8 Ala. 302, 306 (application by a negro to an attorney to draw up a petition to the Legislature for freedom, held to be "such as did not require legal skill in its execution," and therefore not privileged); *Colo.*: 1873, *Machette v. Wanless*, 2 Colo. 169, 179 (conversation with an attorney "simply asked to prepare a mortgage," held not privileged); 1887, *Caldwell v. Davis*, 10 id. 481, 492, 15 Pac. 696 ("the only employment of *L.* by *D.* was to draw the release and deed"; conversation held not privileged); *Ill.*: 1861, *DeWolf v. Strader*, 26 Ill. 225, 230 (an attorney "acting as scrivener, merely to draw a deed,"

and not "consulted as counsel or asked for a legal opinion on a state of facts," held not privileged); 1883, *Smith v. Long*, 106 id. 485, 488 (similar); 1886, *Hollenback v. Todd*, 119 id. 543, 546, 8 N. E. 829 (an attorney who drew the client's assignment and was asked and gave his opinion thereon, held privileged); *Ind.*: 1860, *Borum v. Fouts*, 15 Ind. 50, 53 (consultation of an attorney as scrivener, to draw notes and a bond and to reckon interest, held not privileged); 1887, *Hanlon v. Doherty*, 109 id. 37, 44, 9 N. E. 782 (preceding case approved); *Kan.*: 1893, *Sparks v. Sparks*, 51 Kan. 195, 201, 32 Pac. 892 (a mere scrivener of documents, though professionally an attorney, not privileged); 1903, *Grimshaw v. Kent*, 67 id. 463, 73 Pac. 92 (a lawyer drafting a contract; privilege not applied); *Ky.*: 1892, *Carter v. West*, 93 Ky. 211, 19 S. W. 592 ("in this instance the attorney . . . was the legal adviser of the party, and not a mere scrivener; she was relying on him to see that she got a good title," and the privilege was applied); *Md.*: 1882, *Crane v. Barkdoll*, 59 Md. 534, 538 (here the client "employed the attorney to draw the deed and sought his professional advice in reference to it"; held privileged); *Mass.*: 1833, *Hatton v. Robinson*, 14 Pick. 416, 423 (an attorney drawing a conveyance, held not privileged; quoted *supra*); *Mo.*: 1856, *Johnson v. Sullivan*, 23 Mo. 474, 479 (communications to one "employed in his professional capacity to draft a deed," and to one employed "to prepare insolvent papers," held privileged); *Mont.*: 1899, *Smith v. Caldwell*, 22 Mont. 331, 56 Pac. 590 (a person was attorney, justice of the peace, and notary; a communication by one securing his services in drawing a deed, and not consulting him for legal advice, held admissible); *N. Y.*: 1881, *Root v. Wright*, 84 N. Y. 74, 76 (privilege held applicable to the drawing of a contract where the attorney's advice was sought as to its terms); *Pa.*: 1888, *Goodwin G. S. & M. Co.'s Appeal*, 117 Pa. 514, 523, 537, 12 Atl. 736 ("a legal scrivener does not become the repository of confidences within the rule of the law," and is not privileged); *Tex.*: 1891, *Stallings v. Hul-lum*, 79 Tex. 421, 15 S. W. 677 (communications as to a deed's consideration, made to an attorney employed solely as an abstractor of title, held not privileged); *U. S.*: 1839, *Linthicum v. Remington*, 5 Cr. C. C. 546 (facts stated to the attorney at the time of drawing

case must affect the result ; but in general a strict construction is the proper one, especially in those cases where attorneys combine the occupation of real estate and insurance brokers or act also as executive officers of a corporate business. The following opinion is typical of the judicial attitude :

1833, *Shaw, C. J., in Hatton v. Robinson*, 14 Pick. 416, 422: "There are many cases, in which an attorney is employed in transacting business, not properly professional, and where the same might have been transacted by another agent. In such case the fact that the agent sustains the character of an attorney, does not render the communications attending it, privileged ; and they may be testified to by him, as by any other agent. . . . We cannot perceive that the communications were made to [the attorney, Mr. Ames,] by Winch with the purpose of instructing him in any cause, or engaging him in the conduct of any professional business, or of obtaining any legal advice or opinion. If the disclosure of his views and purposes, in the conveyance of property proposed to be drawn, was not, as stated in some of the books, a mere *gratis dictum*, the only purpose seems to have been to satisfy Mr. Ames' mind, and remove any scruple that he might entertain, as to the character of the transaction, and to convince him, that whatever might be the legal character of the act, it was not intended with moral turpitude. It did satisfy him that he was not to be engaged in a conspiracy to cheat, and induced him to consent to draw the deed. Here was no legal advice asked, no opinion requested as to the effect and operation of such a conveyance in point of law, and none given. We are therefore necessarily brought to the conclusion, that either these disclosures were made without any particular motive, or if there was a purpose, connected with the proposed draft, it was to satisfy Mr. Ames' mind, upon a point of fact, not for the information of his own in point of law, and in either event they are not to be deemed privileged communications, which the witness was prohibited from disclosing."

Assuming that legal advice is in fact being expressly sought, as it commonly is, in connection with the drafting, and that the client's communications are therefore within the privilege, the question then arises whether the *contents* and the *execution* of the instrument, thus coming to the attorney's knowledge by his own vision, are privileged from disclosure. This question depends upon another aspect of the principle (*post*, §§ 2308, 2309).

§ 2298. **Same: Application to Advice in a Criminal or Fraudulent Transaction.** It has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise ; and for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client. But the difficulty has been to define the boundaries of this limitation. It has not always been kept in mind that the privilege, in its very fundamentals, presupposes what Bentham so drastically censured, — the furnishing of legal advice to the culpable client, as well as to the worthy one, *i. e.* to a client who, if the law were duly enforced, would lose in the litigation.

a deed as "attorney, counsellor, and conveyancer," held privileged) ; *Va.* : 1811, *Clay v. Williams*, 2 Munf. 105, 113, 121, per Roane, J. (privilege held applicable to an attorney drafting a bond and advising as to its legal effect) ; 1814, *Parker v. Carter*, 4 id. 273, 275, 280, 285 (communications made to an attorney employed to draw such a deed as would settle slaves on his daughter to be exempt from creditors, held

privileged) ; *Wis.* 1877, *Getzlaff v. Seliger*, 43 Wis. 299, 302 (an attorney giving legal advice in the drafting of a mortgage, held subject to the privilege, though he claimed that he was "acting as a notary and not as attorney").

The cases dealing with the mere *fact of execution* of the instrument, apart from conversations at the time, are examined *post*, § 2309.

How, then, can the privilege continue to exist at all, if any exception is to be made by which the confidences of the guilty are to be disclosed? It is possible, of course, to take merely the practical point of view, and to declare that the privilege must at least cease to be a cloak for criminal conspiracy, regardless of its logic, and to contrive an arbitrary limit for this exception. But it seems hardly necessary thus to do violence to the theory of the privilege. Looking at the reasons of policy upon which it rests (*ante*, § 2291), they appear by their natural limits to end with the same conclusion. They predicate the need of confidence on the part not only of injured persons, but also of those who, being already wrongdoers in part or all of their cause, are seeking legal advice suitable for their plight. The confidences of such persons may legitimately be protected, wrongdoers though they have been, because, as already noticed (*ante*, § 2291), the element of wrong is not always found separated from an element of right; because, even when it is, a legal adviser may properly be employed to obtain the best available or lawful terms of making redress; and because the legal adviser cannot habitually be placed in the position of an informer. But these reasons all cease to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*. From that point onwards, no protection is called for by any of these considerations.

Upon this much there has been a fair consensus among all who have declared themselves upon the subject. But certain minor points of detail still remain, if a practical rule for disclosure is to be settled upon. (1) Must not the advice be sought for a *knowingly* unlawful end? (2) Must not that unlawfulness be either a *crime* or a civil wrong involving *moral turpitude*? (3) Must not the attorney have so far abandoned his professional attitude as to have become, by *assent* to the design, a partaker in the client's intended wrong? The judicial attitudes on these questions may be gathered from the following passages:

1743, *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1229; ¹ Serjeant *Tisdall* (arguing): "If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one, which lies on every member of the society, to discover every design which may be formed, contrary to the laws of the society, to destroy the public welfare. For this reason I apprehend, that if a secret, which is contrary to the public good, such as a design to commit treason, murder, or perjury, comes to the knowledge of an attorney, even in a cause wherein he is concerned, the obligation to the public must dispense with the private obligation to the client." Mr. *Harward* (arguing): "I take the distinction to be, that where an attorney comes to the knowledge of a thing that is *malum in se*, against the common rules of morality and honesty, though from his client, and necessary to procure success in the cause, yet it is no breach of trust in him to disclose it, as it can't be presumed an honest man would engage in a trust that by law prevented him from discharging that moral duty all are bound to, nor can private obligation cancel the justice owing by us to the public." Mounteney, B. "For God's sake then let us consider, what will be the consequence of the doctrine now laid down [by the defendant] and so earnestly contended for, that such a declaration made by any person to his attorney ought not by that

¹ The facts of this celebrated case will be found stated *post*, § 2310.

attorney to be proved? A man (without any natural call to it) promotes a prosecution against another for a capital offence; he is desirous and determined, at all events, to get him hanged; he retains an attorney to carry on the prosecution, and makes such a declaration to him as I have before mentioned (the meaning and intention of which, if the attorney hath common understanding about him, it is impossible he should mistake); he happens to be too honest a man to engage in such an affair; he declines the prosecution; but he must never discover this declaration, because he was retained as attorney. This prosecutor applies in the same manner to a second, a third, and so on, who still refuse, but are still to keep this inviolably secret. At last, he finds an attorney wicked enough to carry this iniquitous scheme into execution. And after all, none of these persons are to be admitted to prove this, in order either to bring the guilty party to condign punishment, or to prevent the evil consequences of his crime with regard to civil property. Is this law? Is this reason? I think it is absolutely contrary to both. . . . The declaration now offered to be proved is of that nature, and so highly criminal, that, in my opinion, mankind is interested in the discovery; and whoever it was made to, attorney or not attorney, lies under an obligation to society in general, prior and superior to any obligation he can lie under to a particular individual, to make it known."

1841, *Bronson, J.*, in *Coveney v. Tannahill*, 1 Hill N. Y. 33, 35, 41: "It is the privilege of one who is charged with a wrong, either public or private, to speak unreservedly with his counsel in preparing for his defence; but he should not be allowed to stop the mouth of one who was present when the wrong was done, upon the allegation that he was retained as counsel to see, or aid in the transaction. Indeed, I think there can be no such relation as that of attorney and client, either in the commission of a crime, or the doing of a wrong by force or fraud to an individual. The privileged relation of attorney and client can only exist for lawful and honest purposes. . . . Now, if the plaintiff consulted counsel beforehand as to the means, the expediency, or consequences of committing such a fraud, his communications may, perhaps, be privileged; and they are clearly so, as to what he may have said to counsel since the wrong was done. But the attorney may, I think, be required to disclose whatever act was done in his presence towards the perpetration of the fraud. One who is charged with having done an injury to another, either in his person, his fame, or his property, may freely communicate with his counsel, without the danger of having his confidence betrayed through any legal agency. But when he is not disclosing what has already happened, but is actually engaged in committing the wrong, he can have no privileged witness."

1891, *Green, V. C.*, in *Matthews v. Hoagland*, 48 N. J. Eq. 455, 469, 21 Atl. 1054: "In order that the rule may apply, there must be both professional confidence and professional employment; but if the client has a criminal object in view in his communications with his solicitor, one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud. As I understand the case, the rule, in its different phases and the reasons, may be thus stated: If the client consults the lawyer with reference to the perpetration of a crime, and they coöperate in effecting it, there is no privilege, for it is no part of an attorney's duty to assist in crime; he ceases to be counsel and becomes a criminal. If he refuses to be a party to the act, still there is no privilege, because he cannot properly be consulted professionally for advice to aid in the perpetration of a crime. In the case of a fraud, if it is effected by the coöperation of the attorney, it falls within the rule as to crime, for their consultation to carry it out is a conspiracy, which, on its accomplishment by the commission of the overt act, becomes criminal and an indictable offence."

Looking at the reasons for the privilege, and construing it as strictly as

possible, the first of the above three questions should be answered in the affirmative, but the second and the third in the negative. The decisions apparently reach this general result, except in the second respect, where there is an inclination to mark the line at crime and civil fraud.² Yet it is diffi-

² *England*: 1673, *Rothwell v. King*, 2 Swanst. 221, note (bill charging the suppression of a will; discovery compelled, "for the trust of counsel does not extend to the suppression of deeds or wills"); 1699, *R. v. Warden of the Fleet*, 12 Mod. 337, 341 (an obscure passage, concerning the limits of the privilege for criminal secrets); 1833, *Doe v. Harris*, 5 C. & P. 592, 594 (conveyance in fraud of creditors; the question being proposed, as preliminary to the ascertainment of the privilege, whether the insolvent had "asked his advice for a lawful or an unlawful purpose," Parke, J., would not allow the question; unsound); 1838, *R. v. Avery*, 8 id. 596 (consultation for the purpose of raising money on a forged will; the privilege was denied, but not on this ground); 1846, *R. v. Hayward*, 2 C. & K. 234, 2 Cox Cr. 23, s. v. *R. v. Jones*, 1 Den. Cr. 166 (documents sent to an attorney for advice, including a forged will, with the intent that the attorney should see it and act on it; on a prosecution for forgery, production was compelled); 1846, *R. v. Farley*, 2 C. & K. 313, 2 Cox Cr. 82, 1 Den. Cr. 197 (forgery of a will; the defendant's wife had taken another forged will to a solicitor to obtain an advance of money; this was compelled to be produced); 1846, *Reynell v. Sprye*, 10 Beav. 51, 56, 11 Beav. 618 (a letter procured by defendant to be written by his solicitor to show to plaintiff, held not privileged, as being a part of a plan to deceive; the solicitor "acting as *particeps criminis*, and not in the true relationship of solicitor and client"); 1848, *R. v. Tydney*, 1 Den. Cr. 319 (forgery of a will; the document had been placed by the defendant in a solicitor's hands to "enforce her rights under it"; production was required, the question being reserved but never decided); 1850, *Follett v. Jefferyes*, 1 Sim. N. S. 3, 17 (Lord Cranworth, V. C.; communications respecting an attempt to dispose of property in evasion of creditors, held privileged; "such an act *per se* is no fraud, if the disposition is one which the law allows"); 1851, *Russell v. Jackson*, 9 Hare 387, 391 (Wigram, V. C., referring to a testamentary purpose forbidden by law: "The contriving of a fraud is no part of his duty as solicitor, and I think it can as little be said that it is part of the duty of a solicitor to advise his client as to the means of evading the law"); 1863, *Charlton v. Coombs*, 32 L. J. Ch. N. S. 284 (the attorney must be privy to the fraud, in order that the privilege should cease; unsound); 1873, *R. v. Castro*, and *Tichborne v. Lushington*, Report of Case, III, 9, 2381, 5211, quoted in L. R. 14 Q. B. D. 162 (general principle affirmed); 1884, *R. v. Cox and Railton*, L. R. 14 Q. B. D. 153, 164 (conspiracy to defraud creditors; communication preparatory to the conspiracy, the solicitor acting in good faith and without knowledge of the fraud, held not privileged); 1887, *Postlethwaite*

v. Rickman, L. R. 35 Ch. D. 722, 724 (general principle applied to certain frauds by trustees); 1895, *Williams v. Quebrada R. L. & C. Co.*, 2 Ch. 751 (fraud by a corporation upon its bondholders; corporate minute-books and legal opinions in reference to the plan, held not privileged; there is no distinction between crime and civil fraud); 1900, *R. v. Bullivant*, 2 Q. B. 163 (testator's instructions as to a conveyance to be made with intent to evade succession taxes, held not privileged).

Canada: 1864, *Mackenzie v. Mackenzie*, 9 Low. Can. Jur. 87 (testimony as to the client's money or goods in the attorney's hands, held not privileged, where the issue was whether they had been there placed to evade the law); 1873, *Ethier v. Homier*, 18 id. 83 (the privilege does not apply where the advocate is "not only adviser, but also party to the transaction"; here an attorney was compelled to testify whether he wrote a libellous letter at the client's instance).

United States: 1884, *State v. Barrows*, 52 Conn. 323, 325 (the client's statement that she intended to testify differently from what she had already said, held not a confession of intended perjury, and therefore without the rule; general principle expressly reserved from decision); 1902, *Supplee v. Hall*, — id. —, 52 Atl. 407 (validity of a mortgage as against creditors; questions to the mortgagor's attorney as to information acquired in consultations contemplating "some conduct which might render him liable to a civil action by reason of actual or constructive fraud," held privileged); 1893, *State v. Kidd*, 89 Ia. 54, 56 N. W. 263 (sending a false copy of a jury's findings to the attorney, with intent to deceive himself and the Court, held not privileged); 1851, *McLellan v. Longfellow*, 32 Me. 494 (conversations while seeking advice for the drafting of a bill of sale, held privileged); 1870, *Higbee v. Dresser*, 103 Mass. 523, 526 ("a mere suggestion of fraud, in general terms," is not sufficient); 1903, *State v. Faulkner*, — Mo. —, 75 S. W. 116 (communication after the crime was complete; "to assist one criminal in requiring or inducing his confederate in crime to disgorge the price of his crime," held not privileged); 1891, *Matthews v. Hoagland*, 43 N. J. Eq. 455, 465, 21 Atl. 1054 (quoted *supra*; privilege held applicable to a contemplated fraud, as well as a crime, for which the attorney's advice is sought; "it falls within the rule as to crime"; *Bank v. Mersereau*, N. Y., declared to be founded on unsatisfactory authority; *R. v. Cox and Railton*, Eng., approved); 1848, *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 598, Walworth, C. (privilege held applicable to communications concerning a proposed fraud upon creditors; the exception extending only to "a felony or other crime which was *matum in se*"; but "I admit I should have

cult to see how any moral line can properly be drawn at that crude boundary, or how the law can protect a deliberate plan to defy the law and oust another person of his rights, whatever the precise nature of those rights may be. The law, in its endeavor to maintain abstract fundamentals, is already sufficiently callous to concrete failures of justice, and needs rather to cultivate greater sensitiveness in such matters.

2. "From a professional legal adviser in his capacity as such"

§ 2300. Persons having Legal Knowledge, but not Admitted to Practice.

There is no ground for encouraging the relation of client and legal adviser except when it is formed with one who has been formally admitted to the office of attorney or counsellor as duly qualified to give legal advice. That the person consulted is in fact practising, without formal sanction of the Court, is certainly not sufficient.¹ On the other hand, where a distinct sanction is required for the several grades of Courts within the same sovereignty, a practitioner admitted for a lower Court only is clearly within the privilege for the purpose of litigation before that Court. So, too, a duly admitted practitioner, while acting for a client belonging to his jurisdiction, is within the privilege in whatever other jurisdiction it may be invoked.² In the few jurisdictions still maintaining the self-stultifying rule that every citizen, even though not possessing any specific qualifications, is entitled to practise at the bar, it may be supposed that a *de facto* professional practice suffices.³ Finally, a mere student of law, aspiring to future entrance to the profession, is without the privilege, however much legal skill he may possess in comparison with some of those who are within it.⁴

been much better satisfied if I had found this question an open one"); 1841, *Coveney v. Tannahill*, 1 Hill N. Y. 33, 35, 41 (privilege held not to cover the execution of an instrument in fraud of creditors; quoted *supra*); 1858, *McMannus v. State*, 2 Head 213, 216 (questions as to "a contemplated crime," held not privileged); 1891, *Alexander v. U. S.*, 138 U. S. 353, 357, 11 Sup. 350 (communication with regard to a crime or fraud, held privileged otherwise than in the trial "for the crime in furtherance of which the communication was made"; this distinction is groundless, upon either principle or precedent, and seems to have been due to a confusion of the old controversy (*ante*, § 2294) as to communications for other litigation); 1875, *People v. Mahon*, 1 Utah 205, 208 (communications relating to a contemplated forgery, held not privileged); 1854, *Dudley v. Beck*, 3 Wis. 274, 283 (fraud; question reserved, whether the mere disclosure of a fraud and the request for aid therein is privileged; but here a fraudulent agreement between client and attorney to act together was held not privileged).

¹ 1880, *Slade v. Tucker*, L. R. 14 Ch. D. 824, 827 (communications to a pursuivant of the Herald's College, assisting in a pedigree protest, held not privileged); 1859, *Sample v. Frost*, 10 Ia. 266 (consultation with one who

"was receiving business to transact as an attorney and expecting to be admitted and was admitted at the next term," held not privileged); 1879, *Scales v. Kelley*, 2 Lea 706 (licensed practitioner before justices of the peace and the county court, held within the privilege); 1854, *Brayton v. Chase*, 3 Wis. 456 (privilege held not applicable to one not licensed as an attorney, though practising before a justice of the peace). *Contra*: 1887, *Benedict v. State*, 44 Oh. St. 679, 688, 11 N. E. 125 (consultation with one who practised before justices of the peace, but was not admitted to the bar, held privileged; but the Court's remark that nothing was lacking "except the mere form of the admission of the adviser to practice in courts of record" shows a singular notion of the guarantees implied in the professional status).

² 1859, *Lawrence v. Campbell*, 4 Drew. 485 (the privilege applies to a Scotch solicitor, residing in London, and acting for a Scotch client resident in Scotland).

³ 1829, *Bean v. Quimby*, 5 N. H. 94, 97 (communication to one not an admitted attorney, but acting as attorney and legal adviser, held privileged, under a statute permitting any citizen to appear as attorney).

⁴ 1851, *Barnes v. Harris*, 7 Cush. 576 (student in an office, not being the attorney's agent or clerk, not privileged); 1890, *Schubkagel v.*

§ 2301. **Attorney's Clerks and other Agents.** It has never been questioned that the privilege protects communications to the attorney's clerks and his other agents for rendering his services.¹ The assistance of these agents being indispensable to his work, and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents.²

§ 2302. **Client's Belief in the Attorney's Status.** The theory of the privilege (*ante*, § 2291) clearly requires that the client's *bona fide* belief in the status of his adviser as an admitted attorney should entitle him to the privilege. No doubt an intention to employ only such a person is necessary, as well as a respectable degree of precaution in seeking one; but from that point onwards he is entitled to peace of mind, and need not take the risk of a deception, or of a defective professional title.¹

§ 2303. **Consultation in Attorney's Capacity.** An attorney may often be brought into a discussion upon the law, without any purpose of treating his expression of opinion as a service rendered professionally. Such a conversation is not privileged, because the reason of the privilege designs to secure only the freedom of resort to attorneys where some appreciable interest of the client is to be protected and the advice is sought and given with a view to its protection. On the other hand, an attorney may render his services without charge, if he pleases, and hence the mere circumstance that the advice is given gratuitously does not nullify the privilege.¹ In view of the frequency with which some persons seek to obtain informally and gratui-

Dierstein, 131 Pa. 46, 54, 18 Atl. 1059 ("A law student is in this respect on no higher plane than a blacksmith retained in a like service"); 1816, *Andrews v. Solomon*, 1 Pet. C. C. 337, 359 (Washington, J.: "Not one of these reasons [for the privilege] apply to the student"); 1850, *Holman v. Kimball*, 22 Vt. 555 (a law student having an office of his own, but not yet admitted to the bar; privilege denied).

¹ 1825, *Taylor v. Forster*, 2 C. & P. 195; 1831, *Bowman v. Norton*, 5 id. 177; 1829, *Eicke v. Nokes*, 1 M. & M. 303, *semble*; 1881, *Lyell v. Kennedy*, L. R. 27 Ch. D. 1, 19 ("such agents as every solicitor's clerk may be said to be" are privileged); 1855, *Landsberger v. Gorham*, 5 Cal. 450 (the privilege held applicable to "a person acting in the capacity of an attorney," and apparently an attorney's clerk); 1857, *Sibley v. Waffle*, 16 N. Y. 180, 183, per Bowen, J. Compare the rule as to mere *students of law* (*ante*, § 2300).

The amendments to certain of the statutes (*ante*, § 2292), extending the privilege to the attorney's "clerk, stenographer, or other person employed," were therefore unnecessary. The irresponsible presumption of some who undertake to instruct the profession is shown in a certain editorial remark, when pointing out one of these amendments, that it made "a notable change in the law."

² For the case of communications to *third*

persons in the attorney's presence, see *post*, §§ 2311, 2312. For the distinction between clerks and witnesses or other volunteers, see *post*, § 2317.

¹ Besides the following cases, compare the doctrine as to the client's belief in the relevancy of his communication (*post*, § 2310), and as to the admissibility of a confession procured by trick (*ante*, § 841): *Admitted*: 1807, *Fountain v. Young*, 6 Esp. 113 (here the person was in fact only a clerk in Newgate); 1890, *Hawes v. State*, 88 Ala. 38, 7 So. 302 (said *obiter*); 1859, *Sample v. Frost*, 10 Ia. 266 (one who was just about to be admitted to the bar); 1851, *Barnes v. Harris*, 7 Cush. 576 (student in a law office). *Excluded*: 1886, *People v. Barker*, 60 Mich. 277, 297, 307, 27 N. W. 539 (confession made to a detective, fraudulently pretending to be an attorney, held privileged); 1893, *State v. Russell*, 83 Wis. 330, 53 N. W. 441 (communication by a woman in prison to the district attorney and his agent, pretending to be her counsel, held privileged); 1856, *Coon v. Swan*, 30 Vt. 6, *semble*.

The following ruling seems peculiar: 1890, *Hawes v. State*, 88 Ala. 38, 7 So. 302 (communications made "to an attorney in ignorance of his professional character," excluded).

¹ 1878, *Andrews v. Simms*, 33 Ark. 771, 773; 1850, *Reed v. Smith*, 2 Ind. 160; 1897, *Davis v. Morgan*, 19 Mont. 141, 47 Pac. 793.

tously valuable legal advice, and the lamentable frequency with which attorneys weakly submit to such an imposition, especially in rural communities, it is often difficult to determine whether the consultation is a professional one, within the privilege. The local habits of life, and the circumstances of the case, must largely determine the ruling.² The case of a consultation of the *opponent's attorney* seems rather to fall under another head (*post*, § 2312), as also the case of a consultation by one person not on his own behalf but as *the agent of another* (*post*, § 2317).

§ 2304. **Time of Consultation; Rejection of Retainer by Attorney.** It follows that a communication to an attorney, not in his capacity as such, is without the privilege if made *before* the relation was entered into or *after* it was ended.¹ An interesting question, however, arises when the communication is made *pending negotiations for the retainer*. Here it would seem plain, by the reason of the privilege, that, since the would-be client cannot certainly predict the attorney's acceptance of the employment, the former must be protected in his preliminary statements when making the overtures, even if the overture is refused. It would further be immaterial that the refusal was due

² Various instances are as follows: *Eng.*: 1792, *Wilson v. Rastall*, 4 T. R. 753, 758 (letters handed to an attorney, but not in his character as a professional adviser, held not privileged); 1838, *Greenlaw v. King*, 1 Beav. 137, 145, Lord Langdale, M. R. (correspondence with a solicitor, but only as "agent and confidential friend," not privileged); *Can.*: 1889, *Rudd v. Frank*, 17 Ont. 758, 764 (communications as to a friend, held not privileged); *U. S.*: 1893, *Patten v. Glover*, 1 D. C. App. 466, 476 (consultation as a friend, not privileged); 1887, *Brown v. Matthews*, 79 Ga. 1, 4 S. E. 13 (consultation held not privileged, where the attorney was "raided," not retained"; it must be "the offspring of the relation, present or prospective, not of taking or expecting to take the fruits of such a relation without forming it"); 1898, *O'Brien v. Spalding*, 102 id. 490, 31 S. E. 100 (consultation as a friend, not privileged); 1902, *Harkless v. Smith*, 115 id. 350, 41 S. E. 634 (one who prepared a deed without compensation and in his own interest, held not the legal adviser of the parties); 1852, *Goltra v. Wolcott*, 14 Ill. 89 (consultation as a friend, not privileged); 1895, *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 343 (attorney consulted as a friend by a widow about her husband's affairs, held not privileged); 1896, *State v. Swafford*, 98 Ia. 362, 67 N. W. 284 (a friendly consultation between the defendant and the then prosecutrix's attorney, to contrive means for helping her to get occupation, held not privileged); 1895, *Wade v. Ridley*, 87 Me. 363, 372, 32 Atl. 975 (consultation held professional, on the facts); 1903, *People v. Pratt*, — Mich. —, 94 N. W. 752 (communication to a judge, before examination by the grand jury, with the object of consulting "some one that I have confidence in," held privileged; *Grant and Hooker, JJ., diss.*); 1886, *Romberg v. Hughes*, 18 Nebr. 579, 26

N. W. 351 (consultation as a friend, not privileged); 1895, *Bayse v. State*, 45 id. 261, 63 N. W. 811 (consultation held not professional, on the facts); 1848, *Beeson v. Beeson*, 9 Pa. St. 279, 301 (consultation as a friend, not privileged); 1903, *Sargent v. Johns*, 206 id. 336, 55 Atl. 1051 (similar); 1858, *M'Mannus v. State*, 2 Head 213 (questions as to "abstract legal opinions," without reference to "some act past, or right or interest in existence," held not privileged); 1856, *Thompson v. Kilborne*, 28 Vt. 750, 757 (friendly consultation, held, upon the facts and the local custom, not to be a professional consultation; Chief Justice Redfield rebukes the local profession for their lax habits in conversing without formal retainer upon legal subjects); 1856, *Coon v. Swan*, 30 id. 6 (legal advice given merely "as a neighbor," held not protected); 1873, *Earle v. Grout*, 46 id. 113, 125 (similar); 1861, *Dunn v. Amos*, 14 Wis. 106, 109, 114 (legal advice held not a professional consultation on the facts); 1873, *Orton v. McCord*, 33 id. 205, 211 (legal advice held professional, on the facts); 1900, *Bruley v. Garvin*, 105 Wis. 625, 81 N. W. 1038 (communication at a casual consultation on a railway train, excluded on the facts).

¹ *Eng.*: 1664, *Sparke v. Middleton*, 1 Keb. 505 (cited *ante*, § 2290); 1673, *Cuts v. Pickering*, 1 Ventr. 197; *U. S.*: 1868, *Chillicothe F. R. & B. Co. v. Jameson*, 48 Ill. 281, 283; 1870, *People v. Barker*, 56 id. 299; 1895, *Jennings v. Sturdevant*, 140 Ind. 641, 40 N. E. 61; 1895, *Harless v. Harless*, 144 id. 196, 41 N. E. 592; 1901, *State v. Herbert*, 63 Kan. 516, 66 Pac. 235; 1894, *Brady v. State*, 39 Nebr. 529, 532, 58 N. W. 161 (even though the same as one made during the relation); 1896, *Home Ins. Co. v. Berg*, 46 id. 600, 65 N. W. 780; 1816, *Yordan v. Hess*, 13 John. 492, 494; 1895, *Turner's Estate*, 167 Pa. 609, 31 Atl. 867; 1901, *State v. Snowden*, 23 Utah 318, 65 Pac. 479.

to a disagreement as to fees and to the client's own withdrawal by reason of the fee demanded; for upon none of these matters could he predict the result until his preliminary statement had been made. Obviously, too, if the retainer is accepted, the privilege covers the preliminary statement. On the other hand, if the client continues his communication after the attorney's refusal to act for him, or if the client knowingly attempts to retain one who is already retained by the opponent, he does not need or deserve the protection of the privilege.²

3. "The communications relevant to that purpose,"

§ 2306. **Communications, distinguished from Acts; Client's Conduct, Appearance, Abode, etc.** Does the privilege cover only that knowledge of the attorney which is obtained from hearing the client's *utterances*, or also that which comes from seeing the client's *acts*? This question has given rise to a difference of opinion more apparent than real. It is sometimes discussed as if the word "communications" were synonymous with "utterances of words." That is, those who favor its largest answer repudiate the limits of the word "communications," as if it included no more than "utterances"; and yet it is of course conceivable that an act or a bodily condition may be voluntarily disclosed and wittingly made known to the attorney by the client without any utterance of words. The problem is also sometimes discussed, from the point of view of the attorney, as involving the inquiry whether the privileged knowledge of the attorney is restricted to that which he obtains by the sense of hearing only, or includes also that which he learns by seeing; and this mode of statement corresponds more closely to the distinction be-

² The rulings are not entirely harmonious, but the above applications of the principle are fairly borne out: 1894, *Denver T. Co. v. Owens*, 20 Colo. 107, 125, 36 Pac. 848 (preliminary statement of the case with a view to employing, privileged); 1872, *McLean v. Clark*, 47 Ga. 24, 45, 69 (S. made a proposition to the plaintiff's attorney, declaring that, if it was accepted, S. would employ the attorney; held, that the latter was not S.'s attorney so as to create a privilege in S.'s favor); 1893, *Peek v. Boone*, 90 id. 769, 17 S. E. 66 (consultation with a view to the attorney's employment, whether or not the attorney is ultimately retained, held privileged; here the attorney had declined the employment); 1877, *Thorp v. Goewey*, 85 Ill. 611, 615 (consultation for litigation, the attorney finally not being employed because of a disagreement as to his fee, held privileged); 1891, *Theisen v. Dayton*, 82 Ia. 74, 47 N. W. 891 (statements to an attorney to secure his employment to "keep a mortgage alive," the attorney declining the employment, held not privileged); 1854, *Sargent v. Hampden*, 38 Me. 581, 584 (conversations with a view to a retainer, even though it be afterwards declined, said to be privileged); 1857, *Alderman v. People*, 4 Mich. 414, 422 (privilege applies to communications to "an attor-

ney in fact by a party under an impression that such attorney had consented or agreed to act," "although the attorney himself may not have so understood the agreement"); 1848, *Crisler v. Garland*, 11 Sm. & M. 136 (communications while seeking to retain the attorney, who declined employment, held privileged); 1872, *Cross v. Riggins*, 50 Mo. 335 (communication to an attorney, seeking advice, the attorney declining to give an opinion, held privileged); 1897, *Farley v. Peebles*, 50 Nebr. 723, 70 N. W. 231 (excluded, where the attorney had already refused to accept the employment); 1849, *Heaton v. Findlay*, 12 Pa. St. 304, 310 (communications "preliminary to his engagement as counsel," made in satisfying the counsel of the propriety of his retainer, held not privileged); 1875, *Strong v. Dodds*, 47 Vt. 348, 353 (communication seeking to retain an attorney, who then declines to bring suit, held privileged); 1886, *Tucker v. Finch*, 66 Wis. 17, 21, 27 N. W. 817 (communications seeking to retain an attorney, who declined because of a prior retainer on the other side, held not privileged); 1887, *Plano Mfg. Co. v. Frawley*, 68 id. 577, 584, 32 N. W. 768 (communications after an attorney has given notice that he is retained on the other side, held not privileged).

tween utterances and acts of the client. In the following passages the various judicial attitudes are represented:

Ante 1767, *Buller, J.*, *Trials at Nisi Prius*, 284: "[The privilege does not cover] a fact of his own knowledge, and of which he might have had knowledge without being counsel or attorney in the cause; as, suppose him witness to a deed produced in the cause, he shall be examined to the true time of execution;¹ so, if the question were about a rasure in a deed or a will, he might be examined to the question whether he had ever seen such deed or will in other plight, for that is a fact of his own knowledge; but he ought not to be permitted to discover any confessions his client may have made to him on such head."

1803, *Ellenborough, L. C. J.*, in *Robson v. Kemp*, 5 Esp. 52, 55: "The act [of destroying a power of attorney] cannot be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is as privileged as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been derived from his situation as an attorney."

1833, *L. C. Brougham*, in *Greenough v. Gaskell*, 1 Myl. & K. 98, 104: "[The privilege does not exist] where there could not be said, in any correctness of speech, to be a communication at all,—as where, for instance, a fact, something that was done, became known to him from his having been brought to a certain place by the circumstance of his being attorney, but of which fact any other man if there would have been equally cognizant."

1857, *Brown v. Foster*, 1 H. & N. 736; *Pollock, C. B.*: "A legal adviser may give evidence of a fact which is patent to his senses"; *Martin, B.*: "With respect to matters which the counsel sees with his eyes, he cannot refuse to answer."

1841, *Bronson, J.*, in *Coveney v. Tannahill*, 1 Hill N. Y. 33, 35: "This privilege of a client does not extend to every fact which the attorney may learn in the course of his employment. There is a difference in principle between communications made by the client and acts done by him in the presence of the attorney; . . . I will not undertake to say how far the distinction between the communications and the acts of the client may extend"; apparently holding that the execution of a document is an act.

1861, *Woodward, J.*, in *Daniel v. Daniel*, 39 Pa. 191, 210 (permitting the question, to an attorney, why he could not have had with the testator, his client, any conversation worth repeating): "Communications made to a counsel are privileged; but if a client is too imbecile to make any communications, I never before heard that that fact was incompetent testimony on account of the professional relation,—no more than the shape of the client's head, which is the subject of the next bill. If a lawyer learns from professional visits that he has a fool for a client, whether he acquires the knowledge by the want of intelligent answers, or by study of phrenological developments, the fact is competent evidence in a proper case, and no rule of law forbids the lawyer from delivering it."

The marked contrast is between the statement of Lord Ellenborough, in *Robson v. Kemp*, and that of Baron Martin, in *Brown v. Foster*. Can they be reconciled? And is either of them consistent with Mr. Justice Bronson's distinction between a communication and an act? The truth is that each is right, under some circumstances, and all are harmonious, when the proper allowance is made. Looking back at the reason of the privilege, it is seen to secure the client's freedom of mind in committing his affairs to the attorney's knowledge. It is designed to influence him when he may be hesitating

¹ This statement is clearly correct on the ground that the request to attest makes the act non-confidential (*post*, § 2315); but its association with the ensuing statements has sometimes given rise to misunderstanding. Buller's notions of the principle were apparently not quite clear.

between the positive action of disclosure and the inaction of secrecy. There is, therefore, by hypothesis, always some voluntary act of disclosure, — some removal of that secrecy which would otherwise have existed as between the client and the attorney. In short, there must be some deliberate communication. On the one hand, then, those data which would have come to the attorney's notice in any event, by mere observation, without any action on the client's part — such as the color of his hat or the pattern of his shoe —, and those data which become known by such acts as the client would ordinarily have done in any event, without any purpose of communicating them to the attorney as his adviser — such as the style of his handwriting or the amount of money in the roll of bills from which he pays his retainer —, these are not any part of the communications of the client; in the language of Lord Chancellor Brougham and Mr. Justice Buller, they are "facts of which any other man if there would have been equally cognisant." On the other hand, almost any act, done by the client in the sight of the attorney and during the consultation, may conceivably be done by the client as the subject of a communication, and the only question will be whether, in the circumstances of the case, it was intended to be done as such. The client, supposedly, may make a specimen of his handwriting for the attorney's information, or may exhibit an identifying scar, or may show a secret token. If any of these acts are done as part of a communication to the attorney, and if further the communication is intended to be confidential (*post*, § 2311), the privilege comes into play.

Ordinarily, then, it is true, as Chief Baron Pollock said, that "a legal adviser may give evidence of a fact which is patent to his senses"; that is, of anything which he either sees or even hears, so far as it is otherwise patent, — in other words, is not the subject of a voluntary communication. Yet, in a given case, any of these things *may* be committed to the attorney in such a way as to be within the privilege. It is to be noted, however, that many such acts, which thus become the subject of a communication, may still not be confidentially committed to the attorney, and thus be not privileged (*post*, §§ 2311-2314); and some of the rulings now to be noticed in the ensuing sections can perhaps be attributed to that consideration. Obviously no fixed form of rule can be stated for the present application of the principle. In the ordinary case, it is only the expressed communications of the client that will be privileged.²

² Sundry examples are as follows: *Eng.*: 1790, *Hooper v. Harcourt*, 1 H. Bl. 534 (after judgment, an attorney was held not compellable to disclose his client's abode for the purpose of his being taken on execution; the application "came too late after verdict"); 1817, *Parkins v. Hawkshaw*, 2 Stark. 239 (to prove the identity of defendant with the obligor of a bond, the defendant's attorney was not allowed to testify to "communications which he had had with the defendant"); *U. S.*: 1898, *Wicks v. Dean*, 103 Ky. 69, 44 S. W. 397 (attorney may speak of the client's mental condition as learned at the time

of a consultation); 1868, *White v. Bird*, 20 La. An. 188 (attorney held compellable as garnishee to disclose whether he has assets belonging to the client, unless he cannot do so without disclosing matters confided to him by the client); 1861, *Daniel v. Daniel*, 39 Pa. 191, 211 (attorney's opinion of his client's sanity, held not privileged; quoted *supra*); 1894, *Turner v. Warren*, 160 id. 336, 343, 28 Atl. 781 (fact of delivery of papers, date, person, and condition, held not privileged); 1896, *State v. Fitzgerald*, 68 Vt. 125, 34 Atl. 429 (whether the client was intoxicated when seen in the jail with B., admis-

§ 2307. **Same: Production of the Client's Documents.** The application of the foregoing principle to the case of documents delivered or shown to the attorney is not without difficulty. But, before examining it, a superficially related question, dependent upon other principles, must be disposed of. Is the attorney compellable to *produce in court*, by subpoena or bill of discovery, the documents placed in his possession by the client? This is not a question of compelling the disclosure of the attorney's knowledge; he may know nothing of the contents of the document, nor is he asked to testify about them. Whether the package contains a diamond or a deed is immaterial. But must he produce it?

(1) The answer depends upon the other privileges of the client *irrespective of the present privilege*. The attorney is but the agent of the client to hold the deed; if the client is compellable to give up possession, then the attorney is; if the client is not, then the attorney is not. It is merely a question of possession, and the attorney is in this respect like any other agent. There is, to be sure, the added consideration of policy, namely, that if the attorney were not compellable when the client was, then the client's obligation to produce could always be evaded in very simple fashion by placing the deed with the attorney; and such a quibble could not be tolerated by any practical system of law. But, apart from this, the doctrine of agency is ample to justify the result. The extent of the client's obligation to produce must therefore be taken as determining the present question; and that obligation has undergone radical change in the history of our law. In the first place, at common law, the client who was a *party opponent* in the suit was not obliged to produce, either at or before the trial, except so far as the rule of profert and oyer extended; but in equity he was obliged to produce any document (except that before trial he could not be obliged to discover the documents affecting his own case alone); and under modern statutes the equitable rule has been made available by motion or subpoena to produce in common-law proceedings (*ante*, §§ 1857-1859, 2219). In the next place, the client who was a *third person* was at common law bound to produce upon subpoena, except when the document was a deed supporting some title of his own (*ante*, §§ 2193, 2211). In the third place, the client was and is in any instance not bound to produce a self-incriminating document (*ante*, § 2264).

It follows, then, that *when the client himself would be privileged* from production of the document, either as a party at common law, or as a third person claiming title, or as exempt from self-crimination, the attorney having possession of the document is not bound to produce; and such has invari-

sible, since the attorney saw "nothing that was not observable by B. and by all other persons who saw him during the time of his alleged intoxication"); 1882, *State v. Douglass*, 20 W. Va. 770, 779 (testimony that a pistol produced had been received from the defendant's counsel, held admissible; but the counsel's statement, at the time of delivering it, that he had obtained it in consequence of a communication from the defend-

ant, and the counsel's testimony that he had so obtained it, held not admissible; careful opinion by Green, J.).

For rulings as to disclosing the *identity* of the client, see *post*, § 2313.

For rulings as to the disclosure by an attorney *drafting a will* as to the *testator's sanity or undue influence*, see *post*, §§ 2314-2315.

ably been the ruling.¹ On the other hand, if the *client would be compellable* to produce, either by motion or by subpoena or by bill of discovery, then the attorney is equally compellable, if the document is in his custody, to produce under the appropriate procedure.²

¹ *England*: 1765, *R. v. Dixon*, 3 Burr. 1687 (attorney not required to produce vouchers of his client before the grand jury on a charge of forgery); 1797, *Bothomly v. Usborne*, Peake Add. Cas. 99, 101 (attorney not compellable to produce the client's documents nor to prove their contents, when the client is privileged as a party to the cause); 1821, *Laing v. Barclay*, 3 Stark. 38, 42 (attorney of defendant not required to produce bankruptcy proceedings confidentially deposited with him); 1822, *Harris v. Hill*, ib. 140 (attorney in possession of a privileged third person's document, not compellable to produce); 1831, *Nixon v. Mayoh*, 1 Mo. & Rob. 76 (attorney not compelled to produce the party-opponent's document); 1834, *Mills v. Oddy*, 6 C. & P. 728, 731 ("the attorney is not to produce his client's title-deeds nor to disclose their contents"; here the client was not a party); 1834, *Bate v. Kinsey*, 1 Cr. M. & R. 33 (attorney in possession of documents of the plaintiff, held not compellable to produce them or to disclose their contents); 1834, *Doe v. Seaton*, 2 A. & E. 171, 181 (attorney holding a deed for both vendor and vendee; deed held privileged as to the vendee, although the vendor consented to production); 1840, *Doe v. Ross*, 7 M. & W. 102, 122, *semble* (attorney possessing the title-deed of a third person is not compellable to produce; otherwise, if his client is called and waives the privilege); 1849, *R. v. Hankins*, 2 C. & K. 823, 3 Cox Cr. 434 (perjury in swearing to the signature of an account; the account being in the possession of the attorney, who had a lien thereon, *Coltman, J.*, declined to compel production); 1850, *Newton v. Chaplin*, 10 C. B. 356 (production of a corporate minute-book, placed in the attorney's hands for legal advice by W. C., not a party to the cause, held not compellable, W. C. refusing under his privilege to allow production; *Maule, J.*: "The privilege of W. C. as to the book was the same in the hands of F., [the attorney,] as if he had kept the book in his own hands"); *United States*: 1807, *Lynde v. Judd*, 3 Day 499 (attorney not compellable to produce the client's document); 1817, *Jackson v. Burtis*, 14 John. 391, 399 (documents left with the attorney by the client's agent, held not demandable on subpoena); 1830, *Jackson v. Denison*, 4 Wend. 558 (counsel held not bound to produce a client's deed); 1831, *McPherson v. Rathbone*, 7 id. 216 (paper delivered by the client to the attorney, held not demandable from the attorney by subpoena); 1841, *Bronson, J.*, in *Coveny v. Tannahill*, 1 Hill N. Y. 33, 35 (quoted *post*, § 2308); 1801, *State v. Squires*, Tyler 147 (attorney held not amenable to compulsory process for the delivery of notes, alleged to be forged by his client, which were deposited with him as attorney; "in contemplation of law they are in the possession of the client"); 1832, *Durkee v. Leland*, 4 Vt.

612, 615, *semble* (see citation *infra*); 1889, *Selden v. State*, 74 Wis. 271, 275, 42 N. W. 218 (letters of husband to wife, deposited by her with her attorney for divorce, not producible). For the question *who is to determine* whether the document is privileged as claimed, see *post*, § 2322.

² *England*: 1803, *Pearson v. Fletcher*, 5 Esp. 90 (L. C. J. Ellenborough, on facts similar to those in *Bateson v. Hartsink*, *infra*, compelled the solicitor to produce the proceedings); 1815, *Copeland v. Watts*, 1 Stark. 95 (like *Cohen v. Templar*, *infra*); 1816, *Corsen v. Dubois*, Holt 239 (attorney compelled to produce a bankruptcy commission which was not privileged for his clients the assignees); 1817, *Cohen v. Templar*, 2 Stark. 260 (attorney compellable to produce the document of a third person having no privilege); 1822, *Lowe v. Firkins*, 11 Price 455, 461, 464 (steward of plaintiff, held bound to answer as to documents of his master in his possession; and also bound to produce them on a bill of discovery, though not on a subpoena *d. t.* inasmuch as his custody was the plaintiff's); 1824, *Hawkins v. Howard*, Ry. & Mo. 64 (books of assignees, not parties, held producible by their attorney); 1829, *Doe v. Thomas*, 9 B. & C. 288, 293 (lease placed with the attorney by the party; the attorney held bound to produce on subpoena); 1848, *Doe v. Langdon*, 12 Q. B. 711, 719 (like *Cohen v. Templar*, *supra*); 1853, *Volant v. Soyer*, 13 C. B. 231 (attorney held not bound to produce a title-deed of his client; *Jervis, C. J.*, doubted whether the rule of professional confidence covered documents of the client in general, since the statutory sanction for motions to compel a party's production of documents; *Maule, J.*, placed the ruling on the ground of professional confidence; this ruling was made just after the statutory reform, and illustrates both aspects of the rule); *Canada*: 1863, *Livingstone v. Gartshore*, 23 U. C. Q. B. 166, *semble* (like *Cohen v. Templar*, *supra*); *United States*: 1900, *Allen v. Ins. Co.*, 72 Conn. 693, 45 Atl. 955 (production required, where the answer of the client admitted its possession); 1860, *Andrews v. R. Co.*, 14 Ind. 169, 174 ("the party himself might have been compelled under the statute to produce the receipts on the trial; he could not defeat that production by passing it into the hands of his attorney," and the attorney was held compellable to testify to contents); 1842, *Travis v. January*, 3 Rob. La. 227, 230 ("the attorney may be as properly called on to produce the papers and documents necessary to establish the rights of the adversary . . . as his client himself could be under our laws"); 1861, *Mitchell's Case*, 12 Abb. Pr. 249, 262 (attorney must produce the party's documents where the party has no privilege; good opinion by *Daly, J.*); 1902, *Jones v. Reilly*, 174 N. Y. 97, 66 N. E. 649 ("The privilege was that of the client, not

(2) So much as precedes is the rule for documents *independently pre-existing*. But where the document is itself the client's written communication, *coming into existence merely as a communication to the attorney*, the situation is obviously different. This communication itself is not to be disclosed, whether it was made by the client by word of mouth or by writing. Where the document already had an independent existence, the communication consists in bringing its contents to the attorney's knowledge, and that knowledge is not to be disclosed by his testimony, as will be seen (*post*, § 2308); but the physical possession of the document is distinct from that knowledge, and to compel production of the document is not to compel the disclosure of the communication (*supra*, par. 1). But since a document which is itself a communication is within the privilege, the test is whether the document first came into existence as a part of a communication to the attorney. For example, a client obtains his foreman's report as to an injury in the factory, together with the card of instructions furnished to the injured employee when he first came into the service, and sends these to the attorney, with a letter of his own stating the circumstances of the injury as ascertained by him. Of these, the second is clearly without the privilege, the third is clearly within it, while the first may or may not be.

The application of this distinction is sometimes difficult enough in a particular case. But the situation is often further complicated by two other considerations. In the first place, a communication to the solicitor by an *agent of the client* or by an *agent* of the solicitor is protected by the present privilege, while a communication by a mere stranger is not (*post*, § 2317). Thus the application of the above doctrine, as to documents coming into existence for the purpose of communication to the attorney, becomes particularly difficult when the actual maker of the document is some person other than the client himself, and can only be solved by a reference to the rule as to agents. For this reason the precedents may better be considered in connection with the latter subject (*post*, § 2319). In the second place, the party is not obliged to disclose, by discovery before trial, the testimony of his prospective witnesses (*ante*, §§ 1856, 1857, 1859); and hence, on grounds wholly independent of the present privilege, it may become necessary to distinguish between the written information given beforehand by a witness as such and that furnished by the party's employee as his agent. These various principles so

of the counsel; and when, by change in the law, the client could be compelled by subpoena to produce documents in his possession, the rule that the attorney could not be forced to produce them when in his possession necessarily fell"); 1827, *Rhoades v. Selin*, 4 Wash. C. C. 715, 718 (attorney compellable to produce papers which the client himself was compellable to produce).

Contra, but unsound: 1801, *Bateson v. Hart-sink*, 4 Esp. 43 (L. C. J. Kenyon; the solicitor of third persons, the assignees in bankruptcy of the present defendant, was held not compellable to produce the proceedings of the assignees; here

they were otherwise obtainable by motion against the assignees; this ruling was virtually repudiated in the later English ones); 1877, *Dover v. Harrell*, 58 Ga. 572 (ejectment; deed placed in the attorney's possession by the defendant for preparing his defence; the attorney held not compellable to produce; this is expressly sanctioned by the local Code, quoted *ante*, § 2292); 1889, *Stokoe v. R. Co.*, 40 Minn. 545, 42 N. W. 482 (attorney is not compellable to produce his client's documents); 1897, *Davis v. R. Co.*, 70 id. 37, 72 N. W. 823 (documents "intrusted" to the attorney by the client, held privileged).

intermingle in their application that an examination of the precedents can better be made elsewhere (*post*, § 2318).

§ 2308. **Same: Testimony to Contents of Documents.** The client's disclosure of the contents of a preëxisting document will almost always be an act of communication (*ante*, § 2306), *i. e.* a part of the matters voluntarily committed to the notice of the attorney. It is impossible, in the language of Mr. Justice Bronson,¹ to perceive "any solid distinction between the oral statement of a fact to counsel and a communication of the same fact by delivering to him a deed or other written instrument." Unless, therefore, a particular communication of this sort is not confidential (*post*, § 2311), it is within the privilege, and the testimony of the attorney on the stand cannot be required.² Nor does it here make any difference that the client would have been compellable

¹ *Coveny v. Tannahill*, N. Y., *infra*.

² Sundry examples are as follows: *England*: 1676, *Bulstrode v. Letchmere*, *Freem. Ch.* 5 ("the defendant being a counsellor at law shall not be bound to answer concerning any writings which he hath seen, nor for anything which he knoweth in the cause as counsellor"); 1693, *Anon.*, *Skinner* 404 (attorney who had "drawn an indenture of agreement," not compellable "to discover the matter of it"); 1797, *Bothomly v. Usborne*, *Peake Add. Cas.* 99, 101 (cited *ante*, § 2307); 1826, *R. v. Upper Boddington*, 8 *Dowl. & R.* 726 (the attorney held mortgage deeds of H., not a party, who claimed his privilege; the attorney was therefore forbidden to testify to their contents, "because the whole of those contents were a confidential communication between a client and his attorney"); 1834, *Bate v. Kinsey*, 1 *Cr. M. & R.* 38 (cited *ante*, § 2307); 1834, *Marston v. Downes*, 6 *C. & P.* 381, 1 *A. & E.* 31 (attorney of a third person cannot prove the contents of the client's title-deeds); 1836, *Wheatley v. Williams*, 1 *M. & W.* 533 (attorney not allowed to testify whether a paper shown in consultation bore a stamp; "all that appears on the face of such document is a part of the confidential communication"; the passage in *Buller's Nisi Prius*, *ante*, § 2306, interpreted); 1837, *Doe v. Watkins*, 3 *Bing. N. C.* 421 (like *Marston v. Downes*, *supra*); 1842, *Herring v. Cloberry*, 1 *Phil. Ch.* 91, *L. C. Lyndhurst* (testimony as to the client's suggestions of alterations and her execution of the deed with knowledge of its contents, held privileged); 1848, *Hibberd v. Knight*, 2 *Exch.* 11 (*Marston v. Downes*, *supra*, approved); 1842, *Davies v. Waters*, 9 *M. & W.* 608, 612 (attorney held privileged from testifying to a deed read by him at a consultation with counsel; to do otherwise "would be in fact seeking to have in evidence what occurs at a consultation between the parties"); *Canada*: 1857, *Lynch v. O'Hara*, 6 *U. C. C. P.* 259, 265 (he must disclose possession and identity, but not contents); *United States*: 1834, *Crawford v. McKissack*, 1 *Port.* 433 (an indorsement on the bond in action had been obliterated; the plaintiff's attorney held not compellable to state its tenor); 1867, *Donald v. Mitchell*, 43 *Ill.* 40, 45 (whether a prom-

issory note, when handed to the attorney for bringing suit, was indorsed, held privileged); 1811, *Anon.*, 8 *Mass.* 370 (the Court refused to compel the attorney to disclose a document handed to him by the client for use in litigation; "it is in the keeping of his client as much as if it were in his own pocket"); 1869, *Gray v. Fox*, 43 *Mo.* 570 (testimony of the attorney as to the condition of notes when placed in his hands for litigation, held privileged); 1833, *Brown v. Payson*, 6 *N. H.* 448, 448 ("the situation and contents of a paper, delivered to an attorney for inspection in the course of employment as attorney," held privileged); 1891, *Matthews v. Hoagland*, 48 *N. J. Eq.* 455, 464, 21 *Atl.* 1054 (whether a certificate, obtained from the client, was indorsed when the attorney saw it, held privileged); 1841, *Coveny v. Tannahill*, 1 *Hill N. Y.* 33, 35 (quoted *ante*, § 2306); 1832, *Durkee v. Leland*, 4 *Vt.* 612, 615 (a statute made parties compellable to produce, but no notice had been given; held, that the attorney of the party was not compellable to produce, nor, *semble*, to testify about it); 1892, *Arbuckle v. Templeton*, 65 *id.* 205, 208, 25 *Atl.* 1095 (action on a note; the defendant had shown the note to the attorney for advice about it; whether the note then bore an indorsement, privileged). *Contra*: 1767, *Buller*, *Trials at Nisi Prius*, 284, *semble* (quoted *supra*, § 2306); 1857, *Brown v. Foster*, 1 *H. & N.* 736 (an account-book was produced in court, and counsel and magistrate examined it; the counsel held not privileged for testimony to an item therein; quoted *supra*, § 2306); 1834, *John v. John*, *Wright* 584, 586 (action on a note; the note was in defendant's possession, but no notice to produce had been given; by statute a party could notify the opponent to produce documents and the Court could compel production or give judgment by default; the attorney had the notes in court, but refused to produce, whereon the Court obliged him to testify to their contents; here the ruling was wrong, in that it treated his disclosure as not a violation of the privilege; but the result was right, because notice in court was sufficient, where the documents were already there (*ante*, § 1204), and hence production was compellable).

to produce the deed, in chancery or otherwise; for he is also compellable to tell what he knows on other subjects, and yet his communications about them, made to the attorney, are privileged. The communication of the document is distinct from the document itself. It is, however, worth noting that if the communication were made as a part of an expedient to avoid production (as, if the client should show the document to the attorney and then destroy it), the privilege ought not to be conceded.

§ 2309. **Same: Testimony to Possession, Existence, and Execution of Documents.** The existence, the execution, or the place of custody of a document, may be a part of a communication to the attorney, in the sense already noted (*ante*, § 2306), and may also be a confidential one (*post*, § 2312). But ordinarily it will be neither. The signing, for example, of a release or a note in the attorney's presence is not usually intended as an act of disclosure to him, or, if it is, as a confidential one. For lack of both of these elements, then, the Courts have usually declared the attorney's testimony to these acts not to be within the privilege.¹ Upon which ground these rulings have been intended

¹ Additional cases, concerning the *execution of wills*, are for convenience' sake collected *post*, § 2314: *England*: 1712, Lord Say & Seal's Case, 10 Mod. 40 (attorney compelled to testify to a deed's ante-dating; "the time of executing a deed could not be called the secret of his client; it was a thing he might come to the knowledge of without his client's acquainting him"); 1776, Duchess of Kingston's Trial, 20 How. St. Tr. 613 (Lord Mansfield: "Even if he swears to an answer in Chancery, he cannot protect himself from swearing whether that is his client's hand or not, or to his having sworn it, or the execution of a deed; it does not come within the objection to an attorney revealing the secrets of his client"); 1793, Sanford v. Remington, 2 Ves. Jr. 189 (L. C. Loughborough, compelled an attorney "to disclose all that did pass in his presence at the execution of the deed, as a witness; so, his having been sent by his client with orders to put the judgment into execution; that is an act; but he is not to disclose the private conversation as to the deed with regard to what was communicated as to the reasons for making it, etc."); 1803, Robson v. Kemp, 5 Esp. 52, 55 (circumstances of destruction of a deed, privileged, if known to the witness as attorney; quoted *ante*, § 2306); 1804, Brard v. Ackerman, *ib.* 119 (existence and description of a certain bill in the attorney's possession by professional confidence, held privileged); 1824, Hurd v. Moring, 1 C. & P. 372 (attorney compelled to testify to the handwriting of a bill, though his knowledge rested solely on seeing the defendant sign the bail-bond, while engaged in the cause); 1828, Bevan v. Waters, M. & M. 235 (like Dwyer v. Collins, *infra*); 1834, Bate v. Kinsey, 1 Cr. M. & R. 38 (attorney need not disclose whether he has a document in his possession); 1852, Dwyer v. Collins, 7 Exch. 639 (action on a bill of exchange; the defendant wished the bill in proving his plea, and in order to lay a foundation for a copy, asked the plaintiff's counsel if

he had the bill with him; the objection of "breach of professional confidence," as an excuse for not answering, was overruled); *Canada*: 1848, James v. Mills, 4 U. C. Q. B. 366 (whether the attorney has the document in court; not decided); 1857, Lynch v. O'Hara, 6 U. C. C. P. 259, 265 (cited *ante*, § 2308); *United States*: 1888, Chapman v. Peebles, 84 Ala. 283, 4 So. 273 (that the attorney wrote a note in the client's presence, that the latter signed it, and that money was then paid, held not privileged, being "acts, not communications in professional confidence"); 1878, Cole v. Cheovanda, 4 Colo. 17, 21 (like Dwyer v. Collins, *supra*); 1877, Raffle v. Moore, 58 Ga. 94, 100, 104 (the date of signing certain notes, made on the attorney's advice, held privileged); 1842, Travis v. January, 3 Rob. La. 227, 230 (attorney may be compelled to state whether he has documents of the client and what he has done with them); 1876, Brown v. Jewett, 120 Mass. 215 (counsel compelled to testify to the signature of client on a note, so long as he did not disclose confidential communications nor base his testimony thereon); 1889, Stokoe v. R. Co., 40 Minn. 545, 42 N. W. 482 (attorney must state whether he possesses the client's document, when the foundation for using a copy is to be laid); 1820, Brandt v. Klein, 17 John. 335, 339 (in showing notice to produce a will, it became necessary to prove that the will was at the place of trial; the opponent's attorney was held compellable to testify whether it was in his possession; this not being a fact "communicated as a secret" nor involving "any confidential communication between them"); 1820, Jackson v. M'Vey, 18 id. 330 (same); 1841, Coveney v. Tannahill, 1 Hill N. Y. 33, 35 ("The attorney may be called to prove the existence of a paper and that it is in his possession, for the purpose of enabling the other party to give parol evidence of its contents"); 1878, Rundle v. Foster, 3 Tenn. Ch. 658 (disclosure of the date of a bill

to stand is not always clear; and the circumstances of each case must be considered. But the principle is not doubtful. It should be noted, however, that where the attorney is an *attesting witness* to the document, the transaction is not a confidential one, and therefore, in another aspect of the principle (*post*, § 2315), he may be called to testify.²

§ 2310. **Relevancy or Necessity of the Communication.** The Courts have not always used consistent language in answering the question whether the privilege is limited in some way to communications necessary or material or relevant to some purpose of the consultation. In the following passages, the two typical attitudes are represented:

1743, *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1229; it was proposed to show that the defendant, by supporting a criminal prosecution for murder against the plaintiff, who claimed the defendant's estate and peerage, had tried to put the plaintiff out of the way, and had expressed such plans in an interview with Mr. Giffard, a solicitor; this solicitor had often been employed by the defendant, but for six months had had no affairs of his in hand, and did not expect to be employed again; on May 1 the plaintiff had killed a person, — by accident, as he claimed; on May 2, the defendant, hearing of it, sent for Mr. Giffard and told him to go and conduct the prosecution, not disclosing the defendant's name, and incidentally made certain remarks, now offered in evidence, as to being easy in his title and willing to give £10,000 if the plaintiff could be hanged for the murder; Mr. Prime Sergeant *Malone* (for the defendant): "The mutual confidence between client and attorney requires the preservation of secrecy; and as the client cannot be supposed to be qualified to distinguish what is, or is not necessary to his cause, if he should be mistaken, and entrust his attorney with what the attorney should be of opinion was unnecessary, yet surely his attorney ought not to reveal it. As clients are not versed in law affairs, they must be informed by their attorney, for which purpose they must tell them their whole case, and this necessity creates a confidence between them. . . . There seems to be no difference whether the conversation relates to the principal cause in which the attorney is concerned, or to a collateral action, in which he is not; it is in either case grounded on the confidence that arises from the attorney's being employed, and therefore ought not to be disclosed." *Bowes*, L. C. B.: "Now, admitting the policy of the law in protecting secrets disclosed by the client to his attorney, to be, as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it follow from thence, that everything said by a client to his attorney falls under the same reason? I own, I think not; because there is not the same necessity upon the client to trust him in one case as in the other; and of this the

of sale drawn for the client by the attorney, held compellable, as being not a communication but an act); 1832, *Durkee v. Leland*, 4 Vt. 612, 615 (attorney must disclose whether the document exists and where he last saw it); 1897, *Stanliber v. Graves*, 97 Wis. 515, 73 N. W. 48, *semble* (date of execution of a mortgage in his presence, held not privileged).

Compare the cases *ante*, § 2297, where the consultation of an attorney as a *conveyancer* is sometimes held not to be within the privilege; under such rulings, not even the express communications of the party are privileged; but under the rulings in the present section it is assumed that the privilege applies to express communications, and the only question is as to the act of execution or the like.

² The cases of wills are placed *post*, § 2315;

the following are cases of deeds: 1793, *Sandford v. Remington*, 2 Ves. Jr. 189, quoted *supra*; 1803, *Robson v. Kemp*, 5 Esp. 52, quoted *post*, § 2315; 1841, *Mackenzie v. Yeo*, 2 Curt. Eccl. 866, 868.

In *Robson v. Kemp*, *supra*, as again reported in 4 Esp. 233, 236, Lord Ellenborough is made to say that an attorney "from his situation is bound to prove the execution of a deed"; but this is inconsistent with other statements of his in the report in 5 Esp. 52, as quoted *ante*, § 2306. The two reports appear to represent the same trial; but in any event the document was the same, and was attested by the attorney; so that the remark reported in 4 Esp. was plainly made of that "situation," and was in that application correct.

Court may judge, from the particulars of the conversation. Nor do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. . . . But where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney"; *Mounteney, B.*: "If this original principle be kept constantly in view, I think it cannot be difficult to determine either the present question or any other which may arise upon this head; for upon this principle, whatever either is, or by the party concerned can naturally be supposed, necessary to be communicated to the attorney in order to the carrying on any suit or prosecution in which he is retained, — that the attorney shall inviolably keep secret. On the other hand, whatever is not, nor can possibly by any man living be supposed to be, necessary for that purpose, that the attorney is at liberty, and in many cases — as particularly, I think, in the present case — the attorney ought to disclose." *Dawson, B.*: "Nothing that came properly to the knowledge of the attorney in defence of his client's cause ought to be revealed. I will suppose an unknowing man to have twenty deeds by him, and he delivers them all to his attorney to see which were relative to the suit; he looks them over, and finds not half of them to be relative thereto. I apprehend the attorney is not compellable to disclose the contents of any one of those deeds; neither do I think it necessary; . . . and I think the Court must in this case be satisfied, first, that what came to this man's knowledge was not necessary to his client's affairs; and in the next place, that the client could not think it necessary. . . . The motive for carrying on the prosecution against the plaintiff is said to be, because he has a right to the estate the defendant was in possession of. Can any man think that this was necessary to tell the attorney, or that the defendant could have thought it so? What was necessary, or what a man might have thought necessary, ought not to be disclosed. But if the defendant in this case has gone anything further, he has trusted him, not as an attorney, but as an acquaintance."

1849, *Bell, J.*, in *Moore v. Bray*, 10 Pa. St. 519, 524: "It seems, however, to have been thought [by counsel here] that, because the facts disclosed, in reference to the consideration of the assignment of the mortgage, were unessential to the conduct of the suit, and the communications regarded by the counsel in the light of casual conversations, they are not entitled to protection. But this is a mistake. It is true, the rule does not embrace the disclosure of collateral facts, made during accidental conversations, held irrespective of the professional character of the recipient. But the circle of protection is not so narrow as to exclude communications a professional person may deem unimportant to the controversy, or the briefest and lightest talk the client may choose to indulge with his legal adviser, provided he regards him as such, at the moment. To found a distinction on such a ground, would be to measure the safety of the confiding party by the extent of his intelligence and knowledge, and to expose to betrayal those very anxieties which prompt those in difficulty to seek the ear of him in whom they trust, in season and out of season."

It should be clear, on the one hand, that the actual necessity of making a particular statement, or the materiality to the cause of a particular fact, cannot determine the answer; for the client cannot know what is necessary or material, and the object of the privilege (*ante*, §§ 2291, 2302) is that he should be unhampered in his quest for advice. On the other hand, when he knowingly departs from that purpose and interjects other matters not relevant to it, he is in that respect not seeking legal advice and the privilege does not design to protect him (*ante*, § 2296). The test is, therefore, not whether the fact or the statement is actually necessary or material or relevant to the subject of the consultation, but whether the statement is made as a part of the

purpose of the client to obtain advice on that subject. Some such rule would seem to have been in the minds of all the judges, in spite of the occasional apparent inconsistency of their utterances.¹

4. "Made in confidence"

§ 2311. **Communications must be Confidential; Confidentiality not presumed; Presence of a Third Person; Sundry Applications of the Principle.** The privilege assumes, of course, that the communications are made with the intention of confidentiality. The reason for prohibiting disclosure (*ante*, § 2291) ceases when the client does not appear to have been desirous of secrecy. "The moment confidence ceases," said Lord Eldon, "privilege ceases."¹ This much is universally conceded.² No express request for secrecy, to be sure, is necessary;³ but the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential; and the mere relation of attorney and client does not raise a presumption of confidentiality.⁴

¹ The rulings are as follows: *England*: 1743, *Annesley v. Anglesea*, 17 How. St. Tr. 1229 (quoted *supra*); 1791, *Cobden v. Kenrick*, 4 T. R. 481 (after the attorney had secured a settlement, though before it was paid, the client said to him that "he was glad it was settled, for he had only given £10 in cash, etc."; this was held not privileged; the difference is "whether the communications were made by the client to his attorney in confidence as instructions for conducting his cause, or a mere *gratis dictum*"); 1840, *Gillard v. Bates*, 6 M. & W. 547 ("The test is, whether the communication is necessary for the purpose of carrying on the proceeding in which the attorney is employed"); *United States*: 1877, *State v. Mewherter*, 46 Ia. 88, 93 (consultation with an attorney respecting a suit with H.; threats against H.'s life, made during the consultation, held not privileged, since they "in no manner pertained to the business of the professional consultation"); 1847, *Aiken v. Kilburne*, 27 Me. 252, 262 (the privilege "does not depend upon the importance or materiality of the communications in the defence of that suit"); 1883, *Snow v. Gould*, 74 id. 540, 543 ("The privilege does not concern extraneous or impertinent communications"); 1901, *National Bank v. Delano*, 177 Mass. 362, 58 N. E. 1079 (privilege applies to statements made to the attorney as such, even as to facts not expressly made the subject of the request for advice); 1892, *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381, 4 U. S. App. 438, 474 (questions as to a fee-contract with the attorney, excluded; if the relation of legal adviser exists, the communications need not concern precisely the topic of advice); 1849, *Moore v. Bray*, 10 Pa. St. 519, 524 (incidental or unnecessary parts of a consultation are equally privileged; quoted *supra*).

Whether the privileged and the unprivileged parts of a conversation can be *separated*, for the purpose of proving the latter alone, must depend upon the circumstances of each case:

1895, *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 343 (where the last part of a conversation was held separable).

² 1819, *Parkhurst v. Lowten*, 2 Swanst. 194, 216.

³ 1833, *Greenough v. Gaskell*, 1 Myl. & K. 98, 104 (not privileged "where the matter communicated was not in its nature private, and could in no sense be termed the subject of a confidential disclosure"); 1865, *Hager v. Shindler*, 29 Cal. 47, 63; 1884, *Johnson v. Patterson*, 13 Lea 626, 649 (principle enforced, even under a statute not expressly using the word "confidential"). This is apparently accepted even under those statutes (*ante*, § 2292) which, like the California Code, describe the privilege without using the word "confidential."

⁴ 1839, *Wheeler v. Hill*, 16 Me. 329, 333 (it is not necessary that there should have been "any particular circumstances or injunctions of secrecy").

⁵ *Eng.*: 1878, *Gardner v. Irvin*, L. R. 4 Exch. D. 49, 53 ("It is not sufficient for the affidavits to say that the letters are a correspondence between a client and his solicitor; the letters must be professional communications of a confidential character for the purpose of getting legal advice"); 1891, *O'Shea v. Wood*, Prob. 237, 286 (foregoing passage approved; "letters are not necessarily privileged because they pass between solicitor and client; in order to be privileged, there must be a professional element in the correspondence"); *Can.*: 1874, *Hamelyn v. White*, 6 Ont. Pr. 143 (that it is a communication between solicitor and client, held sufficient); 1897, *Hoffman v. Crerar*, 17 id. 404 (preceding case followed, with hesitation); 1901, *Clergue v. McKay*, 3 Ont. L. R. 478 (*Hoffman v. Crerar* repudiated; the communication must also be stated to be "confidential and of a professional character"; modern English cases reviewed).

Add the following, which seem reasonable: 1870, *People v. Atkinson*, 40 Cal. 284 (the privilege is presumed, if the attorney fails to

These circumstances will of course vary in individual cases, and the ruling must therefore depend much on the case in hand.⁵ One of the circumstances, by which it is commonly apparent that the communication is not confidential, is the *presence of a third person*, not being the agent of either client or attorney.⁶ Here, even if we might predicate a desire for confidence by the client, the policy of the privilege would still not protect him, because it goes no further than is necessary to secure the client's subjective freedom of consultation (*ante*, § 2291), and the presence of a third person (other than the agent of either) is obviously unnecessary for communications to the attorney as such, — however useful it may be for communications in negotiation with

recollect whether the specific communication was during confidential relations); 1881, *Carroll v. Sprague*, 59 id. 655, 660 (same; provided it is shown that the confidential relation actually existed for the transaction in question).

⁵ *England*: 1797, *Bothomly v. Osborne*, Peake Add. Cas. 99, 101 ("the preparation of the agreement was not an act of confidence"; and the drafting attorney was allowed to prove the contents); 1829, *Eicke v. Nokes*, 1 M. & M. 303 (receipt of a copy of a bill, held not privileged); 1849, *Doe v. Hertford*, 13 Jur. 632 (map given by the owner to an attorney employed to effect a sale, held not privileged; "he is authorized to show the map to all the world"); *United States*: 1865, *Hager v. Shindler*, 29 Cal. 47, 62 (the attorney being by arrangement a grantee for the purpose of raising money for the client, the latter's communications for this independent purpose were held not privileged, as being "foreign to the object for which the attorney was retained"); 1896, *Ruiz v. Dow*, 113 id. 490, 45 Pac. 867 (instructions regarding the delivery of a deed, admitted); 1886, *Todd v. Munson*, 53 Conn. 579, 4 Atl. 99 (an instruction to an attorney to prepare a deed expressing a trust, held not privileged; otherwise, of a parol declaration of trust); 1874, *Burnside v. Terry*, 51 Ga. 186, 191 (instructions to an attorney, intended for communication to the opponent as the basis of a contract, and by the latter accepted as such, held not privileged); 1873, *Burnham v. Roberts*, 70 Ill. 19, 21 (bill in chancery, sworn but never filed, excluded, as a communication by the client; unsound); 1885, *Scott v. Harris*, 113 id. 447, 455 (communications directing the attorney to make certain statements to legatees interested, held not privileged); 1863, *Mulford v. Mueller*, 3 Abb. App. Dec. 330 (that S. acted under C.'s direction in collecting a judgment, and that C. directed him to pay to X. and not to M., held not privileged); 1892, *Rosseau v. Bleau*, 131 N. Y. 177, 183, 30 N. E. 52 (delivery of a deed by the client to the attorney, for the purpose of the latter's delivery to another person, held not privileged); 1849, *Heaton v. Findlay*, 12 Pa. St. 304, 310 (communication of facts to be embodied in a letter sent to the sheriff, held not privileged); 1884, *Henderson v. Terry*, 62 Tex. 281, 285 (communication to a third person, made through the attorney, held

not privileged); 1892, *Aultman v. Ritter*, 81 Wis. 395, 398, 21 N. W. 569 (receipt of a check from the client, with which to pay certain charges, held not privileged); 1893, *State v. Kidd*, 89 Ia. 54, 56 N. W. 263 (copy of special findings of a jury, and letter of request to return, sent to the attorney, held not confidential); 1894, *Toms v. Beebe*, 90 id. 612, 58 N. W. 925 (conversation held not privileged, under the Code wording); 1895, *Caldwell v. Meltvedt*, 93 id. 730, 61 N. W. 1090 (collection of a note and execution of deed to reconvey mortgaged property, held not privileged); 1882, *Lange v. Perley*, 47 Mich. 353, 357, 11 N. W. 193 (communications with a county attorney, one of a committee of three to obtain a settlement with a defaulting official's sureties, held not privileged on the facts); 1900, *Lorimer v. Lorimer*, 124 id. 631, 83 N. W. 609 (consultation as to a provision for a woman now claiming as wife, held privileged); 1851, *Fraser v. Sutherland*, 2 Grant Ch. 442, 446 (communications to the solicitor, intended to be laid before creditors, held not privileged).

⁶ 1889, *Sharon v. Sharon*, 79 Cal. 633, 677, 22 Pac. 26, 131 (communication "on a public street and in the presence of and mostly with a third party," held not privileged); 1859, *Godard v. Gardner*, 28 Conn. 172 (consultation in the presence of the attorney's son, who was in no way assisting in the cause; the son held compellable); 1880, *Pulford's Appeal*, 48 id. 247, 249 (principle approved); 1877, *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502, 504 (presence of a third person, held to destroy the privilege); 1886, *House v. House*, 61 Mich. 69, 27 N. W. 858, *semble* (similar); 1895, *People v. Buchanan*, 145 N. Y. 1, 39 N. E. 846 (similar); 1876, *Bowers v. State*, 29 Oh. St. 542, 546 (presence of the mother of the prosecutrix in a rape case, during the consultation, held not to destroy the privilege); 1897, *Hummel v. Kistner*, 182 Pa. 216, 37 Atl. 815 (by a client to the attorney during the drawing of a deed and in the grantee's presence, held not privileged). *Contra*: 1899, *Butler v. Fayerweather*, 33 C. C. A. 625, 91 Fed. 458 (that others were present at the execution of a will does not take away the privilege of the drafting attorney as to the contents and execution then communicated to him; unsound).

the third person.⁷ It follows, of course, *a priori*, that communications to the third person in the presence of the attorney are not within the privilege.⁸

§ 2312. **Communications to Opponent or his Attorney or in Opponent's Presence; Joint Attorney.** There may be a relative, not an absolute, confidence. The chief instance occurs when the *same attorney acts for two parties* having a common interest, and each party communicates with him. Here the communications are clearly privileged from disclosure at the instance of a third person.¹ Yet they are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment by either from the other. On the other hand, a communication to the *opposing party's* attorney, as such, is clearly without the privilege, since no confidence is reposed, nor, if reposed, could be accepted.² But between these two extremes occur a number of situations, shading into each other. It is necessary to examine these situations separately, with their respective solutions:³

⁷ The distinction, sometimes taken, that in such cases the attorney alone is still bound to secrecy is unsound: 1892, *Blount v. Kimpton*, 155 Mass. 378, 29 N. E. 590 (here the plaintiff and defendant were present with the attorney, and the attorney was prevented from testifying to the former's communications; "as between the client and attorney, they are still confidential, though made in the presence or hearing of a third party"); 1899, *Hartness v. Brown*, 21 Wash. 655, 69 Pac. 491 (the presence of a third person does not render the attorney compellable to disclose).

⁸ 1863, *Gallagher v. Williamson*, 23 Cal. 331 (communications between the client and other persons present, held not privileged; otherwise, of confidential communications directly to the attorney at the same meeting); 1892, *Hanson v. Bean*, 51 Minn. 546, 53 N. W. 871 (communication to a third person in the attorney's presence, held not privileged); 1841, *Coveney v. Tannahill*, 1 Hill N. Y. 33, 37 ("What was done and said between the plaintiff and Tannahill in the way of business cannot be turned into a confidential communication between attorney and client merely because the plaintiff had an attorney present to hear and see what took place. No secret was confided to him"). For the compellability of a *third person overhearing* the communication to disclose it, see *post*, § 2326.

¹ This is universally conceded: 1803, *Robson v. Kemp*, 5 Esp. 233, 235 (an attorney who had prepared a deed from father to son, acting for both, was not compelled to disclose, for the assignees in bankruptcy of the father, adversary to the son); 1837, *Doe v. Watkins*, 3 Bing. N. C. 421 (attorney for borrower and lender); 1881, *Root v. Wright*, 84 N. Y. 72, 76; 1886, *Kaut v. Kessler*, 114 Pa. 603, 610, 7 Atl. 586; 1889, *Harris v. Daugherty*, 74 Tex. 1, 11 S. W. 921 (conversations with a joint attorney, declared privileged as against third persons; but here the attorney was held to be acting for one party only).

² *Offers of compromise* may of course be ex-

cluded, but not by reason of any privilege: *ante*, § 1061.

³ The rulings, however, cannot well be arranged under the appropriate heads, inasmuch as their reasoning is often loosely or obscurely stated; they are as follows: *England*: 1778, *Captain Baillie's Trial*, 21 How. St. Tr. 1, 359, 385 (Mr. Murphy declined to relate a confidential conversation had by him, as counsel for the defendant, with the opposite party; but the opposite party waived objection, and the witness was ordered to testify; in fact, Mr. Murphy's motives for refusing seem not to have been above suspicion); 1806, *Spenceley v. Schulenburg*, 7 East 357 (the defendant's attorney, held compellable to testify to the contents of a notice served on him by the plaintiff; "in the disclosure of this there could be no breach of confidence"); 1833, *Griffith v. Davies*, 5 B. & Ad. 502 (conversation between the plaintiff and the defendant, at which the defendant's attorney was present, held not privileged); 1833, *Ripon v. Davies*, 2 Nev. & M. 310 (conversation between the defendant and his attorney, and the plaintiff, after action begun, held not privileged); 1834, *Marston v. Downes*, 6 C. & P. 381, 382 (the mortgagor's conversation with the mortgagee's attorney, the former having his own attorney for the raising of the money, held not privileged); 1838, *R. v. Avery*, 8 id. 596, 598 (forgery of a will, with intent to defraud W.; the defendant having applied to S., a solicitor for W., to act as solicitor in raising the money, *Patteson, J.*, with some doubt, compelled S. to disclose the communication); 1838, *Desborough v. Rawlins*, 3 Myl. & Cr. 515 (communication by an agent representing an adverse interest to the solicitor and his client, held not privileged); 1843, *Shore v. Bedford*, 5 M. & Gr. 271 (defendant's communication in the plaintiff's presence to the plaintiff's attorney, held not privileged); 1846, *Reynell v. Sprye*, 10 Beav. 51, 55 (case and opinion procured by the defendant for the defendant and the plaintiff, both being interested in an estate, admitted); 1847,

(1) First, then, a communication by A to X as the common attorney of A and B, who afterwards become party opponents, is not privileged, as

Tugwell v. Hooper, ib. 348 ("This gentleman, who had become a trustee for two parties, could not act separately as the solicitor for one against the other having an opposite interest" and then acquire information in the trust matters and conceal it from one *cestui* on the pretext of being solicitor for the other); 1847, *Weeks v. Argent*, 16 M. & W. 817 (attorney for the payee, held compellable to disclose the consideration for a note signed by the maker in the presence of the payee and their two attorneys); 1848, *Chant v. Brown*, 7 Hare 79, 88 (a solicitor having afterwards become devisee and thus a party to the suit, the privilege did not cease as to prior communications made to him as solicitor, and discovery of them could not be obtained from him as a party; apparently unsound); 1851, *Gore v. Bowser*, 5 DeG. & Sm. 30, 34 (communication by a solicitor with the opposite party, not privileged); 1852, *Cleave v. Jones*, 7 Exch. 421, 426 (action for money advanced by the attorney; the client's account, rendered to the attorney, held privileged against the latter; unsound); 1865, *Talbot v. Marshfield*, 2 Dr. & Sm. 549 (certain cases and opinions taken by trustees under a will, held in part privileged, in part not, as against the residuary legatees); 1869, *Ross v. Gibbs*, L. R. 8 Eq. 522, 524 (communications between mortgagor and mortgagee and an attorney acting on their joint behalf, held not privileged for the latter against the former, if made before litigation was begun by the former); 1883, *Mason v. Cattley*, L. R. 22 Ch. D. 609 (action by *cestuis* against trustees; the latter's communications before action brought, held not privileged); 1900, *Ainsworth v. Wilding*, 2 Ch. 315, 320 ("a mere record of what takes place in chambers, in the course of a hostile action, in the presence of parties on both sides, is not privileged").

United States: Ala.: 1846, *Brazier v. Fortune*, 10 Ala. 516 (incidental remark, made during a consultation in the presence of the opposing attorney also, held privileged, by a majority; unsound); 1856, *Parish v. Gates*, 29 id. 254, 260 ("by selecting the same attorney, and making their communications in the presence of each other, each party waived" the confidence); *Cal.*: 1889, *Bauer's Estate*, 79 Cal. 304, 312, 21 Pac. 759 ("When two persons address a lawyer as their common agent," the privilege ceases as between them); 1896, *Murphy v. Waterhouse*, 113 id. 467, 45 Pac. 866 (conversations between the parties where a lawyer is present as the adviser of one or of both, not privileged as between them); 1902, *Harris v. Harris*, 136 id. 379, 69 Pac. 23 (communications with the opponent, not privileged); *D. C.*: 1894, *Olmstead v. Webb*, 5 D. C. App. 38, 51, 55 ("The object of the rule ceases . . . when the client or his representatives charge him [the attorney], either directly or indirectly, with fraud or other improper or unprofessional conduct"); *Ga.*: 1858, *Corbett v. Gilbert*, 24 Ga. 454, 459 (conversation between the plaintiff and the de-

fendant in an attorney's presence, admitted); *Ill.*: 1873, *Burnham v. Roberts*, 70 Ill. 19, 21, *semble* (bill in chancery made by the attorney for a while also attorney for B, excluded); 1885, *Lynn v. Lyerle*, 113 id. 128, 134 (communications when "both parties were present and what each said was communicated to the other as well as to the attorney," held not privileged); 1888, *Tyler v. Tyler*, 126 id. 525, 541, 21 N. E. 616 (similar); 1888, *Griffin v. Griffin*, 125 id. 430, 17 N. E. 782 (similar); 1900, *Funk v. Mohr*, 185 id. 395, 57 N. E. 2 (an attorney allowed to testify to the construction put by him on a contract made by him for one party with the other); *Ind.*: 1859, *Mave v. Baird*, 12 Ind. 318 (privilege not applicable where the attorney is sued by the client for negligent management and disobedience of instructions); 1863, *Bowers v. Briggs*, 20 id. 139 (privilege held applicable where C and D, as sureties on a note by B, consulted the attorney of A, who had begun suit on the note, to inquire as to confessing judgment; the consultation being independent of A and yet with a view to advise in the interest of C and D); 1875, *Seranton v. Stewart*, 52 id. 68, 79 (the wife's consultation of the husband's attorney regarding personalty purchased by the proceeds of her realty, held to make him her attorney); 1887, *Hanlon v. Doherty*, 109 id. 37, 44, 9 N. E. 782 (conversation with a joint attorney, both parties being present, held not privileged); 1888, *Colt v. McConnell*, 116 id. 256, 19 N. E. 106 ("When both parties are present," there is no privilege); *Ia.*: 1895, *Wyland v. Griffith*, 96 Ia. 24, 64 N. W. 673 (an agreement between plaintiff and defendant, made in the presence of the latter's attorney, not privileged); *Kan.*: 1893, *Sparks v. Sparks*, 51 Kan. 195, 201, 32 Pac. 892 (an attorney drafting a deed for both parties and in the presence of both; not privileged); *Ky.*: 1901, *Taylor v. Roulstone*, — Ky. —, 61 S. W. 354 (joint attorney; communications not privileged as between the parties); 1902, *Smick v. Beswick*, — id. —, 68 S. W. 439 (statements by the clients of a joint attorney, in each other's presence, in a controversy between them, held admissible); *Mass.*: 1902, *Thompson v. Cashman*, 181 Mass. 36, 62 N. E. 976 (communications to a joint attorney, not privileged, as between the parties); *Mich.*: 1886, *Cady v. Walker*, 62 Mich. 157, 28 N. W. 805 (communication with a joint attorney in each other's presence, held not privileged); *Minn.*: 1901, *Shove v. Martine*, 85 Minn. 29, 88 N. W. 254 (communications to a joint attorney, not privileged as between the parties); *Mo.*: 1858, *Hull v. Lyon*, 27 Mo. 570, 576 (consultation by M., under whom the defendant claimed, with the common attorney of M. and plaintiff, both parties being present, held privileged as against the plaintiff; no precedent cited); *Nebr.*: 1886, *Clay v. Tyson*, 19 Nebr. 530, 26 N. W. 240 (communication to an attorney already employed in adverse interests, and nevertheless knowingly employed by the plaintiff, held not privileged);

between A and B; since there was no secrecy between them at the time of communication. (2) A communication by A to X as A's attorney, X afterwards becoming A's party-opponent (as, in a suit for fees or for negligence) is not privileged; since there was no secrecy as between them at the time of communication.⁴ (3) A communication by A to X as A's attorney, X being then also the attorney of B, now become the party-opponent, is ordinarily privileged, because of the relation of X towards A. Nor does the fact of A's knowledge that X is already B's attorney, nor the fact of B's being already adversely interested, destroy the privilege; for, although X ought not to undertake to act for both in any matter where there is a possibility of adverse interests, none the less is A protected by reason of the relation. In practice, difficulty often will arise here in distinguishing this situation from that of (1) *supra* and that of (5) *infra*, in either of which the privilege exists. For example, when a *cestui* employs the attorney for the trustee to report upon the investments, does the case fall under (1) or (3)?⁵ Again, a mortgagor communicates with the mortgagee's attorney, who has threatened to foreclose, in regard to obtaining a second mortgage; does the case fall within (3) or (5)?⁶ (4) In the foregoing case, if A consults X as his attorney, with the express purpose of inducing him, while B's attorney, to act adversely to B, the communication would clearly cease to be privileged; for, by a former part of the principle (*ante*, § 2298), the privilege cannot cover communications designed to achieve a fraud. (5) X being the attorney of B, the party-opponent, A consults X as B's attorney (as, when B is suing A upon a note, and A comes to ask for delay); here, the privilege clearly does not exist, for there is no relation of legal adviser on X's part to A. (6) In the same situa-

but here the employment was merely to close up accounts, and not for litigation); 1891, *Nelson v. Becker*, 32 id. 99, 48 N. W. 962 (communication to one already employed, unknown to the client, by the opponent, held privileged); 1898, *David Adler & S. C. Co. v. Hellman*, 55 id. 266, 75 N. W. 877 (communications with both parties present, not privileged); 1903, *Jahnke v. State*, — id. —, 94 N. W. 158 (communication by one of two joint defendants under arrest, to their joint attorney, held privileged); *Nev.*: 1895, *Livingston v. Wagner*, 23 Nev. 53, 42 Pac. 290 (communications to attorney of both parties, not privileged); *N. J.*: 1884, *Gulick v. Gulick*, 38 N. J. Eq. 402, 39 id. 516 (communication to an attorney who was the joint adviser of both parties, held not privileged); 1896, *Roper v. State*, 58 N. J. L. 420, 33 Atl. 969 (an interview between the plaintiff and the defendant, the former's counsel being present, held not privileged for the defendant); *N. Y.*: 1864, *Whiting v. Barney*, 30 N. Y. 330, 343 ("Both parties being present, there was nothing confidential in the communication"; three judges dissenting on various grounds); 1871, *Britton v. Lorenz*, 45 id. 51, 57 ("Where the communications are made in the presence of all parties to the controversy, they are not privileged . . . as to either of these parties"); 1877, *Hebbard v. Haughian*, 70 id. 54, 61, *semble* (an attorney not

privileged as to directions given him at a transaction with both parties); 1891, *Hurlburt v. Hurlburt*, 128 id. 420, 424, 28 N. E. 651 (like *Britton v. Lorenz*); 1901, *Doheny v. Lacy*, 168 id. 213, 61 N. E. 259 (communications to a joint attorney, not privileged as between the parties); *N. C.*: 1888, *Michael v. Foil*, 100 N. C. 178, 6 S. E. 264 ("a communication made to counsel by two defendants is not privileged from disclosure in a subsequent suit between the two"); *Pa.*: 1888, *Goodwin G. S. & M. Co.'s Appeal*, 117 Pa. 514, 522, 537, 12 Atl. 736 (conversations with a joint attorney, in each other's presence, held not privileged); 1898, *Kremer v. Kister*, — id. —, 40 Atl. 1008 (an agreement between parties and counsel at a former trial regarding the verdict, held not privileged); *Tex.*: 1873, *Allen v. Root*, 39 Tex. 589, 593, 597 (a communication from the opponent in the suit, held not privileged); *Va.*: 1888, *Hall v. Rixey*, 84 Va. 790, 6 S. E. 215 (a conversation with the opponent held not privileged).

⁴ *Chant v. Brown*, *Cleave v. Jones*, Eng., *Nave v. Baird*, Ind., *supra*.

⁵ *Tugwell v. Hooper*, *Mason v. Catley*, R. v. *Avery*, Eng., *Scranton v. Stewart*, Ind., *supra*.

⁶ *Marston v. Downes*, *Ross v. Gibbs*, Eng., *Bowers v. Briggs*, Ind., *Clay v. Tyson*, Nebr., *supra*.

tion, B is also present; this is also not within the privilege, for the additional reason of lack of confidentiality (*ante*, § 2311). So, too, if A's attorney Y be also present, the case is no different. (7) X being the attorney of A, and the opponent B being also present, A's communication to X is not privileged, for the reasons already noted (*ante*, § 2311).

Of these various situations, those of (6) and (7) are the commonest subject of rulings. Upon these there can be no doubt or practical difficulty, for the principle of confidentiality (*ante*, § 2311) disposes of them.

§ 2313. **Identity of Client or Purpose of Suit.** The identity of the attorney's client, or the name of the real party in interest, will seldom be a matter communicated in confidence; for the procedure of litigation ordinarily presupposes a disclosure of these facts. Furthermore, so far as a client may in fact desire secrecy and may be able to secure action without appearing as a party to the proceedings, it would be improper to sanction such a wish. Every litigant is in justice entitled to know the identity of his opponents. He cannot be obliged to struggle in the dark against unknown forces. He has by anticipation the right, in later proceedings, if desired, to enforce the legal responsibility of those who may have maliciously sued or prosecuted him or fraudulently evaded his claim. He has as much right to ask the attorney "Who pays your fees?" as to ask the witness (*ante*, § 966), "Who maintains you during this trial?" Upon the analogy of the principle already examined (*ante*, § 2298), the privilege cannot be used to evade a client's responsibility for the use of legal process; and if it is necessary for that purpose to make a plain exception to the rule of confidence, then it must be made.

On the other hand, the litigant is not entitled to ask any more than serves to fix the client's identity. A communication as to the nature of the title claimed, or the capacity in which suit was brought, or the ultimate motive of the litigation, is equally protected with others, so far as any policy of the privilege is concerned. Here, however, as always, there may have been in the nature of the communication nothing confidential, — as where the claim put forward in former litigation is inquired of; and in such cases the privilege falls away. Such seems to be the correct distinction for this much-mooted class of cases. There is not entire harmony in the rulings; but no doubt much ought to depend upon the circumstances of each case.¹

¹ *England*: 1721, *Gynn v. Kirby*, 1 Stra. 402 (the attorney for the plaintiff was summoned to produce his client, where the defendant claimed that the client was fictitious); 1740, *R. v. Watkinson*, 2 id. 1122 (a solicitor not compelled to speak to the identity of a client signing an answer in chancery; but the reporter adds, "*quære*, for this was to a fact in his own knowledge and no matter of secrecy committed to him by his client"); 1776, *Duchess of Kingston's Trial*, 20 How. St. Tr. 613 (*contra* to the preceding case; cited *ante*, § 2309); 1823, *Studdy v. Sanders*, 2 Dowl. & R. 347 (testimony to the identity of parties in two causes, not privileged, "because it was

a fact easily cognizable to the witness and to many other persons, without any confidence on the subject being reposed in him"); 1824, *Foot v. Hayne*, 1 C. & P. 545, 546 (in proving the defendant's conduct, the fact that he had on a certain day applied to counsel to retain him was held privileged); 1829, *Levy v. Pope*, 1 M. & M. 410 (who was the party employing him, held not privileged); 1834, *Beckwith v. Benner*, 6 C. & P. 681, 682 (an attorney allowed to be asked whether the defendants, charged as executors, had employed him in that character); 1841, *Jones v. Jones*, 9 M. & W. 75, *Parke, B.* (an attorney may disclose the client's name for

§ 2314. **Execution of a Will or Deed; Temporary Confidentiality.** It has already been noticed (*ante*, § 2309) that the fact of *execution* of a *deed* has commonly been declared to be without the privilege, partly because it was not a subject of communication at all, and partly because, if a communication, it was not impliedly a confidential one. On the other hand, the *contents* of the deed are generally within the privilege (*ante*, § 2308). No further examination of the principle as applied to deeds is here necessary.

But for *wills* a special consideration comes into play. Here it can hardly be doubted that the execution and especially the contents are impliedly desired by the client to be kept secret during his lifetime, and are accordingly a part of his confidential communication. It must be assumed that during that period the attorney ought not to be called upon to disclose even the fact of a will's execution, much less its tenor. But, on the other hand, this confidence is intended to be temporary only. That there may be such a qualification to the privilege is plain.¹ That it appropriately explains the client's

identification); 1855, *Forshaw v. Lewis*, 1 Jur. N. s. 263 (letters merely showing "the existence of the relation of attorney and client," held not privileged); *Canada*: 1848, *Beamer v. Darling*, 4 U. C. Q. B. 249 (trespass for causing an arrest under a writ; the attorney compelled to testify who employed him to sue out the writ); *Ont.* Rules of Court 1897, § 143 (a solicitor must on demand disclose the name and abode of the plaintiff); *Man. Rev. St.* 1902, c. 40, Rule 178 (every solicitor of record for a claimant shall on demand disclose "the profession or occupation and the place of abode" of the plaintiff); *United States*: 1880, *Mobile & M. R. Co. v. Yeates*, 67 Ala. 164, 168 (whether suits were defended on instructions from M., held not privileged); 1869, *Satterlee v. Bliss*, 36 Cal. 489, 507 (disclosure of "the character in which the client employed him," held compellable; doubting *Chirac v. Reinicker*, U. S., *infra*); 1857, *Martin v. Anderson*, 21 Ga. 301, 308 (an attorney held compellable to answer whether A. was his client in the cause, or had given him instructions to sue, or was dead, or was a fictitious person); 1867, *Stephens v. Mattox*, 37 id. 289, 291 (ejectment; the plaintiff's attorney held compellable to state whether the plaintiff had employed him, but not to state whether the employment was to sue for the plaintiff individually or as administrator); 1898, *Alger v. Turner*, 105 id. 178, 31 S. E. 423 (whether he had authority from A. as client to begin a suit, not privileged); 1828, *Cormier v. Richard*, 7 Mart. N. s. La. 177 (that the attorney was employed to resist a claim on a certain ground, held "not a secret confided to the attorney, since he was to spread the opposition on the record"); 1860, *Shaughnessy v. Fogg*, 15 La. An. 330 ("the attorney may be interrogated as to who is his client; he may also be asked through whose agency or in what manner and at what time he was retained"); 1839, *Wheeler v. Hill*, 16 Me. 329, 333 (disclosure by the attorney "that B. employed him," held compellable, but nothing as to the purpose of instituting the suit); 1841, *Gower v. Emery*,

18 id. 79, 83 (disclosure compelled of the fact of employment by B. and S.); 1882, *Alden v. Goddard*, 73 id. 345, 348 (the privilege does not forbid testimony to the client's signing a bill in equity, in which he stated his place of residence); 1833, *Brown v. Payson*, 6 N. H. 443, 448 ("there is no right in any one to employ an attorney in court and say that the attorney is privileged from disclosing who sent him there"); 1878, *Harriman v. Jones*, 58 id. 328 (similar); 1846, *Levers v. Van Buskirk*, 4 Pa. St. 309, 316 (privilege held not applicable to the attorney's testimony that the same title was in question in a former trial); 1848, *Beeson v. Beeson*, 9 id. 279, 281, 301 (an attorney held compellable to testify who as the real party in interest employed him); 1853, *Miller v. Weeks*, 22 id. 89, 92 (an attorney held not compellable to testify that the plaintiff was a mere trustee for W. & Co. who were the real bringers of the suit; no precedent cited); 1826, *Chirac v. Reinicker*, 11 Wheat. 280, 294 (trespass for mesne profits; to prove the real party in interest in the prior ejectment suit, a question as to the defendant's retainer, as landlord of the premises, of certain counsel, was held privileged, as involving "a disclosure of the title and claim set up"; though a question merely as to the fact of retainer was intimated to be without the privilege); 1901, *U. S. v. Lee*, 107 Fed. 702 (an attorney compelled to disclose the name and residence of one who had retained him for the defence, but not that person's interest in the defence); 1852, *Wetherbee v. Ezekiel*, 25 Vt. 47 (information as to two actions being "commenced for the same cause of action," held privileged); 1901, *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393 (the authorization of the attorney to settle a claim, held not privileged); 1881, *Moats v. Rymer*, 13 W. Va. 642, 645 (the fee agreed to be received by the attorney, being material to affect his credit as a witness for his client, held not privileged).

¹ 1883, *Snow v. Gould*, 74 Me. 540, 543 ("That which may be private at a time may

relation with an attorney *drafting a will* seems almost equally clear. It follows, therefore, that after the *testator's death* the attorney is at liberty to disclose all that affects the execution and tenor of the will.² The only question could be as to communications tending to show the invalidity of the will, *i. e.* from which a circumstantial inference could be drawn that the testator was insane or was unduly influenced. It may be conceded that the testator would not wish the attorney to assist in any way the overthrow of the will. But the answer is that such utterances were obviously not confidentially made with reference to the secrecy of the fact of insanity or undue influence, for the testator of course did not believe those facts to exist and therefore could not possibly be said to have communicated them.³ As to the tenor and execution of the will, it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death; and, with this general intention covering the whole transaction, it is impossible to select a circumstance here or there (such as the absence

not be private at an after-time"; holding that a client's letter to an attorney instructing divorce proceedings was not privileged, after divorce obtained, in a controversy between the attorney and the client concerning compensation).

² 1851, *Russell v. Jackson*, 9 Hare 387, 392 (Wigram, V. C., held that "in the cases of testamentary dispositions, the very foundation on which the rule proceeds seems to be wanting"; here allowing disclosure of a secret trust in devisees); 1901, *Nelson's Estate*, 132 Cal. 182, 64 Pac. 294 (the attorney drawing a will, admitted to testify to his instructions; testator's employment of him operating as a waiver); 1894, *Olmstead v. Webb*, 5 D. C. App. 38, 50 (the attorney drafting a will, allowed to testify that he conformed to the testator's instructions; *Russell v. Jackson* followed); 1898, *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100 (probate of a will; the attorney drawing it may after the testator's death testify to "what passed between her when he read over to her" the will; the statute of 1887, Code § 5271, does not change this); 1892, *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726 (the testator's instructions to the attorney for drawing the will, held not privileged, since after the testator's death "the case does not fall within the reason of the rule"); 1836, *Graham v. O'Fallon*, 4 Mo. 338 (the attorney drawing a will, allowed to testify to the drafting, the reading over, and the contents; no principle stated); 1861, *Daniel v. Daniel*, 39 Pa. 191, 211 (quoted *ante*, § 2306); 1865, *Blackburn v. Crawfords*, 3 Wall. 175, 184, 192 (legitimacy and inheritance; a testator's statements to his attorney, in the preparation of a will, concerning the children's legitimacy, the will describing them as natural children, held not privileged, partly because the protection of the client under the privilege was not affected by corroboration of the will, and partly because the assertions in the will indicated that the statements were not confidentially intended; *Clifford, J.*, diss.); 1898, *Fayerweather v. Ritch*, C. C., 90 Fed. 13, *semble* (an attorney prepar-

ing a will may testify to its contents as executed, because otherwise perhaps "the whole object of a testator's action would be destroyed"); s. c. on appeal, 1899, *Butler v. Fayerweather*, 33 C. C. A. 625, 91 Fed. 458 (an attorney compellable at common law, *semble*, to disclose the contents of a lost will and the fact of due execution, where he drew but did not attest it); 1903, *Downing's Will*, 118 Wis. 581, 95 N. W. 876 (attorney drafting a will, held not privileged as to the facts of execution). *Contra*: 1893, *Gurley v. Park*, 135 Ind. 440, 442, 35 N. E. 279 (testimony to sanity, by the attorney drawing the will, privileged); 1888, *Loder v. Whelpley*, 111 N. Y. 239, 248, 18 N. E. 874 (the attorney drafting a will under instructions from the testator, held privileged as to conversations bearing on the issue of undue influence, etc.; "he acts in that capacity, although, asking no questions and without advising, he does nothing more than to reduce those directions to writing"); 1898, *Fayerweather v. Ritch*, C. C., 90 Fed. 13 (under N. Y. St. 1893, c. 295, which amended the Code, quoted *ante*, § 2292, in consequence of the ruling in *Coleman's Will*, cited *post*, § 2315, the privilege still does not apply to the testimony of the drafting attorney to the execution and contents of a will, even where he is not an attesting witness, because the document "ceased to be confidential when it was executed"; overruled on appeal); s. c. on appeal: 1899, *Butler v. Fayerweather*, 33 C. C. A. 625, 91 Fed. 458 (an attorney not attesting the will, but drawing it, held not compellable under the N. Y. Code as amended, to disclose the contents or execution of a lost will).

Still other rulings reach the conclusion stated above, in the text, on the ground that either executor or heir has the *right of waiver* on behalf of the deceased: *post*, § 2329. Some of the rulings above cited meant perhaps to proceed on that principle.

³ This is pointed out in *Daniel v. Daniel*, Pa., quoted *ante*, § 2306.

of one witness in another room) and argue that the testator would have wanted it kept secret if he had known that it would tend to defeat his intended act. The confidence is not apportionable by a reference to what the testator might have intended had he known or reflected on certain facts which now bear against the will.

§ 2315. **Same: Attorney as Attesting Witness.** When the attorney is made a witness to *attest the execution* of a document (and not merely to draft it), there is no confidence contemplated, and therefore no privilege for the occasion when the attorney is called upon to fulfil the function thereby assumed. He cannot be an attesting witness and yet not attest:

1803, *Ellenborough, L. C. J.*, in *Robson v. Kemp*, 5 Esp. 52, 54: "If an attorney puts his name to an instrument as a witness, he makes himself thereby a public man, and no longer clothed with the character of an attorney."

1888, *Ruger, C. J.*, in *Coleman's Will*, 111 N. Y. 220, 226, 19 N. E. 71: "An examination of the will itself, as well as the evidence of all of the witnesses present on the occasion of the execution, concur in establishing the fact that the testator requested both Hughes and Northrup to sign the attestation clause of his first as well as of his second will, as witnesses thereto. That request implies not only information as to the necessity of such signatures to the validity of the instrument executed, but also knowledge of the obligations which they assumed in respect to the proof thereof after his death. He must have been aware that his object in making a will might prove to be ineffectual unless these witnesses could be called to testify to the circumstances attending its execution, including the condition of his mental faculties at that time. . . . It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute, and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts, learned through their professional relations, upon a judicial proceeding to take place after his death? We think not."

Accordingly, it has always been held that an attorney who signs in attestation of a *deed* is compellable to testify.¹ The same consequence ensues for a *will*,²

¹ *Eng.*: 1778, *Doe v. Andrews*, Cowp. 845 ("by attesting an instrument, a man pledges himself to give evidence of it, whenever he is called upon"); 1793, *Sandford v. Remington*, 2 Ves. Jr. 189 (deed; cited *ante*, § 2309); 1803, *Robson v. Kemp*, 5 Esp. 52 (destroyed power of attorney; the attorney's attestation requires disclosure of "all that passed at the time respecting the execution of the instrument; but not what took place in the concoction and preparation of the deed"); 1830, *Grindall v. Grindall*, K. B., Butterworth's Rep. 63, Lord Tenterden, C. J.; 1833, *Greenough v. Gaskell*, 1 Myl. & K. 98, 104 (not privileged "where the attorney made himself a subscribing witness and thereby assumed another character for the occasion, and adopting the duties which it imposes became bound to give evidence of all that a subscribing witness can be required to prove"); 1841, *Mackenzie v. Yeo*, 2 Curt. Eccl. 866, 868 ("the witnessing the execution of a deed being no part of the duty of a solicitor," he is

not privileged for what he knows as witness); *U. S.*: 1848, *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 596 (an attorney attesting a power of attorney, held compellable to testify to matters connected with the execution of the instrument, but not to conversations as to the purpose of the judgment to be confessed by the power).

² 1895, *Wax's Estate*, 106 Cal. 343, 347, 39 Pac. 624; 1895, *Mullin's Estate*, 110 id. 252, 42 Pac. 645; 1898, *O'Brien v. Spalding*, 102 Ga. 490, 31 S. E. 100 (repudiating the theory of waiver, Code § 5271 prohibiting a waiver); 1894, *Taylor v. Pegram*, 151 Ill. 106, 114, 37 N. E. 837 (an attorney also drawing the will; allowed to speak as to undue influence); 1893, *Pence v. Waugh*, 135 Ind. 143, 153, 34 N. E. 860 (an attorney also drawing the will; not privileged as to proof of the will, including sanity); 1900, *Kern v. Kern*, 154 id. 29, 55 N. E. 1004 (contents of a lost will, in an issue between heirs and devisees, the attorney being

not only as to the tenor and the act of execution, but also as to the circumstances affecting sanity and influence; for, since the intention at large negatives confidence, no discrimination can be made, as already noticed (*ante*, § 2314), for particular facts which now turn out to invalidate the will. It may be added that this generally accepted result can hardly be reached through predicated a *waiver by the testator*,³ for there cannot be a waiver of that which never came into existence; the true explanation is that no confidence was intended to be instituted. On the other hand, if it could be assumed that there had been a confidence and therefore a privilege, it could then still be maintained, in testamentary contests, that both executor and heir have the right of waiver (*post*, § 2329).

5. "By the client"

§ 2317. **Privilege not applicable to Knowledge acquired by the Attorney from Third Persons, unless as Agents of the Client; Who are Agents.** 1. The privilege is designed to secure subjective freedom of mind for the client in seeking legal advice (*ante*, § 2291). It has no concern with other persons' freedom of mind, nor with the attorney's own desire for secrecy in his conduct of a client's case. It is therefore not sufficient for the attorney, in invoking the privilege, to state that the information came somehow to him while acting for the client, nor that it came from some particular *third person* for the benefit of the client.¹

a subscribing witness, held not privileged; distinguishing *Gurley v. Park*, *ante*, § 2314; 1894, *Denning v. Butcher*, 91 Ia. 425, 434, 59 N. W. 69 (attorney also drawing the will; not privileged as to "all facts and circumstances attending its execution," including sanity); 1901, *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217 (attorney drafting and witnessing a will, allowed to be asked whether he made the contents known to testatrix); 1888, *Coleman's Will*, 111 N. Y. 220, 226, 19 N. E. 71 (an attorney attesting a will, held not privileged as to the testator's conduct and conversation at the time of execution, on the theory of waiver; quoted *supra*); 1889, *Alberti v. R. Co.*, 118 id. 77, 85, 23 N. E. 35 (preceding case approved); 1893, *McMaster v. Scriven*, 85 Wis. 162, 167, 55 N. W. 149 (the attorney who had also drawn the will, allowed to speak of "any matter in relation to the will and its execution," including the maker's mental condition).

³ As suggested in *Mullin's Estate*, Cal., *Coleman's Will*, N. Y., *infra*.

¹ *England*: 1806, *Spenceley v. Schulenburg*, 7 East 357 (L. C. J. Ellenborough said that the privilege extended only "to confidential communications from his client, and not to communications from collateral quarters"); 1835, *Sawyer v. Birchmore*, 3 Myl. & K. 572 (Pepys, M. R.; letters communicated to the solicitor "from collateral quarters," held not privileged); 1860, *Marsh v. Keith*, 1 Dr. & Sm. 342, 348, 6 Jur. n. s. 1182 (*Kindersley*, V. C.; plea that

the knowledge had been acquired "by virtue of the solicitor's employment as solicitor," held insufficient, since it might have been obtained "without any communication from or consultation with the client"); 1863, *Ford v. Tennant*, 32 Beav. 162, 168 (*Romilly*, M. R., held the privilege to cover communications with "all other persons with whom the solicitor must communicate in order to conduct the cause," but not to "information derived from third parties, from strangers, or from the opponents of the client"; repudiating the *obiter dictum* in *Greenough v. Gaskell* covering all communications "either from a client or on his account or for his benefit"); *United States*: 1854, *Patten v. Moor*, 29 N. H. 163, 166 (an attorney present at the execution of a mortgage by M. and G. to the client P., the latter not being present, held compellable to testify to the execution, since the facts were "not communicated or confided to him by his client, although he became acquainted with them while engaged in his professional duty as the attorney or counsel of his client"); 1803, *Baker v. Arnold*, 1 Caines 258, 266, *semble*; 1821, *Johnson v. Davenport*, 19 John. 135 (an attorney held compellable to testify to his client's signature, if he "became acquainted with it in any other way [than by the client's communication], though it was subsequent to his retainer"); 1834, *Bogert v. Bogert*, 2 Edw. Ch. 399, 403; 1844, *Crosby v. Berger*, 11 Paige 377, *Walworth*, C. ("information derived from other persons or other sources, although such

2. On the other hand, the client's freedom of communication requires a liberty of employing other means than his own personal action. The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege. This of course includes communications through an *interpreter*,² and also communications *through a messenger* or any other *agent of transmission*,³ as well as communications *originating with the client's agent* and made to the attorney.⁴ It follows, too, that the communications of the *attorney's agent* to the attorney are within the privilege, because the attorney's agent is also the client's sub-agent and is acting as such for the client.⁵

§ 2318. **Documents of the Client existing before Communication; General Liability to Production by Discovery, distinguished.** At this point it is necessary to recall certain principles of discovery, otherwise established, which complicate the application of the foregoing principle as to agents'

information is derived or obtained while acting as attorney or counsel, is not privileged"; 1832, *Rogers v. Dare*, Wright 136. *Contra*: 1894, *Freeman v. Brewster*, 93 Ga. 649, 21 S. E. 165 (the privilege held to cover not only all statements by the client, but also "all facts knowledge of which he obtained concerning his client's case pending his employment"; Code § 5271 seems not literally to justify this).

The question *who is the client* arises here, but is usually a question of fact: 1851, *Warde v. Warde*, 15 Jur. 758; 1859, *Shean v. Philips*, 1 F. & F. 449; 1858, *Allen v. Harrison*, 30 Vt. 219 (information given by one who was a nominal party only, held not a professional consultation on the facts). Compare the cases cited *ante*, § 2312.

² 1791, *Du Barré v. Livette*, Peake N. P. 77 (conversation had through an interpreter with the attorney, the client being a Frenchman and the attorney not understanding French, held privileged; the interpreter was here the prohibited witness); 1792, *Wilson v. Rastall*, 4 T. R. 753, 756 (L. C. J. Kenyon said, "In *Madam Du Barré's* case, I said at the trial that the interpreter was the organ of the attorney"); 1814, *Parker v. Carter*, 4 Munf. 273, 287.

³ 1821, *Walker v. Wildman*, 6 Madd. 47 (the privilege held applicable to communications "through the intervention of a third person"); 1834, *R. v. Brewer*, 6 C. & P. 363, 365 (Park, J.; a letter by an accused in jail, requesting a friend to consult a solicitor, held not privileged); 1839, *Bunbury v. Bunbury*, 2 Beav. 173 ("The necessity which arises of transmitting such communications through another party renders it privileged"; but here the communication was held not "professional or confidential"); 1849, *Reid v. Langlois*, 1 McN. & G. 627, 638 (letters by the defendant to his agent for communication to the legal adviser, held privileged, irrespective of the necessity of employing an agent); 1851, *Glyn v. Caulfield*, 3 id. 463, 473 (preceding case approved); 1862, *Hooper v. Gumm*, 2

J. & Hem. 602, 606 (similar); 1876, *Anderson v. Bank*, L. R. 2 Ch. D. 644, 649 (Jessel, M. R.: "He may employ a third person to write the letter, or he may send the letter through a messenger, or he may give a verbal message to a messenger").

⁴ 1845, *Carpmael v. Powis*, 9 Beav. 16, 20, on appeal in 1 Phil. Ch. 687 (communication "from the brother of the client as representing her," and as the medium of communication, held privileged; nor, so far as the solicitor is concerned, is it essential that an agent was a necessity under the circumstances); 1851, *Russell v. Jackson*, 9 Hare 387, 391 (the privilege is the same for the agent's communications "as if had with the principal"); 1862, *Hooper v. Gumm*, 2 J. & Hem. 602, 606 (agent's letters to the solicitor, protected); 1887, *Fire Ass'n v. Fleming*, 78 Ga. 733, 3 S. E. 420 (client's agent's correspondence, protected); 1855, *Maas v. Bloch*, 7 Ind. 202 (client's agent's conversation with the attorney, held privileged); 1891, *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483 (husband as the agent of the wife to consult; privilege recognized); 1895, *Frank v. Morley's Estate*, 106 Mich. 635, 64 N. W. 577 (where M. employed the attorney on F.'s behalf to draw a petition for F., a communication by M. in F.'s presence was held not privileged); 1879, *Scales v. Kelley*, 2 Lea 706 (communications by the client's wife and daughter seeking to engage counsel for the client, held privileged).

⁵ 1844, *Steele v. Stewart*, 1 Phil. Ch. 471, 475 (communications by the solicitor's agent to the client, and also to the solicitor, held privileged; here there was a necessity, the witnesses being in India and an agent being sent to collect evidence); 1850, *Goodall v. Little*, 1 Sim. n. s. 155, 163 (letters between the solicitor and an attorney, in a local jurisdiction, employed by the solicitor, held privileged); 1863, *Ford v. Tennant*, 32 Beav. 162, 168 (cited *supra*); 1876, *Jessel, M. R., in Anderson v. Bank*, L. R. 2 Ch. D. 644, 649.

communications. The principles of discovery are those already considered in detail (*ante*, §§ 1856–1859, 2219).

(a) In the first place, a document of the client existing before it was communicated to the attorney is not within the present privilege so as to be exempt from production (*ante*, § 2307). But a document which has *come into existence as a communication* to the attorney, being itself a communication, is within the present privilege (*ante*, § 2307). Documents of the latter sort are therefore *exempt from production* under a bill of discovery;¹ while documents of the former sort are not exempt from production under a bill of discovery or the modern statutory motion to produce,² although at common law the party as such would not have been compellable to produce. That is to say, at common law, he was protected in the first instance as party and in the second instance as client; while in chancery and under statutes he has ceased to be protected as party but is still protected as client. Only those documents, therefore, which he has created as a communicating client are now privileged. The application of this distinction would in any case lead obviously to certain fine discriminations; but when the principle of agent's communications (*ante*, § 2317) additionally comes into play, it will be seen that the various documents which may be made by agents on behalf of clients present infinitely varied openings for the doubt whether or not they came into existence in the ordinary course of the client's affairs or only with the intention of furnishing information to the attorney. Of this difficulty, the cases of reports of accidents by railway officers are a typical instance.³

(b) Secondly, the ordinary rule of discovery, by which a party, by *answers to interrogatories*, must disclose all facts on a bill of discovery, is subject to one limitation, namely, that the party need not before trial discover the *names of his witnesses*, nor the *tenor of their testimony* proving the facts of his own case (*ante*, § 1856). A prospective witness' communication may therefore be exempt from discovery before trial on this ground,⁴ while it would not be exempt merely as a communication to the attorney.⁵ The application of this distinction also may lead in particular cases to some doubt.

§ 2319. **Same: Conflict of the foregoing Principles, illustrated.** The result, in England, of the combined application of the foregoing principles (*ante*, §§ 2317, 2318) has led often to confusion of judicial language, in the following ways.¹

¹ 1852, *Cleave v. Jones*, 7 Exch. 421, 426 (an account made out by the client for the attorney's use in preparing a case for counsel, held privileged); 1878, *Southwark & V. W. Co. v. Quick*, L. R. 3 Q. B. D. 315, 318, 323 ("If a document comes into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice or of enabling him either to prosecute or defend an action, it is privileged, because it is something done for the purpose of serving as a communication between the client and the solicitor," even though the latter did not suggest its preparation, and even though he did not ultimately receive it; here applied to

exclude certain notes of interviews with expected witnesses, experts, etc.).

² 1886, *Chadwick v. Bowman*, L. R. 16 Q. B. D. 561 (copies, procured by a solicitor from third persons, of letters written by the client, held not privileged, the originals not having "come into existence for the purposes of the action").

³ *E. g.* *Woolley v. R. Co.*, *post*, § 2319; *Lyell v. Kennedy*, *ib.*, is the great modern case.

⁴ 1826, *Preston v. Carr*, 1 Y. & J. 175 (letters from witnesses, not compelled to be discovered).

⁵ Cases cited *ante*, § 2317.

¹ The rulings are as follows: *England*: 1831, *Whitbread v. Gurney*, 1 Younge 541, Exch.

(1) In applying the privilege for communications of *clients and their agents* or their attorneys' agents, the more clearly the communicator is a stranger

(L. C. B. Lyndhurst; letters between the parties themselves, with reference to their defence, held not privileged); 1833, *Greenough v. Gaskell*, 1 Myl. & K. 98, 102 (excluding book-entries, letters, and papers, made and received as solicitor acting for a client); 1835, *Curling v. Perring*, 2 id. 380 (Pepys, M. R., held that letters by a solicitor of the defendant to a person not a party but a material witness were privileged); 1836, *Storey v. Lord Lennox*, 1 Myl. & Cr. 525, 537 (documents obtained by the party himself in correspondence with third persons preparatory to litigation; L. C. Cottenham declined to express an opinion); 1840, *Dartmouth v. Holdsworth*, 10 Sim. 476 (solicitor's letters to a witness, held not privileged, unless shown to have been confidential); 1841, *Smith v. Fell*, 2 Curt. Eccl. 667, 670 (conversations by B. with F.'s solicitor, in F.'s presence and at F.'s request, relating to B.'s information on the matter for which the solicitor was employed, held privileged); 1841, *Mackenzie v. Yeo*, 2 Curt. Eccl. 866, 870 (memorandum of a communication by a subscribing witness to the solicitor, held before litigation begun but after legal advice sought, held not privileged; "there is no confidence between him and his client in this matter"; but letters from another attorney to the same solicitor, both being employed about the same cause, were held privileged); 1844, *Maden v. Vevers*, 7 Beav. 489 (documents made "in contemplation of litigation," but not for or by a legal adviser, not privileged); 1850, *Balguy v. Broadhurst*, 1 Sim. N. S. 111 (documents procured by the solicitor for the purpose of defence, held not privileged on that ground merely); 1850, *Goodall v. Little*, ib. 155, 161 (Lord Cranworth, V. C.; letters written by one co-defendant to another, with a view to enable the addressee to consult the solicitor upon them, held not privileged); 1851, *Glyn v. Caulfield*, 3 McN. & G. 463, 473 (L. C. Truro; letters written after suit begun, by and to the defendants, shareholders in a company, to and by other shareholders and directors, for the purpose of being communicated to legal advisers, held not privileged; *Goodall v. Little* approved); 1853, *Wright v. Vernon*, 1 Drew. 344, 350 (Kindersley, V. C.; extracts from a parish register "obtained by the defendants to enable them to conduct their defence," not privileged; but a statement of the supposed pedigree, made for instruction of counsel, held privileged); 1857, *Lafone v. Falkland Islands Co.*, 4 K. & J. 34 (Page-Wood, V. C.; report of an agent of the defendant, made in consequence of the solicitor's instructions to procure evidence, held privileged, as "procured for the purpose of being communicated to the solicitor" and to be used as evidence); 1857, *Betts v. Menzies*, 3 Jur. N. S. 885 (Page-Wood, V. C.; correspondence between co-defendants, held not privileged); 1858, *Colman v. Trueman*, 3 H. & N. 871 (breach of contract of sale; correspondence between the vendors, their broker, and their consignors, after the

alleged breach, held not privileged; yet, per Pollock, C. B., "it would be monstrous if an attorney could not write to a stranger for information respecting the suit, without being liable to have his correspondence called for"); 1859, *London Gaslight Co. v. Chelsea*, 6 C. B. N. S. 411, 424 (dispute as to gas supply; the defendants' officers' reports and records of consumption, etc., held not privileged, as not being "mere proofs collected by the defendants' attorney for the purpose of establishing their defence"); 1862, *Jenkyns v. Bushby*, L. R. 2 Eq. 547 (Kindersley, V. C.; letter by one defendant to another, with directions to send it on to their solicitor, held privileged); 1863, *Walsham v. Stainton*, 2 Hem. & M. 1, 4 (Page-Wood, V. C.: "Where the solicitor, in order to enable himself to advise on the matter, calls in some other person to assist and give his opinion," the privilege applies; here applied to schedules made by an accountant); 1863, *Ford v. Tennant*, 32 Beav. 162 (cited *ante*, § 2317); 1863, *Chartered Bank v. Rich*, 4 B. & S. 73 (letters between the plaintiff and its agents abroad, after dispute arisen, referring to the evidence and other information affecting proceedings against the defendant, held privileged, as "matters which would have been done by an attorney but for the distance of the place occasioning the necessity of employing an agent"); 1865, *Nicholl v. Jones*, 2 Hem. & M. 588, 596 (shortland notes, taken by the defendant, in prior litigation between the defendant and other persons, held not privileged; except as to "observations and notes made thereon"); 1867, *Baker v. R. Co.*, L. R. 3 Q. B. 91 (reports by a medical agent and another, after visiting the injured person at the defendant's request, but apparently before claim filed, held not privileged); 1869, *Ross v. Gibbs*, L. R. 8 Eq. 522 (Stuart, V. C.; reports from an agent of defendant, sent to collect evidence for the suit, held privileged, though the agent was not a legal adviser); 1869, *Woolley v. R. Co.*, L. R. 4 C. P. 602, 608 (reports as to an accident, made by the defendant's inspector in the course of his duty, held privileged, irrespective of litigation begun or anticipated; otherwise of reports from scientific men consulted as to the causes of the accident "with a direct view to litigation"; on the first point this ruling is unsound); 1870, *Cossey v. R. Co.*, 5 id. 146 (a medical officer's report, made to the defendant after claim filed by an injured person, and in consequence thereof, held privileged, as made "with a view to litigation or impending litigation"); 1872, *Fenner v. R. Co.*, L. R. 7 Q. B. 767 (reports made by a freight manager of the defendant, after claim for injury filed, and in consequence thereof, held not privileged); 1872, *McFarlan v. Rolt*, L. R. 14 Eq. 580 (documents passing between the defendant's solicitor and D., a person said to be "acting on behalf" of the defendant, before dispute arising, held privileged); 1874, *Skinner v. R. Co.*, L. R. 9 Exch. 298 (a medical officer's

to the parties, the more plainly he falls without the privilege; while the more markedly the relation of agent appears, the clearer the privilege is. On the

report, made to the defendant after claim by an injured person and in consequence thereof, held privileged; otherwise for a report made in the ordinary course of duty, "whether before or after action brought"; approving *Cooley v. R. Co.*; 1875, *Hutchinson v. Glover*, L. R. 1 Q. B. D. 141 (letters between the defendant and a third person, relating to information as to claims against the defendant, and written in consequence of letters of complaint from the plaintiff's attorney, held not privileged); 1876, *Bustros v. White*, ib. 423 (letters between the plaintiffs and their agents, relative to the plaintiffs' claim, held not privileged); 1876, *M'Corquodale v. Bell*, L. R. 1 C. P. D. 471 (communication by the representative of a third person to the plaintiff's solicitor, held privileged, on the ground that "documents obtained by a party or his solicitor with a view to and in contemplation of litigation either pending or anticipated, are protected"); 1876, *Pacey v. R. Co.*, L. R. 2 Exch. D. 440 (report of the defendant's medical officer, made after claim filed but before action brought, and based on an inspection consented to, held privileged); 1876, *Anderson v. Bank*, L. R. 2 Ch. D. 644, 647 (*Jessel, M. R.*; report by the defendant's agent, to the defendant, at the latter's request, without any suggestion to the former that it was for submission to a legal adviser, held not privileged; approved on appeal; *Ross v. Gibbs* repudiated; *L. J. James* declared that all that had been written as to the reason for the privilege would be "puerile nonsense if there had been that law . . . that any communication made by a person with a view to litigation, whoever the person is, must be protected"; *L. J. Mellish* discriminated between information from the defendant's own agent, as here, and information from indifferent persons as prospective witnesses); 1877, *Friend v. R. Co.*, L. R. 2 Exch. D. 487 (report of a medical man, examining an injured plaintiff under an order of Court obtained by the defendant, held privileged, as being made for the information of their solicitor); 1878, *The Theodore Körner*, L. R. 3 P. D. 162 (reports of surveyors of shipping, made to the plaintiff in order to prepare for making a claim against the ship for an injury to goods, held privileged); 1878, *Southwark & V. W. Co. v. Quick*, L. R. 3 Q. B. D. 315 (cited *ante*, § 2318); 1881, *Wheeler v. Le-Marchant*, L. R. 17 Ch. D. 675, 681 (documents by third persons are protected "where they have come into existence after litigation commenced or in contemplation and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation or of obtaining evidence to be used in such litigation or of obtaining information which might lead to the obtaining of such evidence"; but not, as here, a report from a surveyor as to the state of property, asked by the solicitor as preliminary to legal advice, but not with reference to litigation or actual dispute; in short, that "communications between a solicitor and

a third person in the course of his advising his client" are not as such privileged); 1882, *Nordon v. Defries*, L. R. 8 Q. B. D. 508 (shorthand notes, taken by the defendant in another action between the same parties touching the same subject, and in part for the purpose of informing counsel in subsequent litigation, held privileged; approving *M'Corquodale v. Bell*); 1883, *The Palermo*, L. R. 9 P. D. 6 (copies of depositions of the crew of the plaintiff's ship, taken at the instance of the solicitor for the purpose of litigation, held privileged); 1883, *Kennedy v. Lyell*, L. R. 23 Ch. D. 387, 402, 407, 27 id. 1, 26; s. c. on appeal, *Lyell v. Kennedy*, L. R. 9 App. Cas. 81, 87, 93 (the party's knowledge or belief, derived from reading a brief of facts or other report of facts ascertained by the solicitor and furnished to the party, held privileged; "as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also"; "a man ought not to be called upon to state what his belief is, founded upon information, which information is privileged"; furthermore, documents obtained by a defendant, "at the instigation of a solicitor," "for the purpose of defending himself against various claimants," and placed in his solicitor's hands, are privileged; "a collection of records may be the result of professional knowledge research and skill; . . . it is the solicitor's mind, if that be so, which has selected the materials; . . . you cannot have disclosure of them without asking for the key to the labor which the solicitor has bestowed in obtaining them"; here, copies of burial certificates and other records, of inscriptions on tombstones, and photographs of houses, were held privileged); 1885, *Pearce v. Foster*, L. R. 15 Q. B. D. 114, 118 (documents "brought into existence for the purposes or in the course of communications between solicitor and client" held privileged); 1884, *Bristol v. Cox*, L. R. 26 Ch. D. 678, 682 (reports by committees of the corporation, made in contemplation of and reference to the litigation in hand, held privileged; "this corporation cannot in its corporate capacity either think or write or act except by certain machinery which is so to speak extraneous of itself"); 1885, *Rawstone v. Preston Co.*, 30 id. 116 (shorthand notes of evidence and speeches at a prior arbitration on another matter between the same parties, held not privileged); 1886, *Chadwick v. Bowman*, L. R. 16 Q. B. D. 561 (cited *ante*, § 2318); 1887, *Robson v. Worswick*, L. R. 38 Ch. D. 370 (shorthand notes taken by the defendants, in prior litigation between the defendants and other persons, held not privileged, because taken in open court); 1887, *Young v. Holloway*, L. R. 12 P. D. 167 (letters sent to the client by third persons to be communicated to her solicitor to help the cause, held privileged; also anonymous letters sent to the solicitor, "with a view to the conduct of the action," but not on his express

other hand, in applying the rule of discovery exempting *prospective witnesses'* statements (*ante*, § 2318, *b*), the more clearly the person is an indifferent witness, the more plain is the exemption from discovery; while the more marked his capacity as a mere agent of the party, the plainer the liability to disclose. The two principles thus pull in opposite directions. What helps to apply the one exemption will tend to disfavor the other. Whether the judicial intention is to invoke the one or the other is not always plain to see. A ruling which is sound enough from the one point of view would be unsound from the other; and it becomes difficult to determine whether the ruling harmonizes or conflicts with either principle.²

(2) Furthermore, under both of these principles, the circumstance that *litigation has begun*, or not, is commonly important. That is, whether under the one principle (the exemption from discovery) the person is to be deemed to have written as prospective witness will often be determined by the circumstance that litigation has begun or not; and whether under the other principle (the privilege for communications to an attorney) he is to be deemed to have written as the client's agent for communication to the attorney, will also often be dependent on the same circumstance. But, on the other hand, the privilege at large was (in England) until 1870 in a state of controversy involving the very same circumstance (*ante*, § 2294), *i. e.* whether the privilege was restricted to litigious communications or not. Thus the rulings which helped to repudiate that restriction for the privilege at large helped at the same time to confuse the discussion of it in its present relation to the boundaries of ordinary discovery.³

request or inquiry; Bowen, L. J., thought that the solicitor's employment was an implied invitation on his client's behalf to send information); 1893, *Learoyd v. Halifax J. S. B. Co.*, 1 Ch. 687 (shorthand writer's notes of a private examination of witnesses by the solicitor, at the instance of the plaintiff, a trustee in bankruptcy, with a view to possible litigation, held privileged; *Anderson v. Bank and Wheeler v. LeMarchant* discussed); 1895, *Re Strachan*, 1 Ch. 439, 444 (the privilege does not extend to documents filed with a master in lunacy); 1898, *Calcraft v. Guest*, 1 Q. B. 759 (documents prepared for former litigation over the same rights, privileged; "Wheeler v. LeMarchant was right, and Minet v. Morgan [*ante*, § 2294] was right too"); 1900, *Ainsworth v. Wilding*, 2 Ch. 315, 322 (notes made by a solicitor pending suit; opinion not clear); 1900, *R. v. Bullivant*, 2 Q. B. 163 (*Wheeler v. LeMarchant* followed).

Canada: B. C.: 1896, *Van Volkenburg v. Bank of B. N. A.*, 5 Br. C. 4 (letters between bank managers; *Anderson v. Bank*, *supra*, followed); *Ont.*: 1875, *Toronto G. R. Co. v. Taylor*, 6 Ont. Pr. 227 (expert opinions on a patent, not procured in contemplation of the present litigation, not privileged); 1876, *Merchants' Bank v. Moffatt*, ib. 348 (correspondence between the plaintiff's agents, written at the advice of the solicitor, held privileged); 1883, *Guelph C. Co. v. Whitehead*, 9 id. 509 (documents procured by

the defendant's solicitor from third persons, for use in the cause, held privileged); 1883, *Canada C. R. Co. v. M'Laren*, 8 Ont. App. 564 (railway engine-driver's report in a repairs-book; question not decided); 1887, *Betts v. Grand Trunk R. Co.*, 12 Ont. Pr. 86, 634 (report of an investigation made by the defendant's officers immediately after the accident, held not privileged; following *Wheeler v. LeMarchant*, *supra*); 1892, *Donahue v. Johnston*, 14 id. 476 (correspondence between the defendant and a third person, written at the advice of the defendant's solicitor to obtain information, after litigation threatened by the plaintiff, held privileged); 1895, *Hunter v. Grand Trunk R. Co.*, 16 id. 385 (similar reports, made for the benefit of the defendant's solicitor in the suit, held privileged); 1902, *Platt v. Buck*, 4 Ont. L. R. 421 (letters between P. and his attorney, given to the defendant by P.'s executor, and plaintiff and defendant both claiming title under P.; held not privileged).

² The cases of *Storey v. Lord Lennox*, *MacKenzie v. Yeo*, *London Gaslight Co. v. Chelsea*, *Ross v. Gibbs*, *Woolley v. R. Co.*, and *Anderson v. Bank*, *supra*, illustrate this.

³ *Balguy v. Broadhurst*, *Goodall v. Little*, *Cossey v. R. Co.*, *Anderson v. Bank*, and *Wheeler v. LeMarchant*, *supra*, illustrate this. As late as 1898, an English judge (in *Calcraft v. Guest*, *supra*) thought it worth while to explain that

(3) Finally, the proper limits of the principle of agents' communications (*ante*, § 2317) are withal apparently too intricate to permit of a definite rule which will solve all concrete cases. In 1835, in *Curling v. Perring*, the Master of the Rolls applies the privilege to a solicitor's correspondence with a witness; in 1841, in *Mackenzie v. Yeo*, the contrary is done; forty years later, in *Anderson v. Bank and Wheeler v. LeMarchant*,⁴ the same inconsistency prevails, and the line between a mere witness and an agent of the solicitor appears to be ignored. *Young v. Holloway* and *Learoyd v. Halifax Co.*, ten years later, leave the distinctions still unsatisfactory. Certainly, the exact bearings and effect of all the different principles involved have not yet been clearly stated by any judge. Whenever such a statement shall have been made and generally sanctioned, the proper course will be to leave its application to the trial judge. As it is, the long series of reported precedents has accomplished little in the way of definition.

In the United States, it is noticeable that these bearings of the privilege have received very little development, — probably in part for the reasons elsewhere noted (*ante*, § 2294).⁵

§ 2320. **Communications by the Attorney to the Client.** That the attorney's communications to the client are also within the privilege was always assumed in the earlier cases,¹ and has seldom been brought into question.² The reason for it is, not any design of securing the attorney's freedom of expression, but the necessity of preventing their use as constituting admissions of the client (*ante*, § 1071), or as leading to inferences of the tenor of the client's communications, — although in this latter aspect, being hearsay statements, they could seldom be available at all (*ante*, § 1063).

6. "Are at his instance permanently protected"

§ 2321. **Privilege is the Client's, not the Attorney's, nor the Party's; Who may Claim.** Under the original theory of the privilege, it was the attorney's, not the client's (*ante*, § 2290). But under the modern theory (*ante*, § 2291),

"*Wheeler v. LeMarchant* was right, and *Minet v. Morgan* [*ante*, § 2294] was right too."

⁴ The proposition of *Jessel, M. R.*, that for third persons' communications to solicitors the test is whether they are made after litigation begun or contemplated seems unsound; for it ignores the necessity of a request, implied or expressed, sufficient to make the person the solicitor's agent; compare *Young v. Holloway*.

⁵ 1880, *Pulford's Appeal*, 48 Conn. 247, 249 (bill of particulars, prepared for the party by O., and handed by him to the attorney; O. and the party held compellable to produce it); 1877, *Williams v. Young*, 46 Ia. 140, 143 (attorney not privileged as to his deposit of the client's money with a third person); 1901, *State v. Herbert*, 63 Kan. 516, 66 Pac. 237 (testimony by a witness in the county attorney's hearing is not privileged); 1874, *Re Aspinwall*, 7 Ben. 433 (the privilege extends to information received on behalf of the client from persons to whom

the client has referred the attorney for such information); 1898, *Lalancé & G. M. Co. v. Haberman M. Co.*, 87 Fed. 563 (while communications with a witness are not privileged, a scientific expert engaged to help in presenting the case is in effect an assistant counsel; and the privilege exists for communications between legal counsel and himself, so long as he does not become a witness; the opinion clearly explains the reasons); 1899, *Hartness v. Brown*, 21 Wash. 655, 59 Pac. 491 (deed by W. to the plaintiff; W. consulted an attorney about the deed, and the attorney sent for the plaintiff; communications by the plaintiff excluded, because made to W.'s attorney about a matter of joint interest).

¹ *Ante*, § 2294.

² 1840, *Jenkinson v. Andrews*, 5 Blackf. 465 (whether the attorney had informed the client of the meaning of an affidavit, held privileged).

it is plainly the client's, not the attorney's; and this is now a commonplace, never disputed.

But it is as client, *not as party to the cause*, that he is entitled; for the reason of the privilege applies to all clients as such, whether or not they are parties when the disclosure is sought from them. Hence, the privilege equally forbids disclosure by the attorney of a client not in any way concerned in the cause.¹ Conversely, when the client is not a party, then on general principles (*ante*, § 2196) the party cannot invoke the privilege;² and, if the privilege is erroneously refused, the party cannot appeal on the ground of this error.³

§ 2322. **Inference from Claim of Privilege; Judge to determine Privilege.** If a client-party claims the privilege, *no inference* should be drawn against him as to the unfavorable nature of the information sought.¹ Whatever the reasoning may be for other privileges (*ante*, §§ 2243, 2272), it is plain that here the drawing of such an inference would virtually disclose the communication, and it is this very disclosure against which the privilege protects.

The claim of privilege being made, the *trial judge determines* whether the facts justify the allowance of the claim.² This follows from the general principle of the judicial function (*post*, § 2550). Its application is usually of no difficulty, except sometimes in determining what weight to give to the party's oath in answering a bill of discovery.³

§ 2323. **Protection continues, though Relation of Client and Attorney be ended.** The subjective freedom of the client, which it is the purpose of the privilege to secure (*ante*, § 2291), could not be attained if the client under-

¹ 1792, *Wilson v. Rastall*, 4 T. R. 753, 760, per Buller, J.; 1811, *R. v. Withers*, 2 Camp. 578, L. C. J. Ellenborough (communications by a third person, privileged, "although he be not in any shape before the court"); 1848, *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 596; 1880, *Bacon v. Frisbie*, 80 N. Y. 394, 400 (nor, when the client objects, can the communication be disclosed under instructions to use it only against a party not the client); 1876, *Bowers v. State*, 29 Oh. St. 542, 546 (prosecutrix in a rape case, held privileged as to consultations with her attorney).

² 1826, *Merle v. Moore*, 2 C. & P. 275 (Best, C. J.; action by an assignee in bankruptcy against the debtor's fraudulent vendee; the bankrupt's attorney being called by the plaintiff, it was held that the defendant could not invoke the privilege, since the bankrupt alone could object); 1899, *McCooe v. R. Co.*, 173 Mass. 117, 53 N. E. 133 (counsel may not object for the party, even where the client is the party in the case); 1890, *Dowie's Estate*, 135 Pa. 210, 19 Atl. 936 ("It is the privilege of the client to object, and not of a stranger, [though he be the party to the cause,] even if the testimony objected to was a privileged communication"). *Contra*: 1880, *Bacon v. Frisbie*, 80 N. Y. 394, 401.

For this general principle as applicable to all privileges, see *ante*, § 2196.

³ 1847, *Weeks v. Argent*, 16 M. & W. 817, per Parke, B. *Contra*: 1884, *State v. Barrows*, 52 Conn. 323, 326. Compare the cases cited *ante*, § 2196.

¹ 1864, *Lord Chelmsford*, in *Wentworth v. Lloyd*, 10 H. L. C. 591. *Contra*: 1899, *McCooe v. R. Co.*, 173 Mass. 117, 53 N. E. 133.

² 1895, *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 342; 1901, *Press Publishing Co. v. Lefferts*, 67 N. J. L. 172, 50 Atl. 342; 1901, *People's Bank v. Brown*, 50 C. C. A. 411, 112 Fed. 652 (and the witness may "by way of preliminary investigation be subjected to such interrogation as may be necessary").

³ 1853, *Volant v. Soyer*, 13 C. B. 231 (the attorney's statement that a document is privileged should ordinarily suffice); 1881, *Lyell v. Kennedy*, L. R. 27 Ch. D. 1, 21 (per Cotton, L. J.; in answers to interrogatories of discovery, "the Court must be satisfied, clearly satisfied, either from admissions or from other documents, that the oath of the defendant by which he claims his protection cannot be really available for the purpose for which he puts it forward"); 1842, *Reynolds v. Rowley*, 3 Rob. La. 201, 204 (the Court may refuse to accept the attorney's statement).

stood that, when the relation ended, or even after the client's death, the attorney could be compelled to disclose the confidences; for there is no limit of time beyond which the disclosures might not be used to the detriment of the client or of his estate. It has therefore never been questioned, since the domination of the modern theory,¹ that the privilege continues even after the end of the litigation or other occasion for legal advice,² and even after the death of the client. It follows, also, on another aspect of the principle (*post*, § 2324), that even after the death of the attorney the client could not be compelled to disclose the communications. The doctrine of *waiver* belongs in another place (*post*, § 2327).

7. "From disclosure by himself or by the legal adviser"

§ 2324. **Testimony by the Client or the Attorney.** The privilege being for the protection of the client in his subjective freedom of consultation (*ante*, §§ 2291, 2321), it would plainly be defeated if the disclosure of the confidences, though not compellable from the attorney, was still obtainable from the *client*. Accordingly, under the modern theory,¹ it has never been doubted that the client's own testimony is equally privileged.²

That the *attorney* himself is prohibited, whether he is willing or not, is of course the fundamental assumption of the modern theory.³

§ 2325. **Indirect Disclosure by the Attorney.** Clearly the privilege could not permit an evasion by receiving the voluntary extrajudicial disclosures of the attorney. Supposing them to be somehow admissible in spite of the Hearsay rule, they would be equally a violation of the privilege with his voluntary disclosures on the stand. If his disclosure has taken the form of handing a confidential document to a third person, the objection is equally forcible and the question is not complicated with the Hearsay rule. On the other hand, the attorney must be credited with some authority for negotiating with the opposing party, and in the course of such negotiations it becomes necessary to make communications and to deliver documents or copies which, apart from the rule as to compromise-admissions (*ante*, § 1061), may afterwards with propriety form the subject of proof as part of the transactions between the parties; indeed, to refuse to examine them would often

¹ Under the original theory, as already noticed in § 2290, the privilege might be thought to end with the ending of the relation.

² 1815, *Cholmondeley v. Clinton*, 19 Ves. Jr. 261, 268, per L. C. Eldon; 1878, *Bullock v. Corry*, L. R. 3 Q. B. D. 356 ("The rule is, once privileged, always privileged"); 1885, *Pearce v. Foster*, L. R. 15 id. 114, 118; 1899, *Struckmeyer v. Lamb*, 75 Minn. 366, 77 N. W. 987.

The doctrine of *waiver* is examined *post*, § 2327.

For the question of professional ethics, whether an attorney will be restrained from going over to the *service of the opponent*, see the following: 1815, *Earl Cholmondeley v. Lord Clinton*, 19 Ves. Jr. 261, and notes to Sumner's

edition; 1821, *Beer v. Ward*, 1 Jac. 77; 1821, *Bricheno v. Thorp*, ib. 300.

³ But not under the earlier theory: *ante*, § 2290.

² 1898, *Birmingham R. & E. Co. v. Wildman*, 119 Ala. 547, 24 So. 548; 1877, *State v. White*, 19 Kan. 445; 1856, *Hemenway v. Smith*, 28 Vt. 701, 707; and the cases cited *ante*, § 2319, assume this.

³ Distinguish the question whether it is allowable for him to testify, at the client's request, *on behalf of the client* (*ante*, § 1911). In the Georgia Code that question and the present privilege are confusedly dealt with in the same paragraph.

be to sanction the breaking of faith with the opponent. How can these opposing considerations be reconciled?

The judicial rulings are in confusion, and no clear appreciation of the significance of the dilemma is shown.¹ The following distinctions may perhaps furnish a solution: (1) Since the attorney has implied authority from the client (*ante*, § 1063) to make admissions and otherwise to act in all that concerns the management of the cause, all disclosures (oral or written) *voluntarily* made to the opposing party or to third persons in the course of negotiations for settlement, or in the course of taking adverse steps in litigation (*e. g.* in serving notices), are receivable, as being made under an implied authority to disclose the confidences when necessary in the opinion of the attorney; unless it appears that the attorney has acted in bad faith towards the client. (2) All other *voluntary* disclosures are inadmissible, except so far as the special circumstances show an implied authority of disclosure from the client over and above the general authority to conduct litigation. (3) All *involuntary* disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle (*post*, § 2326) that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent the overhearing of third persons; and the risk of insufficient precautions is upon the client. This principle applies equally to documents.

§ 2326. **Third Persons Overhearing.** The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial liability and should be strictly construed, it would be improper to

¹ *England*: 1833, *Cocks v. Nash*, 6 C. & P. 154 (a deed was not producible, being in a trustee's hands for the plaintiff and therefore privileged; but a copy furnished by the trustee to the defendant and proved correct by the trustee was admitted); 1842, *Lloyd v. Mostyn*, 4 Dowl. Pr. N. S. 476 (the attorney refusing to produce by claim of privilege, proof was allowed by a copy already made by the attorney and furnished to the opponent under a judge's order; *semble*, Parke, B., declared the same rule applicable to a copy of a document stolen from the attorney); 1852, *Enthoven v. Cobb*, 17 Jur. 81 (communication of a privileged document to another party and a solicitor, having a common interest, held "not made to allow an unlimited communication"); 1868, *R. v. Leverson*, 11 Cox Cr. 152 (letter to the prosecutrix' attorney, coming somehow to the hands of the defendant's attorney, not allowed to be read); 1880, *R. v. Downer*, 14 id. 486, 487 (solicitor's letter to a railway company, making claim for lost articles, held not privileged as involving facts communicated

in confidence); 1898, *Calcraft v. Guest*, 1 Q. B. 759 (copy of a privileged document obtained by accidental transfer of possession, admitted); *United States*: 1899, *Southern R. Co. v. White*, 108 Ga. 201, 33 S. E. 952 (letter to a party's attorney, handed by the latter to the opponent's attorney, excluded); 1887, *Tays v. Carr*, 37 Kan. 141, 14 Pac. 456 (letter from a client to the attorney, produced by a third person, held not privileged); 1892, *Liggett v. Glenn*, 2 C. C. A. 286, 51 Fed. 381, 4 U. S. App. 438, 472 (the communication being a letter or other writing, although it may pass, by loss or otherwise, into a third person's or the adversary's hands, it cannot be used); 1888, *Hicks' Estate v. Blanchard*, 60 Vt. 673, 15 Atl. 401 (action on a note; the defendant not allowed to use a copy of the specifications of claim obtained from the plaintiff's attorney). In *Perry v. State*, 4 Ida. 224, 38 Pac. 658 (1895), where the attorney's exclamation, when found digging up money, "That is my client's money," was admitted as "part of an act," the opinion is confused and useless.

extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge,¹ is not within the protection of the privilege.² The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy (*ante*, § 2325).

8. "Except the client waive the protection."

§ 2327. **Waiver in general; Voluntary Testimony as a Waiver.** The privilege is designed to secure the client's confidence in the secrecy of his communications (*ante*, § 2291); hence, the privilege is not violated by receiving such disclosures as the client by his own will permits to be made. There is no analogy whatever between a rule of conditional exclusion in the nature of privilege (*ante*, § 2196) and an absolute rule of disqualification (*ante*, § 477). Yet the common juxtaposition of the two classes of rules in statutory enactments — due in part to the indiscriminate use of the term "competent," long ago denounced by Bentham — has from time to time made it necessary for the Bench to correct this elementary misunderstanding on the part of the Bar. In respect to the present privilege, it has always been recognized that a waiver may be made;¹ although only since the domination of the modern theory (*ante*, § 2290) has it been perfectly plain that the waiver, like the privilege, belongs solely to the client (*ante*, § 2321), and not to the attorney.²

What constitutes a waiver by implication? Judicial decision gives no clear answer to this question.³ In deciding it, regard must be had to the double

¹ The fallacious distinction, here sometimes taken, that when the third person is present to the client's knowledge, that person may disclose, but not the attorney, has been already noticed (*ante*, § 2311).

² 1889, *Cotton v. State*, 87 Ala. 75, 6 So. 396 (conversation between the accused and his attorney, in the jailer's presence, held not privileged, as to the jailer's testimony); 1894, *Denver T. Co. v. Owens*, 20 Colo. 107, 125, 36 Pac. 848, *semble*; 1895, *Perry v. State*, 4 Ida. 224, 38 Pac. 658 (third person overhearing); 1885, *State v. Sterrett*, 68 Ia. 76, 25 N. W. 936 (third person overhearing); 1859, *Hoy v. Morris*, 13 Gray 519 (a "mere bystander," casually overhearing, and not an agent of the attorney, held not within the privilege; good opinion); 1895, *Bayse v. State*, 45 Nebr. 261, 63 N. W. 811 (third person, known to the client to be present); 1829, *Jackson v. French*, 3 Wend. 337 (third person going with the client); 1874, *Cary v. White*, 59 N. Y. 336, 338; 1899, *Butler v. Fayerweather*, 33 C. C. A. 625, 91 Fed. 458 (execution and contents of will).

³ 1778, *Captain Baillie's Trial*, 21 How. St. Tr. 1, 341, 360, 408; 1826, *Merle v. Moore*, Ry. & Mo. 390; 1883, *Passmore v. Passmore's Estate*, 50 Mich. 626, 16 N. W. 170. In Georgia, where the attorney is disqualified on behalf of the client, as well as privileged, the client of

course cannot waive the disqualification: *ante*, § 1911.

² In 1816, in *Fenwick v. Reed*, 1 Meriv. 114, 122, L. C. Eldon was undecided whether the attorney's executor could waive; but this doubt would not arise to-day.

³ Some of the Codes cited *ante*, § 2292, lay down a rule. Judicial decisions are as follows: *Eng.*: 1654, *Waldron v. Ward*, Style 449 (counsel in the cause, being examined to prove a death, was not allowed to be examined by the opponent on privileged matters); 1841, *Mackenzie v. Yeo*, 2 Curt. Eccl. 866, 876 (a direct examination to matters within the privilege is a waiver permitting cross-examination on those matters); *Can.*: 1868, *Forsyth v. Charlebois*, 12 Low. Can. Jur. 264, *semble* (calling the attorney as a witness amounts to a waiver for all matters touched on in the direct examination); *U. S.*: 1873, *Rowland v. Plummer*, 50 Ala. 182, 194, *semble* (the client's taking the stand, held a waiver as to the attorney's testimony to those facts); 1897, *Louisville & N. R. Co. v. Hill*, 115 id. 334, 22 So. 163 (by using the same conversation for his own purposes, the client was held to waive the privilege); 1855, *Landsberger v. Gorham*, 5 Cal. 450 (direct testimony held on the facts not to amount to a waiver on a certain subject); 1884, *State v. Barrows*, 52 Conn. 323, 325 (witness' voluntary testimony to a preliminary statement

elements that are predicated in every waiver, *i. e.* not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his immunity shall cease, whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point, his election must remain final. As a fair canon of decision, the following distinctions may be suggested:

(1) The client's offer of his *own testimony* in the cause *at large* is not a waiver, for the purpose either of cross-examining him to the communications or of calling the attorney to prove them; otherwise the privilege of consultation would be exercised only at the penalty of closing the client's own mouth on the stand. (2) The client's offer of the *attorney's testimony* in the cause *at large* is not a waiver so far as the attorney's knowledge has been acquired casually as an ordinary witness; but otherwise it is a waiver; for, considering that the attorney ought in general not to be used as a witness (*ante*, § 1911), the client ought to be discouraged from utilizing his attorney in double and inconsistent capacities, and if he has seen fit to furnish him knowledge as a witness, he should deny himself the right to invoke the attorney's function as an adviser. (3) The client's offer of his *own testimony* as to *specific facts* about which he has happened to communicate with

to her attorney, held not a waiver for the whole consultation); 1897, *Takamori v. Kanai*, 11 Haw. 1 (malicious prosecution; advice of counsel as furnishing probable cause; the client's calling the counsel, held a waiver); 1873, *Bigler v. Reyner*, 43 Ind. 112 (the client's taking the stand, held not to be a waiver, for the purpose either of calling the attorney or of cross-examining the client); 1873, *Oliver v. Pate*, *ib.* 132, 142 (similar; but voluntary testimony to the communication is a waiver, permitting the attorney to be called); 1874, *Barker v. Kuhn*, 38 Ia. 392, 395, *semble* (like *State v. White*, Kan., *infra*); 1877, *State v. White*, 19 Kan. 445, 447 (the client's taking the stand is not in itself a waiver of the privilege); 1878, *Wilkins v. Moore*, 20 id. 538, 540 (same); 1869, *Woburn v. Henshaw*, 101 Mass. 193, 200 ("If the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness"); 1874, *Montgomery v. Pickering*, 116 Mass. 227, 231, 237 (calling the attorney is not in itself a waiver of the privilege; nor is the client's own testimony); 1892, *Blount v. Kimpton*, 155 id. 378, 29 N. E. 590 (same, on the first point); 1857, *Alderman v. People*, 4 Mich. 414, 423 (accomplice taking the stand for the State under promise of immunity waives his privilege; "he should be allowed no privileged communications; these he has voluntarily surrendered"); 1889, *People v. Gallagher*, 75 id. 512, 515, 42 N. W. 1063 (an accomplice, testifying for the State, waives

"all privilege as regards the crime in question"); 1890, *State v. Tall*, 43 Minn. 276, 45 N. W. 449 (the client's testimony to a specific fact is a waiver of the privilege as to the communication of that fact to his attorney); 1888, *Jones v. State*, 65 Miss. 179, 3 So. 379 (taking the stand is not in general a waiver; but here an accomplice, who had become State's evidence, was held to have waived and to be subject to cross-examination to his statements to counsel); 1860, *King v. Barrett*, 11 Oh. St. 261, 263 (Code applied; in a civil case the client's voluntary testimony is a waiver of the privilege on the same subject); 1877, *Duttenhofer v. State*, 34 id. 91 (in a criminal case the accused's voluntary testimony is not a waiver; the Code provision not being applicable to criminal cases); 1888, *Hunt v. Blackburn*, 128 U. S. 464, 470, 9 Sup. 125 (privilege held waived by "entering upon a line of defence which involved what transpired between herself and Mr. W. [the attorney]"); 1871, *Chahoon v. Com.*, 21 Gratt. 822, 835 (one of three joint defendants, by taking the stand at the instance of the State and testifying to a communication between counsel and another defendant, held not to waive the privilege by implication); 1881, *Tate v. Tate*, 75 Va. 522, 533 (the client's testimony, not relating to the "privileged matter," held not a waiver, even where on cross-examination the communications were testified to).

the attorney is not a waiver, for the same reason as in (1), *supra*; but his offer of the *attorney's testimony* as to such specific facts is a waiver, for the same reason as in (2), *supra*. (4) The client's offer of his own or the attorney's testimony as to a *specific communication* to the attorney is a waiver as to all other communications to the attorney; for the privilege of secret consultation is intended only as an incidental means of defence, and not as an independent means of attack, and to use it in the latter character is to abandon it in the former. (5) The client's offer of his own or the attorney's testimony as to a *part of any communication* to the attorney is a waiver as to the whole of that communication, on the analogy of the principle of Completeness (*ante*, § 2113).

§ 2328. **Waiver by Joint Clients, Agents, Assignees.** A waiver at one stage of a trial should be final for all further stages;¹ and a waiver at a *first trial* should suffice as a waiver for a later trial, since there is no longer any reason for preserving secrecy. Where the consultation was had by *several clients jointly*, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements; yet neither should be able to obstruct the other in the disclosure of the latter's own statements.² Where the consultation was had by an *agent* of the client, it is ordinarily the client alone who may waive;³ but it has been already noticed that for certain extrajudicial purposes the attorney himself must be regarded as authorized to waive secrecy on behalf of his client (*ante*, § 2325). Where the client's interest has been *assigned*, it seems proper to say that the privilege is transferred to the assignee, for the purpose of waiver, so far as the communications affect merely the realization of the transferred interest; but it remains with the client so far as they affect any liability or right remaining in him.⁴

§ 2329. **Waiver by a Deceased Client's Representative.** That an executor or administrator may exercise authority over all the interests of the estate left by the client, and yet may not incidentally have the right, in the interest of that estate, to waive the privilege of concealing confidential communications affecting it, would seem too inconsistent to be maintained under any system of law. It has, indeed, seldom been maintained for the present privilege; but the denial of this waiver in another field, by some

¹ 1902, *Green v. Crapo*, 181 Mass. 55, 62 N. E. 956 (waiver for a hearing before the Probate Court prevents claim of privilege on a hearing before a Supreme Court justice).

² There are few rulings: 1848, *Bank of Utica v. Mersereau*, 3 Barb. Ch. 528, 596 ("Where the privilege belongs to several clients, I do not think any one of them, or even a majority, contrary to the expressed will of the others, can waive the privilege"); 1871, *Chahoon v. Com.*, 21 Gratt. 822, 835 (C. J. S., and R. S., being jointly indicted for conspiracy, met for consultation with counsel; each had a counsel, but C.'s was absent; L. was counsel for R. S.; at the trial, R. S. having testified to a statement of C. at the meeting, C. called L. to testify to C.'s statement;

but L. claimed the privilege; held, that L. could not testify without a waiver by all three, J. S. having in fact made no waiver; this seems unsound).

³ 1891, *Bingham v. Walk*, 128 Ind. 164, 27 N. E. 483 (here the agent was deceased).

⁴ The few rulings on this point do not take this distinction: 1831, *Bowman v. Norton*, 5 C. & P. 177 (similar facts to *Merle v. Moore*, § 2321, *supra*; Tindal, C. J., would not allow the assignees, as such, to waive the privilege on the bankrupt's behalf); 1838, *Benjamin v. Coventry*, 19 Wend. 353 (waiver may be by the client A, even though by assignment A's interest in the cause has passed to B; Bronson, J., diss.).

Courts (*post*, § 2391), demands here the more emphatic repudiation of such a fallacy :

1851, *Turner*, V. C., in *Russell v. Jackson*, 9 Hare 387, 393: "In the cases of testamentary dispositions, the very foundation on which the rule proceeds seems to be wanting; and in the absence, therefore, of any illegal purpose entertained by the testator, there does not appear to be any ground for applying it. . . . That the privilege does not in all cases terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client as against parties claiming adversely to him, I entertain as little doubt; but it does not, I think, therefore follow that it belongs to the executor as against the next of kin, and in such a case as the present. In the one case the question is whether the property belongs to the client or his estate, and the rule may well apply for the protection of the client's interests. In the other case the question is to which of two parties claiming under the client the property in equity belongs, and it would seem to be a mere arbitrary rule to hold that it belongs to one of them, rather than to the other."

1889, *Collins*, J., in *Layman's Will*, 40 Minn. 372, 42 N. W. 286: "There is an abundance of authority for saying that, upon the decease of the only person who could, in his life-time, exercise the privilege of waiver, the rule should not be so perverted by a strict adherence to it as to render it inconsistent with its objects, and thus bring it into direct conflict with the reason upon which it is founded. The object of the rule, so far as it relates to this class of communications, being the protection of the estate, there remains no reason for continuing it when the very foundation upon which it proceeds is wanting. The testimony called for was quite necessary in order to determine the weight which ought to be given the witness' opinion as to the mental condition of the testator, and his disclosures in no way reflected upon the character or reputation of the deceased. The testimony when given served to protect the estate, and tended to aid in a proper disposition of it. The issue in the case was as to the mental soundness of a person under whom each litigant claimed, and, whatever the result, the interest and the estate of the deceased were not prejudicially affected. It is not an action in which the success of an adverse third party must prove detrimental to the property. Neither of these litigants can be permitted to invoke the rule respecting privileged communications for the purpose of excluding material and important evidence of the character above described upon the only question involved in the dispute, namely, the sanity of the deceased."

1900, *Barker*, J., in *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802: "To allow the executor or administrator of the deceased client to waive the privilege, and to call the attorney to testify as to a privileged communication, in a suit involving the client's estate, no more militates against the principle of public policy involved, than to allow the client himself to waive the privilege. Nor does it tend to weaken the protection which the rule gives for the benefit of the client as an individual. The executor or administrator acts with reference to the question of waiver as the personal representative of the deceased client, and solely in the interest of his estate."

This view is accepted with practical unanimity. It is further generally agreed that in testamentary contests the privilege is divisible, and may be waived by the executor, the administrator, the heir, the next of kin, or the legatee.¹

¹ *Eng.*: 1849, *Doe v. Hertford*, 13 Jur. 632 (waiver by heir and executors, against third persons, held proper, per Erle, J.); 1851, *Russell v. Jackson*, 9 Hare 387, 392 (in a contest between the next of kin and devisees, the privilege was held to belong to neither as against the other; quoted *supra*); 1838, *Greenlaw v. King*, 1 Beav. 137, 145, *semble*, per Lord Langdale, M. R. (waiver by the executor, allowable);

Can.: 1893, *Magee v. R.*, 3 Exch. Can. 304, 327 (he must disclose "all that passed at the time relating to such execution"); *U. S.*: 1865, *Fossler v. Schriber*, 38 Ill. 173 (the "only heir" of the client, held competent to waive the privilege; and even if there were other heirs not parties, "the Court would presume their concurrence"); 1885, *Scott v. Harris*, 113 id. 447, 454, *semble* (in a controversy between legatees and

grantees, the privilege ceases); 1897, *Winters v. Winters*, 102 Ia. 53, 71 N. W. 184 (an heir, devisee, or other representative, but not a stranger, may waive; and hence, in a will contest, either party in interest may waive); 1900, *Brooks v. Holden*, 175 Mass. 137, 55 N. E. 802 (representative of a deceased client may waive; quoted *supra*); 1889, *Layman's Will*, 40 Minn. 372, 42 N. W. 286 (the attorney who prepared a will, permitted to testify as to the testator's sanity, in pro-

bate proceedings; quoted *supra*); 1897, *Glover v. Patten*, 165 U. S. 394, 17 Sup. 411 (privilege ceases "between devisees under a will," "between heirs or next of kin"). *Contra*: 1885, *Westover v. Ins. Co.*, 99 N. Y. 56, 59, 1 N. E. 104 (neither an executor, nor any one else, may waive the privilege after the party's death; said *obiter*).

Compare the testamentary cases decided on other grounds, *ante*, §§ 2314, 2315.

TOPIC B (continued): PRIVILEGED COMMUNICATIONS.

SUB-TOPIC III: COMMUNICATIONS BETWEEN HUSBAND AND WIFE.

CHAPTER LXXXI.

1. In general.

§ 2332. Policy of the Privilege.
§ 2333. History of the Privilege.
§ 2334. Marital Disqualification and Anti-Marital Privilege, distinguished; Statutory Enactments.

2. Scope of the Testimony Privileged.

§ 2336. Knowledge obtained in Confidence, Express or Implied.

§ 2337. Communications, not Acts.
§ 2338. Exceptions and Distinctions.

3. Persons Prohibited and Entitled.

§ 2339. Third Persons Overhearing; Documents obtained by Third Persons.
§ 2340. Who may Claim the Privilege; Waiver.

4. Cessation of the Privilege.

§ 2341. Death; Divorce; Separation; Invalid Marriage.

1. In general.

§ 2332. **Policy of the Privilege.** The policy which should lie at the foundation of every rule of privileged communications (*ante*, § 2285) is amply satisfied in the present privilege. The communications originate in confidence; the confidence is essential to the relation; the relation is a proper object of encouragement by the law; and the injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of truth. There seems therefore to be no reason for objecting to the recognition of the present privilege:

1853, *Commissioners on Common Law Procedure*, Second Report, 13: "The question how far communications of married persons *inter se* should be matter of testimony in courts of justice stands on a very different ground [from that of compelling one to testify to facts against the other]. So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence that the alarm and unhappiness occasioned to society by invading its sanctity and compelling the public disclosure of confidential communications between husband and wife would be a far greater evil than the disadvantage which may occasionally arise from the loss of light which such revelations might throw on questions in dispute. . . . [Hence,] all communications between them should be held to be privileged."

1871, *Freeman, J.*, in *State v. McAuley*, 4 Heisk. 424, 432: "If this could be permitted, it would tend to destroy that bond of mutual confidence and unquestioning trust that is essential to the peace and happiness of the most sacred of all domestic relations. No man would be willing to have his wife called on in a court of justice to detail the facts of which she gains a knowledge by reason of the fact that she is the companion of his privacy and has unlimited freedom of access to all the occurrences that transpire in his home and around the fireside."

1898, *Taylor, C. J.*, in *Mercer v. State*, 40 Fla. 216, 24 So. 154: "Society has a deeply-rooted interest in the preservation of the peace of families, and in the maintenance of the sacred institution of marriage; and its strongest safeguard is to preserve with jealous care any violation of those hallowed confidences inherent in, and inseparable from, the marital status. Therefore the law places the ban of its prohibition upon any breach of the confidence between husband and wife, by declaring all confidential communications between

them to be incompetent matter for either of them to expose as witnesses. The reason of the old rule for rendering interested witnesses incompetent to testify at all in any case to which they were parties was because their interest was supposed to be such a strong incentive to perjury, and, where husband or wife was interested in a cause, both of them were excluded as incompetent witnesses for any purpose, because of their unity of interest; they, in the eye of the law, being regarded as one person, and whenever either was interested both were considered to be equally interested; and the incentive to perjury from such interest was considered to be as strongly operative upon the one as upon the other. But the reason of the rule for excluding the confidences between husband and wife as incompetent matter to be deposed by either of them, though they may be competent witnesses to testify to other facts, is found to rest in that public policy that seeks to preserve inviolate the peace, good order, and limitless confidence between the heads of the family circle so necessary to every well-ordered civilized society."

§ 2333. **History of the Privilege.** The privilege for communications between husband and wife is apparently, in time of origin, the second of such privileges to be enforced at common law, and yet the last to be definitely recognized and distinguished. In the second half of the 1600s an instance of its application is found;¹ and yet the explicit statement of the privilege, as a distinct one from any other rule, did not come in England until the statutory reforms of the Common Law Procedure Act, just as the second half of the 1800s was beginning.² The explanation of the paradox is that until that time the present privilege for communications between husband and wife had not been plainly separated from the other privilege of husband or wife not to testify to any facts against the other. This latter privilege was fully established by the end of the 1600s (*ante*, § 2227). But among the various reasons advanced for its support was the policy of protecting domestic confidence by prohibiting their mutual disclosures (*ante*, § 2228). In other words, the true policy of the present privilege was perceived, and yet it was not enforced in the shape of any rule distinct from the old-established privilege of each not to testify against the other as a party or interested in the suit. That the two are distinct is plain; for the privilege not to testify against the other is broader in the respect that it excludes testimony to any adverse facts even though they have been learned wholly apart from marital confidence, and is narrower in the respect that it applies only to testimony adverse in its tenor and adverse to a party to the cause or to one in an equivalent position. Nevertheless, the privilege against adverse testimony remained for a long time alone in its recognition; and not unnaturally, for two reasons. In the first place, in the great majority of instances in which it was desired to make a wife reveal her husband's communications, he was an adverse party, and his long-established privilege against her adverse testimony served equally to protect him against that sort of her adverse testimony as against any other. In the second place, the other instances where it might be desired that she should reveal his communications would ordinarily be those in which he himself desired her

¹ 1684, *Lady Ivy's Trial*, 10 How. St. Tr. 555, 628 (a husband's oath to the wife's request to him to commit forgery, not admitted against her as witness).

² As late as 1852, Mr. J. Erle, in *Stapleton*

v. Crofts, 18 Q. B. 367, 374, believed that "as no protection was given to conjugal confidence in respect of the wives of witnesses not parties," the rule must be regarded as "not yet established."

testimony in his behalf, and this was of course prevented by her disqualification (*ante*, § 600). Thus there remained only one situation, and that the least common one, in which the two existing rules of disqualification and privilege did not already suffice to dispose of the evidence, namely, the situation in which the husband was not a party but an indifferent person and yet his communications to his wife were material to the cause and were offered to be proved by her. In view of the rarity of this situation under the system of married women's disabilities then prevailing, it is not to be wondered that at common law the question was not forced upon the consideration of the judges, and that the recognition of the present privilege as a rule independent of any other was so belated. Not until the marital disqualification and the marital privilege against adverse testimony were proposed to be abolished or modified did the existence of this third aspect of the subject begin to be perceived.³ Accordingly, when the legislators in the various jurisdictions took the first steps, in the period from 1840 to 1870, to reform the other two rules, by abolishing or restricting the disqualification and the other privilege, they invariably preserved by express enactment the present privilege for communications. So this privilege, hitherto existing rather in principle than in rule, practically begins its existence and is defined in its terms by the legislation of that period.

§ 2334. **Marital Disqualification and Anti-Marital Privilege, distinguished; Statutory Enactments.** (1) That the *disqualification* of husband and wife to testify the one *on the other's behalf* (*ante*, §§ 600-620) is distinct from the privilege of either against the other's disclosure of communications ought to be plain enough. The judicial confusion of them is nevertheless frequent; and the occasional legislative commingling of them in the same sentence of the same enactment has given rise to much of this confusion. Perhaps the commonest error is to ignore the husband's *right to waive* the privilege (*post*, § 2340), *i. e.* when he offers the wife to prove his communications to her, the erroneous tendency is to treat the disclosure as absolutely prohibited in spite of his consent. A disqualification, of course, cannot be waived; but it is of the essence of this privilege (as of every privilege) that it may be; and yet the communications, when offered by the privileged person, are even yet repeatedly excluded, in apparent ignorance of the distinction. Another practical difference is that the *disqualification affects only a party's* or interested person's husband or wife (*ante*, § 607), while the privilege is equally valid for the communications of a husband or wife not a party nor interested.¹ Still another difference is that the disqualification may cease upon the *death or divorce* of the husband or wife (*ante*, § 610), while the present privilege cannot (*post*, § 2341).

(2) The distinction between the present privilege for communications and the privilege against *adverse marital testimony* in general (*ante*, §§ 2227-

³ Compare Mr. J. Erle's remark, *supra*.

¹ 1878, Winchester F. Ins. Co. v. Foster, 90 Ill. 121, 125. *Contra* (but the words of the

extraordinary Illinois statute permit of this ruling): 1877, Galbraith v. McLain, 84 Ill. 379, 383.

2245) has already been noticed in dealing with the history of the rules (*ante*, § 2333). One of the practical differences between them is that the former applies only where the testimony is adverse, *i. e.* where the other spouse is either a party or in an equivalent position (*ante*, § 2234), while the latter may be invoked by any spouse however indifferent to the cause.² Another difference is that the former may cease with the death or divorce of the spouse against whom the testimony may be offered (*ante*, § 2237), while the latter is perpetual (*post*, § 2341). Another and still more important difference is that the former prohibits the spouse's adverse testimony regardless of the source of knowledge, while the latter covers only knowledge obtained through the confidence of the marriage relation. The two privileges have practically nothing in common, either in policy or in rule; and their complete separation needs repeated emphasis before the possibility of confusion can be cleared away.³

The *statutory enactments* dealing with the present privilege are commonly united in the same enactment with the marital disqualification and the other marital privilege, and their interpretation cannot be always accurately made without comparing the entire enactment.⁴ The ensuing examination of the present privilege is made with reference to these statutes.⁵ In a few instances the phrasing of the local statute is peculiar and determining; but certain types of enactment are common to many jurisdictions, and in only one or two respects do the different types represent any substantial difference of policy or rule.

2. Scope of the Testimony Privileged.

§ 2336. **Knowledge obtained in Confidence, Express or Implied.** The essence of the privilege is to protect confidences only. This is inevitably required by the very nature of this class of privileges (*ante*, § 2285). The purpose is to insure subjectively the free and unrestrained secrecy of communication, divested of any apprehension of compulsory disclosure; and if the communication is not intended to be a secret one, the privilege has no application to it. The chief question must be, for the present privilege, merely whether *confidence* or *secrecy* is to be *presumed to have been intended*, in all marital communications, until the contrary appears, or whether the burden of showing the intention of secrecy should be upon the person claiming the privilege. It would seem proper to hold that all marital communications are by implication confidential, and that the contrary intention must be made to

² 1873, *Moore v. Wingate*, 53 Mo. 398, 409; 1878, *Willis v. Gammill*, 67 id. 730, 731.

³ See the opinion of Taylor, C. J., in *Mercer v. State*, Fla., partly quoted *ante*, § 2332.

⁴ The statutes have therefore been collected in one place (*ante*, § 488).

⁵ In the following cases, sundry interpretations are made of the effect of the local statutes: 1897, *People v. Warner*, 117 Cal. 637, 49 Pac. 841 (privilege applies to criminal cases);

1900, *Hyde v. Gannett*, 175 Mass. 177, 55 N. E. 991 (privilege still obtains in offering evidence under St. 1896, c. 445, quoted *ante*, § 1576, admitting certain hearsay evidence); 1897, *Hopkins v. Grimshaw*, 165 U. S. 342, 17 Sup. 401 (the privilege is not abolished by the statute; yet the dictum that the last proviso in § 877 merely qualifies the preceding section, and applies only to spouses who are parties, seems unsound).

appear by the circumstances of any given instance. Looking at the habits of married persons and the infrequency of express injunctions of secrecy, this implication of confidence seems more consonant with the facts of life. Such is practically the general judicial attitude, in spite of apparent differences of phrasing:

1830, *Carr, J.*, in *Robin v. King*, 2 Leigh 140, 144: "Suppose it proved that the declarations were so made [in the family's presence] and no secrecy enjoined; would it follow that the husband wished or expected they should be divulged? Are we to say that every word spoken in the thoughtless, careless confidence of the domestic circle is free for public disclosure unless secrecy be enjoined? Is not the converse of this proposition true? And would it not have a most mischievous effect, would it not seriously break in upon that confidence which is the charm of domestic life, if men should from our decisions have cause to fear that after they were in their graves their reputation might be injured and their children ruined by the declarations they had made in the bosoms of their families? 'This freedom from restraint or apprehension in the intercourse of one's own fire-side seems to me so necessary to the quiet and repose of society that I am fearful of trenching upon it in the slightest degree.'"

1833, *Daniel, J.*, in *Hester v. Hester*, 4 Dev. 228, 230: "The sanctity of such [confidential] communications will be protected. Persons connected by marriage tie have, as was said at the bar, the right to think aloud in the presence of each other. But the question remains, what communications are to be deemed confidential? Not those, we think, which are made to the wife to be by her communicated to others; nor those which the husband makes to the wife as to a matter of fact upon which a thing is to operate after his death, when it must be the wish of the husband that the operation should be according to the truth of the fact as established by his declaration. Suppose a husband to disclose to his wife that he has given to one of their children a horse, can she not after his death prove that as against the executor? . . . The same reason equally applies when from the subject of the conversation it is obvious he did not wish it concealed, but on the contrary must have desired to make it known, and through her, if he found no other means of doing so."

1872, *Sargent, J.*, in *Clements v. Marston*, 52 N. H. 31, 38 (allowing the wife to testify to the expenditures made by her for her husband on account of the defendant's intestate and to conversations in her presence between the latter and the husband): "This violation of marital confidence must be something confided by one to the other simply and specially as husband or wife, and not what would be communicated to any other person under the same circumstances. In this case the wife acted as the husband's agent and kept his money and knew how it was expended; but all the communications made to her were made to her as such agent, just as he would have made the same communications to any other agent doing the same business. There was no confidential communication between them as husband and wife, but simply the ordinary communications between principal and agent; and the communications would be no more confidential than those between any other principal and agent. . . . Allowing the wife to testify for or against her husband, in any case where a stranger would have been a competent witness, seems to be the rule now; and, in that view of the case, nothing should be excluded except something that is strictly confidential, and not only so but communicated in strict marital confidence."

1878, *Green, President*, in *White v. Perry*, 14 W. Va. 66, 80: "Where there is not even a seeming confidence, when the act done or declaration made by the husband, so far from being private or confidential, is designedly public at the time, and from its nature must have been intended to be afterwards public, there is no interest of the marriage relation or of society which in the absence of all interest of the husband or wife requires the latter to be precluded from testifying between other parties to such act or declaration not affecting the character or person of her husband."

The circumstances which will negative this implication of secrecy must of course vary with the particular case. Commonly, the *presence of a third person* within hearing will negative a marital confidence; so, too, the *intended transmission* of the communication to a third person. But fixed rules are scarcely possible.¹

¹ The following citations include those rulings which construe the statutes expressly making a requirement of confidentiality, as well as those which apply the principle of confidentiality to various situations; the statutes are collected *ante*, § 488: *Alabama*: 1874, *Sumner v. Cooke*, 51 Ala. 521 ("the line of separation . . . is incapable of expression definite enough for a rule"); 1881, *Gordon v. Tweedy*, 71 id. 202, 210 (certain deed-transactions, allowed to be disclosed); 1885, *Owen v. State*, 78 id. 425, 432 ("any transaction or communication between husband and wife which does not on its face appear to have been intended to be public or to become so," is privileged); *Arkansas*: 1874, *Spivey v. Platon*, 29 Ark. 603, 607 (a wife's testimony to sundry transactions by the husband with third parties, admitted); 1884, *Nolen v. Harden*, 43 id. 307, 315 (a wife admitted to testify to the delivery by her husband of a bag of gold to a bailee and the bailee's delivery to her); *Connecticut*: 1888, *Spitz's Appeal*, 56 Conn. 184, 187, 14 Atl. 776 (promises made by the husband on borrowing money from the wife, held "no more privileged than a promissory note would have been"); *Illinois*: 1871, *Reeves v. Herr*, 59 Ill. 81, 85 (the privilege is not confined to "subjects which are confidential in their nature"; but includes "any matter which came to her knowledge in consequence of the family relation"; here, an admission by the opponent in conversation with the husband); *Indiana*: 1872, *Mercer v. Patterson*, 41 Ind. 440, 444 (the husband's statements to a third person in the wife's presence, not privileged); 1873, *Griffin v. Smith*, 45 id. 366 (same); 1876, *Denbo v. Wright*, 53 id. 226 (same); 1878, *Floyd v. Miller*, 61 id. 224, 235 (same); 1881, *Smith v. Smith*, 77 id. 80, 82 (the husband's intoxication, not within the privilege); 1882, *Schmied v. Frank*, 86 id. 250, 257 (statements made between them in regard to a purchase by one as agent, not privileged; "the authority given by the wife to the husband to transact her business is not confidential nor intended to be private; . . . it is intended to be known, and would be worthless unless known"); 1883, *Sedgwick v. Tucker*, 90 id. 271, 281 (wife's testimony to agreements with the husband as to property interests, admitted); 1886, *Beitman v. Hopkins*, 109 id. 177, 9 N. E. 720 (privilege not applied to the wife's testimony to the husband's agreement to convey land to her); 1887, *Stanley v. Stanley*, 112 id. 143, 13 N. E. 261 (a wife allowed to testify to the husband's intoxication, not being under the circumstances a confidential fact); 1897, *Reynolds v. State*, 147 id. 3, 46 N. E. 31 (the privilege not applied to statements made in a third person's presence, after a robbery, as to the identity of an assailant); *Iowa*:

1883, *State v. Middleham*, 62 Ia. 150, 17 N. W. 446 (exclamations to others in the defendant's presence, as to the defendant's murder of his stepson, admitted, as not made to the defendant); 1897, *Allbright v. Hannah*, 103 id. 98, 72 N. W. 421 (conversation between the wife and her father, in the husband's presence, admitted); 1901, *Hertrich v. Hertrich*, 114 id. 643, 87 N. W. 689 (the statute excludes "any" communication); *Wright v. Wright*, — id. —, 87 N. W. 709 (communications "explanatory of transactions," held admissible); *Kansas*: 1893, *Chicago K. & N. R. Co. v. Ellis*, 52 Kan. 41, 47, 33 Pac. 478 (agreement of conveyance between husband and wife, excluded); 1899, *Eagon v. Eagon*, 60 id. 697, 57 Pac. 942 (communications are privileged, even though not confidential); *Kentucky*: 1841, *McGuire v. Maloney*, 1 B. Monr. 224 (the wife's testimony to the execution of an instrument with attesting witnesses, admitted; the transaction being "designedly public at the time, and from its nature must have been intended to be afterwards public"); 1899, *Hilbert v. Com.*, — Ky. —, 51 S. W. 817 (dying declaration to the spouse, admissible); 1903, *Arnett v. Com.*, — id. —, 71 S. W. 635 (a husband's dying declaration to his wife may be proved by her, as not being confidential, under Civ. C. § 606); *Maine*: 1859, *Walker v. Sanborn*, 46 Me. 470, 473 (the privilege does not cover an agreement between the husband and a third person made in the wife's presence); *Massachusetts*: 1861, *Dexter v. Booth*, 2 All. 559 ("private conversations," held to include the husband's ratification, in private, of a purchase made by wife); 1866, *Bliss v. Franklin*, 13 id. 244 (the privilege applied to communications by the wife as agent, showing good faith in the husband's prosecution of the defendant); 1873, *Jacobs v. Hesler*, 113 Mass. 157, 160 (conversation in the presence of their young children not paying any attention, held "private"); 1874, *Raynes v. Bennett*, 114 id. 424, 427 (similar to *Dexter v. Booth*, *supra*); 1875, *Drew v. Tarbell*, 117 id. 90 (similar); 1876, *Brown v. Wood*, 121 id. 137 (conversation promising to repay money borrowed, excluded); 1881, *Fay v. Guynon*, 131 id. 31, 33 (conversation in the presence of the wife's sister, who heard a part, admitted); 1887, *Com. v. Jardine*, 143 id. 567, 10 N. E. 250 (exclamations of pain made in the wife's presence, admitted); 1887, *Com. v. Hayes*, 145 id. 289, 293, 14 N. E. 151 (a wife's instructions to the husband as agent, excluded); 1890, *Com. v. Cleary*, 152 id. 491, 25 N. E. 834 (a husband's prohibition to the wife to sell liquors, excluded); 1891, *Lyon v. Prouty*, 154 id. 489, 28 N. E. 908 (the privilege not applied to the husband's communication to his wife in the presence of a daughter fourteen years old,

In many jurisdictions this fundamental element of confidence is not expressly named in the statutory enactment; it privileges "any communica-

who was not shown to have heard it); 1900, *Fuller v. Fuller*, 177 id. 184, 58 N. E. 588 (the privilege applied to an ordinary private conversation); *Michigan*: 1874, *Herrick v. Odell*, 29 Mich. 47, 49 (the privilege does not cover admissions by the husband to a third person, in the wife's presence); 1884, *Hunt v. Eaton*, 55 id. 362, 366, 21 N. W. 429 (the privilege does not cover contracts between them as to separate property, when the parties are competent in that class of litigation); 1896, *Hagerman v. Wignt*, 108 id. 192, 65 N. W. 756 (delivery of a mortgage by a wife to her husband, with instructions to deliver it to the plaintiff after her death, admitted, because involving "an expectation on her part that the communication would be disclosed"); 1897, *McKenzie v. Lautenschlager*, 113 id. 171, 71 N. W. 489 (alienation of the wife's affections; testimony by the husband excluded); 1903, *Chaddock v. Chaddock*, — id. —, 95 N. W. 972 (deed transaction; no point decided); *Minnesota*: 1886, *Leppla v. Tribune Co.*, 35 Minn. 310, 29 N. W. 127 ("communication," in the statute, includes "all conversations between husband and wife, though on subjects not confidential in their nature"); 1895, *Newstrom v. R. Co.*, 61 id. 78, 63 N. W. 253 (same; "except perhaps those which from their very nature were evidently intended to be communicated to others"); *Mississippi*: 1870, *Whitfield v. Whitfield*, 44 Miss. 254, 262 (a widow allowed to testify to her husband's management of slaves, as "facts not in their nature confidential"); 1895, *Saffold v. Horne*, 72 id. 470, 18 So. 433 (conversations between the husband and the deceased opponent, admitted); *Missouri*: 1874, *Darrier v. Darrier*, 53 Mo. 222, 234 (letter from a husband to the wife on a matter of business unspecified, held not a "confidential communication"); 1899, *Long v. Martin*, 152 id. 668, 54 S. W. 473 (communications in a third person's presence, admitted); *New Hampshire*: 1843, *Pike v. Hayes*, 14 N. H. 19, 22 ("facts which came to her knowledge from other sources, and not by means of her situation as a wife," admissible); 1859, *Aiken v. Gale*, 37 id. 494, 500 (knowledge acquired "through confidential communications from her husband," inadmissible); 1872, *Clements v. Marston*, 52 id. 31, 38 (quoted *supra*); *New Jersey*: 1876, *Wood v. Chetwood*, 27 N. J. L. 311 (husband and wife as trustees; their communications respecting the trust property, held not confidential; a trustee "can have no secrets or confidences respecting the trust property"); *New York*: 1838, *Ratcliff v. Wales*, 1 Hill 63 (criminal conversation; like the next case); 1861, *Chamberlain v. People*, 23 N. Y. 85, 89 (divorce; the wife's testimony to her intercourse with a third person, not privileged); 1888, *Parkhurst v. Berdell*, 110 id. 386, 393, 18 N. E. 123 ("not all communications made between husband and wife when alone" are included; but only such as are "expressly made confidential" or are "of a confidential nature or

induced by the marital relation"); *North Carolina*: 1833, *Hester v. Hester*, 4 Dev. 228 (the husband's remarks of dissatisfaction with his will and of an intention to call in neighbors to help him revise it, held not confidential; quoted *supra*); 1851, *Gaskill v. King*, 12 Ired. 211, 215 (a wife's testimony to the husband's handing her a deed and telling her to record it for A. when she pleased, admitted); 1893, *Toole v. Toole*, 112 N. C. 152, 156, 16 S. E. 912 (communication in a third person's presence, admitted); 1895, *State v. Brittain*, 117 id. 783, 23 S. E. 433 (confession of incest by a wife to a husband, excluded); *Ohio*: 1849, *Cook v. Grange*, 18 Oh. 526, 531 (the privilege covers all matters, whether confidential or not; here held to cover a contract made between the husband and a third person); 1855, *Stober v. McCarter*, 4 Oh. St. 513, 523 (preceding case limited to a divorcee's testimony; the survivor may testify to non-confidential facts, other than conversations; the rule for conversations left undecided); 1877, *Duval v. Davey*, 32 id. 604, 609 (the statute does not exclude the husband's testimony to defamatory words uttered to the wife in his presence); 1878, *Bean v. Green*, 33 id. 444, 447 (the wife's testimony in action for loss of support by furnishing liquor to the husband, admitted); 1881, *McCague v. Miller*, 36 id. 595 (a spouse may testify to the "known presence, hearing, or knowledge of such third person"); 1881, *Stevenson v. Morris*, 37 id. 11, 19 (a wife's testimony to the husband's directions, when alone with her, as to a trespass, excluded); 1883, *Sessions v. Trevitt*, 39 id. 259, 267 (testimony admissible, where a third person was present, even though he has died); *Pennsylvania*: 1846, *Cornell v. Vanartsdalen*, 4 Pa. St. 364, 374 ("the rule is the same, in its spirit and extent, as that which excludes confidential communications made by a client to an attorney"; here admitting the wife's testimony to the husband's transactions with a tenant); 1867, *Hitner's Appeal*, 54 id. 110, 111, 117 (reconciliation being a fact sufficient to avoid a deed of separation, a widow was not allowed to testify to cohabitation with the deceased husband after separation; *Thompson and Agnew, JJ.*, diss.); 1868, *Peiffer v. Lytle*, 58 id. 386, 392 (communications about an advancement, admitted); 1881, *Robb's Appeal*, 98 id. 501, 503 ("ordinary business transactions and conversations in which others have participated," not included); 1887, *Brock v. Brock*, 116 id. 109, 113, 9 Atl. 486 (certain business communications, excluded); 1887, *Adams v. Bleakley*, 117 id. 283, 292, 10 Atl. 884 (certain transactions, admitted); 1895, *Seitz v. Seitz*, 170 id. 71, 32 Atl. 578 (an avowal by the husband to the wife of his marital misconduct and of his intention to persist in it, admitted); 1898, *Dumbach v. Bishop*, 183 id. 602, 39 Atl. 38 (transactions between the wife, husband, and a third person, received); *Rhode Island*: 1879, *Campbell v. Chace*, 12 R. I. 333 (privilege held applicable to communications

tion." Some Courts, however, have construed this phrase in the spirit of the correct principle, and have implied a limitation to confidential communications. Others have literally applied the words of the statute, which is thus allowed to create an intolerable anomaly in the law of privileged communications. No justification for such an extension of the privilege has ever been attempted, and it must be supposed that this broad statutory phrasing originated in inadvertence. It is proper enough to maintain (as already noticed) that all marital communications should be presumed to be confidential until the contrary appears; but if the contrary appears, there is no reason for recognizing the privilege.

made in the presence of a third person); *South Carolina*: 1868, *Moseley v. Eakin*, 15 Rich. 324, 339 (the former statute of 1866 excluding "communications," held to "preserve the principles of the common law" and to mean "confidential communications"); *Tennessee*: 1851, *Brewer v. Ferguson*, 11 Humph. 565, 566 (the widow of the testator not admitted for contestants of his will to prove his "conduct and conversation" evidencing insanity; "the law will presume the trust and confidence from the relation"); 1858, *Kimbrough v. Mitchell*, 1 Head 539 (a wife not admitted to prove a husband's ill-usage leading to his quarrel with a third person); 1860, *Queener v. Morrow*, 1 Coldw. 123, 128 (a wife's statements to her husband in a third person's presence, admissible); 1866, *Allison v. Barrow*, 3 id. 414, 416 (same); 1869, *German v. German*, 7 id. 180, 181 (unspecified "statements and conversations," excluded); 1871, *State v. McAuley*, 4 Heisk. 424, 432 (transactions between the husband and a third party, held not provable by the wife who had been present; preceding cases not cited); 1878, *Patton v. Wilson*, 2 Lea 101, 112 (the wife's testimony that she saw documents and money in the husband's possession, excluded); 1879, *Orr v. Cox*, 3 id. 617, 621 (privilege confined to "facts coming to their knowledge through the mutual relation"); after the trial of this case the statute of 1879, Code 1896, § 5596, was enacted; 1882, *Washington v. Bedford*, 10 id. 243, 246 (the wife's testimony to the husband's giving her money, etc., excluded); 1895, *Phoenix Ins. Co. v. Shoemaker*, 95 Tenn. 72, 31 S. W. 270 ("all secret confidential disclosures and communications between the husband and wife, the publication of which would betray conjugal confidence and trust and tend to produce discord in the family are prohibited" from disclosure, and "all transactions and conversations had between the husband and wife in relation to their own affairs, not in the presence of some third person," are also prohibited; yet "matters and conversations that occur between husband and wife and third persons or in the presence of third persons, and are not intended to be secret or of a confidential character," are admissible; and, further than this, the facts of each case must largely control; here excluding conversations and payments alleged to concern a resulting trust, and the delivery of a deed by

husband to wife); 1898, *Young v. Hurst*, — id. —, 48 S. W. 355 (the rule in *Ins. Co. v. Shoemaker* applied to exclude the wife's testimony as to the husband's gift to her of money and a chattel, but admitting it as to her husband's statements to third persons concerning the title); *Texas*: 1891, *Mitchell v. Mitchell*, 80 Tex. 101, 116, 15 S. W. 705 (the meaning of "confidential" must be determined "by the subject-matter of the communication, or by the circumstances under which it is made, or by both"; here, certain letters were excluded); *United States*: 1839, *Stein v. Bowman*, 13 Pet. 209, 221 (a husband's admissions to the wife that he had committed perjury, excluded); *Utah*: 1903, *Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942 (the communication must be confidential); *Virginia*: 1830, *Robin v. King*, 2 Leigh 140 (a widow not admitted to prove the husband's disclaimers of title, "made in the presence of the family"; quoted *supra*); 1873, *Murphy v. Com.*, 23 Gratt. 960, 965 (assault; the injured person's admission to his wife that the defendant struck in defence only, excluded, though the two were then living apart); *Vermont*: 1835, *Williams v. Baldwin*, 7 Vt. 503 (a husband's possession of a letter, and its contents, provable by the wife); 1855, *Smith v. Proctor*, 27 id. 304, 308 (services rendered by a third person to the husband; the wife admitted); 1895, *Wheeler v. Campbell*, 68 id. 98, 34 Atl. 35 (a wife may testify to conversations between the husband and a third person); *Washington*: 1901, *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819, *semble* (the statute does not apply to conversations on business matters, but only to confidential communications); *West Virginia*: 1878, *White v. Perry*, 14 W. Va. 66, 80 (the wife admitted to prove certain transactions of sale by the husband; quoted *supra*); *Wisconsin*: 1870, *Cook v. Henry*, 25 Wis. 569, 571 (authority to the wife to sell household goods, not a confidential communication); 1890, *Bigelow v. Sickles*, 75 id. 427, 429, 44 N. W. 761 (the husband's testimony to the wife's conduct with an adulterer, admitted); 1890, *Smith v. Merrill*, ib. 461, 462, 44 N. W. 759 (note written by a wife to an adulterer in the husband's presence, but kept by her; his testimony to it, excluded); 1897, *Lanctot v. State*, 98 id. 136, 138, 73 N. W. 575 (letters from a husband to the wife, revealing his identity, excluded).

§ 2337. **Communications, not Acts.** The privilege has for its object the security from apprehension of disclosure, — a security in consequence of which confidences will be freely given and not withheld. The protection therefore extends only to communications, *i. e.* utterances, not acts, — the reasoning being analogous to that which establishes a similar limitation for communications between attorney and client (*ante*, § 2306). Nevertheless, the statute in some jurisdictions extends the privilege to “transactions,” or to knowledge of any fact acquired in the marital relation; and there is at first sight some plausibility in this extension. The confidence, it may be argued, which the husband or wife desires, and the freedom from apprehension which the privilege is designed to secure, must be supposed to be equally as desirable for conduct as for utterances. For example, a husband intending a secret journey must be equally desirous to prevent the disclosure of his preparations of accoutrement as of his communications of plan. To be obliged, under pain of disclosure by legal process, to remain dumb as to his destination is no more incongruous with marital confidence than to be obliged to conceal his valise and his railroad-ticket and his travelling garb from the wife’s inspection. Must not the confidence be as desirable for the latter as for the former? And is not every act of domestic privacy, equally with every utterance, done in reliance upon a supposed confidence in the maintenance of that privacy? In short, in the preposterously extreme logic of one Court, must not the law “assume that no husband will commit a crime in the presence of his wife except in the confidence induced by the marital relation?”¹ The difficulty with this argument is that it proves too much. It requires quite as effectually that the same privilege be extended to the testimony of a son or a brother or a parent or a servant. It amounts merely to this, that every man would of course much prefer that no member of his family should, without his consent, be allowed to disclose the private doings of the household. This is natural enough; but it is not at all what the principle of privileged communications has ever assumed as its goal (*ante*, § 2285). The privilege concerns solely the relation of husband and wife; it cares nothing for the family as such, — nothing for parent and child, nothing for brother and sister, nothing for master and servant. It is the peculiar interest of the marital relation, and of that alone, which requires unrestricted confidence; and therefore that relation alone is protected and those confidences alone which spring from that relation are protected. Domestic conduct, therefore, may doubtless be private and confidential, but the confidence is towards the family at large, and not towards the wife in particular. It is only so far as there has been a special confiding of it to the wife (or husband) that it comes within the privilege.

It follows, therefore, on the one hand, that the privilege does not apply to domestic conduct as such. On the other hand, it is equally true that any particular act or conduct may in fact become the subject of a special con-

¹ Ross, C. J., in *French v. Ware*, 65 Vt. 338, 347, 26 Atl. 1096.

fidence in the wife alone, *i. e.* may become a communication to her. For example, the husband, bringing home a package of valuables, and calling his wife's attention, "Note that I place this in the fourth desk-drawer," in effect communicates to her not only the words but also the act of placing the package. While his domestic acts are ordinarily not to be treated as communications, nevertheless it is always conceivable that they may by special circumstances be made part of a communication. To formulate a precise test would perhaps be impracticable. It is clear, however, that the mere doing of an act by the husband in the wife's presence is not a communication of it by him; for it is done for the sake of the doing, not for the sake of the disclosure. There must be something in the way of an invitation of the wife's presence or attention with the object of bringing the act directly to her knowledge. Except in such cases, the privilege cannot cover anything but an utterance of words, spoken or written. One of the many aspects of this principle is illustrated in the following passage:

1882, *James, J.*, in *U. S. v. Guiteau*, 12 D. C. 498, 547: "The exhibition of sanity or insanity is not a communication at all, in the sense of the rule which protects the privacy and confidence of the marriage relation, any more than the height or color or blindness or the loss of an arm of one of the parties is a communication. The rule which is supposed to have been violated was established in order that the conduct, the voluntary conduct, of married life might rest secure upon a basis of peace and trust, and relates to matters which the parties may elect to disclose or not disclose. It was provided in order that matters should not come to the light which would not do so at all without a disturbance and disregard of the bond of peace and confidence between the married pair. Therefore it has not been applied to any matter which the husband for example has elected to make public, by doing or saying it in presence of third persons along with his wife; and it cannot be applied to that which, whether he will or no, he inevitably exhibits to the world as well as to his wife. Some diseases a husband may conceal, and he may choose whether to reveal them or not. . . . But sanity or insanity are conditions which are not of choice; and when the disease of insanity exists, the exhibition of it is neither a matter of voluntary confidence nor capable of being one of the secrets of the married relation."

Apart from the statutes above mentioned, whose wording requires a broader scope, the privilege is commonly accepted as applying to utterances only.²

² Compare also some of the rulings cited *ante*, § 2236: *California*: 1898, *Poulson v. Stanley*, 122 Cal. 655, 55 Pac. 605 (delivery of a deed, not a "communication"); *District of Columbia*: 1882, *U. S. v. Guiteau*, 12 D. C. 498, 547 ("whether in your association with him you ever saw anything that would indicate that he was a man of unsound mind," allowed; quoted *supra*); *Georgia*: 1869, *Williams v. Phillips*, 39 id. 597, 605 (similar to the next case); 1869, *Jackson v. Jackson*, 40 Ga. 150, 153 (privilege covers "any fact which came to her knowledge by reason of the confidential relation of husband and wife"); 1869, *McIntyre v. Meldrim*, ib. 490, 491 (similar); 1872, *Davis v. Weaver*, 46 id. 626, 629 (similar); 1878, *Goodrum v. State*, 60 id. 509, 511 (a husband not allowed to testify that a wife did not complain to him of an assault; "the wife ought to feel . . . as secure that her silence will not be disclosed, to her

detriment or disadvantage, as that what she says will not be repeated"); 1879, *Stanford v. Murphy*, 68 id. 411, 416 (testimony by the wife to a note deposited with her by the husband, excluded; the privilege covers "facts ascertained by reason of such confidential intercourse"); *Illinois*: 1896, *Griffith v. Griffith*, 162 Ill. 368, 44 N. E. 820 (acts of self-abuse by the husband, observed by the wife, held privileged); *Indiana*: 1882, *Perry v. Randall*, 88 Ind. 143 (action for money lost by the plaintiff in the defendant's house and found and kept by the defendant; the defendant's wife not admissible to testify to the defendant's conduct in dealing with the money in her presence); 1893, *Polson v. State*, 137 id. 519, 524, 35 N. E. 907 (the fact of imparting a loathsome disease, not privileged); 1897, *Beyerline v. State*, 147 id. 125, 45 N. E. 772 (that the wife, testifying, had been taken by the neck by the husband and

§ 2338. **Exceptions and Distinctions.** (1) Under a few *statutes*, by express words or by construction, the communications may exceptionally be disclosed, commonly in cases involving the commission of an injury by one spouse upon the other.¹

(2) At *common law*, where exceptions were recognized to the rule forbidding one spouse to testify against the other, *i.e.* in the case of certain *injuries done by one to the other* (*ante*, § 2239), it would seem that the present rule suffered also an exception, and properly.

(3) At *common law*, before any statutory recognition of the present privilege had taken place, the wife's correspondence with the husband was always admitted in actions for *criminal conversation* (*ante*, § 1730). So far as it was admitted for the plaintiff, the husband's offer of it might be treated as a waiver; but so far as admitted for the defendant, it must have implied the recognition of an exception, and properly.²

compelled to forge a signature, admitted, partly because not a communication, partly because not confidential, partly because a crime); *Indian Territory*: 1899, *German-American Ins. Co. v. Paul*, 2 Ind. T. 625, 53 S. W. 442 (that his wife had given him property, admitted); *Iowa*: 1861, *Romans v. Hay*, 12 Ia. 270 (the privilege does not cover the fact of desertion); 1882, *Hanks v. Van Garder*, 59 id. 179, 182, 13 N. W. 103 (the privilege does not cover a husband's transfer of a claim to the wife); *Kansas*: 1900, *State Bank v. Hutchinson*, 62 Kan. 9, 61 Pac. 443 (issue whether a wife's mortgage was executed in fear of threats to prosecute her husband; her testimony that she had heard that he was threatened, admissible, though the source of her hearing was a communication from the husband); *Kentucky*: 1871, *English v. Cropper*, 8 Bush 292 (the privilege does not cover facts known "from other means of information than such as result from the marriage relation"); 1877, *Elswick v. Com.*, 13 id. 155, 156 (same); 1890, *Com. v. Sapp*, 90 Ky. 580, 585, 14 S. W. 834 (same; a wife admitted to testify to the husband's attempt to poison her); *Massachusetts*: 1868, *Baldwin v. Parker*, 99 Mass. 79, 83 (the fact of a communication, not merely its tenor, is privileged); *Missouri*: 1880, *Holman v. Bachus*, 73 Mo. 49, 51 (the privilege covers an act of payment which might be explained by the conversation accompanying); 1893, *McFadin v. Catron*, 120 id. 252, 274, 25 S. W. 506 (preceding case approved); 1895, *Harlan v. Moore*, 132 id. 483, 492, 34 S. W. 70 (the privilege does not cover mere "acts" of a spouse); 1897, *Shanklin v. McCracken*, 140 id. 348, 41 S. W. 898 (testimony of the wife, that M. handed her husband a package, which he opened and handed back to M., and that she saw that it contained deeds, admitted); *New Hampshire*: 1899, *Noyes v. Marston*, 70 N. H. 7, 47 Atl. 592 (in Pub. St. § 20, the restriction of "violation of marital confidence" applies to "statement, etc.," as well as to "any matters," in spite of the lack of a comma after "matter"); *Ohio*: 1849, *Cook v. Grange*, 18 Oh. 526, 531 (the privilege covers "all transactions which occurred during mar-

riage"); 1855, *Stober v. McCarter*, 4 Oh. St. 513, 523 (preceding case limited to a divorcee's testimony; the survivor's testimony may include facts, other than conversations, occurring during coverture which do not violate deceased's confidence or injure his reputation); 1884, *Holtz v. Dick*, 42 id. 23, 26 (husband allowed to testify to wife's handwriting); *Utah*: 1903, *Van Alstine's Estate*, 26 Utah 193, 72 Pac. 942 (condition of the husband as to intoxication in his wife's presence, held not a communication); *Vermont*: 1893, *French v. Ware*, 65 Vt. 338, 344, 26 Atl. 1096 (battery; complaints by the injured husband as to bodily pains, the fact of his inability to labor, and a perusal of accounts with others; the first held privileged, the others not; confidential are "matters of confidence" and "transactions affecting the character," including "direct testimony to the act of a crime"; opinion unsound); *Wisconsin*: 1897, *Lancot v. State*, 98 Wis. 136, 73 N. W. 575 (adultery; to prove the defendant's name and identity, letters to his wife bearing the name J. L., and signed as husband, were excluded).

¹ *Ind.*: 1883, *Doolittle v. State*, 93 Ind. 272 (criminal cases "where the wife is the injured party"; based on a comparison of Rev. St. § 1889, par. 2, "the party injured by the offence committed," with the general provision making the rules in criminal cases the same as in civil cases); 1895, *Jordan v. State*, 142 id. 422, 424, 41 N. E. 817 (same); *Mo.*: 1889, *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663 ("in the present case, S. attempted to take advantage of a legal technicality as to conversations between husband and wife, to prevent the full extent of his fraud from being unearthed," and an exception to the privilege was recognized for fraud); 1896, *Moeckel v. Heim*, 134 id. 576, 36 S. W. 226 (fraud; the husband, as alleged, having persuaded his wife to sign a note, the conversations between them were testified to); 1902, *Rice v. Waddill*, 168 id. 99, 67 S. W. 605 (a husband's letters to his wife, showing a fraudulent scheme to deprive her of property, admitted against his grantees).

² 1896, *Hornor v. Yance*, 93 Wis. 352, 67

(4) The wife's statements *in her husband's presence* are receivable against him as his admissions implied by silent assent (*ante*, § 2232); yet if the interview was private, the present privilege seems to forbid this; for, even regarding the statements as adopted and made by him, they are still private and confidential.³

3. Persons Prohibited and Entitled.

§ 2339. Third Persons Overhearing; Documents obtained by Third Persons.

(1) A *third person overhearing* a confidential communication may testify to it,¹ for the same reason recognized in the privilege for a client's communications with his attorney (*ante*, § 2326).

(2) For *documents* of communication coming into the *possession of a third person*, a distinction should obtain, analogous to that already indicated for a client's communications (*ante*, §§ 2325, 2326); *i. e.* if they were obtained from the addressee by voluntary delivery, they should still be privileged (for otherwise the privilege could by collusion be practically nullified for written communications); but if they were obtained surreptitiously or otherwise without the addressee's consent, the privilege should cease.²

§ 2340. **Who may Claim the Privilege; Waiver.** (1) The privilege is intended to secure freedom from apprehension in the mind of the one desiring to communicate (*ante*, § 2332); it thus belongs to the *communicating one*, and the other one — the addressee of the communication — is therefore not

N. W. 720 (but it is difficult to reconcile this with the local statute, § 4072).

³ 1871, *R. v. Hilditch*, 12 Cox Cr. 131, Cox, J. ("what a wife says in the presence of her husband is admissible, and what she writes to him, if received and recognized by him, is equivalent to a statement made verbally by her in his presence"; a letter found on his person, here doubtfully held admissible).

² 1834, *R. v. Simons*, 6 C. & P. 540; 1889, *Gannon v. State*, 127 Ill. 507, 518, 21 N. E. 525; 1900, *State Bank v. Hutchinson*, 62 Kan. 9, 61 Pac. 443; 1872, *Com. v. Griffin*, 110 Mass. 181; 1862, *State v. Center*, 35 Vt. 378, 382, 386 (proved by a police-officer who was in the next room).

² The rulings are not harmonious; compare the rulings on confession obtained by trick (*ante*, § 841): 1872, *R. v. Pamenter*, 12 Cox Cr. 177 (letter to a wife, given to a constable to post, but retained by him, excluded); 1902, *Ward v. State*, 70 Ark. 204, 66 S. W. 926 (a defendant, in jail, gave to his wife a letter, partly to her and partly to N., and the letter was taken from her; held, that the part to her was inadmissible, and, by a majority, that the part to N. was admissible); 1880, *State v. Hoyt*, 47 Conn. 540 (letters of the defendant to his wife, admitted from one who had obtained possession of them); 1898, *Mercer v. State*, 40 Fla. 216, 24 So. 154 (a husband's letter to his wife, obtained somehow by the defendant; excluded, regardless of the persons by whom it was possessed); 1893, *Wilkerson v. State*, 91 Ga. 729, 738, 17 S. E.

990 (a letter from a husband to the wife, given by her to her paramour, excluded); 1878, *State v. Buffington*, 20 Kan. 599, 613 (a letter from the defendant to his wife, handed by her to the prosecuting witness, admitted; "it is privileged only while it remains in their custody and control, or while it remains within the custody and control of their agents or representatives"); 1893, *Scott v. Com.*, 94 Ky. 511, 23 S. W. 219 (a letter by a husband to the wife, obtained from her by a third person, whether by force or otherwise, privileged); 1892, *State v. Ulrich*, 110 Mo. 350, 364, 19 S. W. 656 (a husband's letters to the wife produced from her custody, excluded); 1877, *Geiger v. State*, 6 Nebr. 545, 549 (a letter from a husband to the wife, found by a third person in the husband's house, admitted; "the Court will not take notice how they are obtained"); 1902, *People v. Truck*, 170 N. Y. 203, 63 N. E. 281 (the defendant's wife permitted to prove her receipt from him in jail of two letters, and her mailing of them, the wife not being aware of the contents or of the addressees); 1887, *Bowman v. Patrick*, 32 Fed. 368 (letters from a husband to a wife, found among his papers by the husband's administrator, and by him delivered to the party, excluded); 1889, *Selden v. State*, 74 Wis. 271, 274, 42 N. W. 218 (letters by a husband to a wife, deposited by her with her attorney for a divorce, held not producible by the latter in a prosecution of the husband for perjury; addresses and postmarks on the envelopes, equally excluded).

entitled to object;¹ unless, as already noticed (*ante*, §§ 2338, par. 4), the latter's silence is desired to be treated as an assent and an adoption of the statement, which thus makes it doubly a communication and doubly privileged.

(2) The spouse possessing the privilege may of course *waive* it. The waiver may be found in some extrajudicial disclosure,² or in some act of testimony which in fairness places the person in a position not to object consistently to further disclosure,³ — for, as already noted (*ante*, § 2327), the principle of waiver cannot depend solely upon the interpretation of conduct implying willingness to waive.

Nevertheless, in a few Courts the doctrine of waiver appears to be ignored entirely.⁴ This confusion of a disqualification with a privilege has been already adverted to (*ante*, § 2334); it is entirely unjustifiable (except as required by the express words of some perversely-phrased statute), and is so radical an error of principle that no further argument would cure such a misapprehension.

4. Cessation of the Privilege.

§ 2341. **Death; Divorce; Separation; Invalid Marriage.** The privilege is intended to secure such a guarantee against apprehension of disclosure as will induce absolute freedom of communication; and this can only be attained by continuing the protection in spite of the termination of the marital relation :

1859, *Stephens, J.*, in *Lingo v. State*, 29 Ga. 470, 483: "Communications between husband and wife are protected forever. This is necessary to the preservation of that perfect confidence and trust which should characterize and bless the relation of man and wife. Each must feel that the other is a safe and sacred depository of all secrets; and the protection which the law holds over the dead is the very source of greatest security to all the living."

(1) Hence, it has always been conceded that the *death* of the person communicating does not terminate the privilege.¹ In this respect, the present

¹ 1900, *Derham v. Derham*, 125 Mich. 109, 83 N. W. 1005; 1888, *Stickney v. Stickney*, 131 U. S. 227, 237, 9 Sup. 677, *semble* (cited *post*, § 2341). *Contra* (that the privilege belongs to both): 1890, *People v. Mullings*, 83 Cal. 138, 143, 23 Pac. 229; 1891, *People v. Wood*, 126 N. Y. 249, 271, 27 N. E. 362, *semble*. *Undecided*: 1882, *Perry v. Randall*, 83 Ind. 143, 146, *semble*.

² 1894, *People v. Hayes*, 140 N. Y. 484, 495, 35 N. E. 951 (letters from a wife to a husband, given by him to his mistress and by her to the district attorney, not privileged for the husband).

³ The statutes cited *ante*, § 488, sometimes provide for this: 1898, *Driver v. Driver*, — Ind. —, 52 N. E. 401 (divorce; husband's use of his own communications to the wife, treated as a waiver of privilege as to his letters on the same subjects); 1897, *Kelley v. Andrews*, 102 Ia. 119, 71 N. W. 251 (presence of the wife in Court at

a former trial when the husband disclosed the communications in question, not a waiver of the privilege for the second trial); 1898, *Nichols v. Nichols*, 147 Mo. 387, 48 S. W. 947 (examination of wife by opponent as to communications waives the privilege as to such communications); 1899, *Rose v. Mitchell*, 21 R. I. 270, 43 Atl. 67 (alienation of wife's affections; whether plaintiff's testimony to wife's language to him is a waiver, allowing her to testify to similar matters, undecided).

The following ruling is unsound; compare § 2276, *ante*: 1891, *Connolly v. Murrell*, 14 Ont. Pr. 187 (the husband may at any time claim the privilege, even after making partial disclosure).

⁴ 1877, *Chapman v. Holding*, 60 Ala. 522, 533, *semble*; 1900, *Robinson v. Robinson*, 22 R. I. 121, 46 Atl. 455. *Undecided*: 1882, *Perry v. Randall*, 83 Ind. 143, 146, *semble*.

¹ 1824, *Doker v. Hasler*, Ry. & Moo. 198

privilege differs not only from the marital disqualification (*ante*, § 610) but also from the marital privilege against adverse testimony (*ante*, § 2237), so that, even where those two have been terminated by death or have been abolished by statute, the present privilege remains for enforcement. (2) In the same way, the privilege does not terminate with *divorce* or separation.² (3) But the application of the privilege to a communication made between husband and wife *living in separation*,³ or between persons living in *unlawful cohabitation*,⁴ cannot be conceded; for here the policy of the privilege does not apply (*ante*, § 2332), since the relation is not one in which the law need seek to foster confidence, and no privilege ever came into existence.

(a widow not admitted to prove a conversation between herself and the testator); 1895, *Emmons v. Barton*, 109 Cal. 662, 669, 42 Pac. 303; 1879, *Brooks v. Francis*, 10 D. C. 109; 1852, *Farmers' Bank v. Cole*, 5 Harringt. 418; 1859, *Lingo v. State*, 29 Ga. 470, 483; 1869, *Jackson v. Jackson*, 40 id. 150, 153; 1895, *Goelz v. Goelz*, 157 Ill. 33, 41, 41 N. E. 756; 1895, *Gillespie v. Gillespie*, 159 id. 84, 90, 42 N. E. 305; 1898, *Geer v. Goudy*, 174 id. 514, 51 N. E. 623; 1872, *Mercer v. Patterson*, 41 Ind. 440, 444; 1873, *Griffin v. Smith*, 45 id. 366; 1900, *Shuman v. Supreme Lodge*, 110 Ia. 480, 81 N. W. 717 (statute applied); 1901, *Hertrich v. Hertrich*, 114 id. 643, 87 N. W. 689; 1841, *McGuire v. Maloney*, 1 B. Monr. 224; 1858, *Short v. Tinsley*, 1 Metc. Ky. 397, 401; 1890, *Com. v. Sapp*, 90 Ky. 580, 584, 14 S. W. 834; 1901, *Murphy v. Murphy*, — Ky. —, 65 S. W. 165 (privilege held not applicable to a widow's testimony to the testator's declarations in a will contest; *Du Relle, J., diss.*); 1902, *Mauhattan L. I. Co. v. Beard*, 112 id. 455, 66 S. W. 35 (privilege held applicable to a widow's testimony in a suit on the husband's insurance policy); 1903, *New York Life Ins. Co. v. Johnson*, — id. —, 72 S. W. 762 (widow's testimony in favor of the deceased's estate, excluded); 1859, *Walker v. Sanborn*, 46 Me. 470, 472; 1861, *Dexter v. Booth*, 2 All. 559; 1886, *Maynard v. Vinton*, 59 Mich. 139, 152, 26 N. W. 401; 1895, *Newstrom v. R. Co.* 61 Minn. 78, 63 N. W. 253; 1895, *Buckingham v. Roar*, 45 Nebr. 244, 63 N. W. 398; 1842, *Babcock v. Booth*, 2 Hill N. Y. 181, 187; 1842, *Osterhout v. Shoemaker*, 3 id. 513, 519; 1872, *Southwick v. Southwick*, 49 N. Y. 510; 1846, *Cornell v. Vanartsdalen*, 4 Pa. St. 364, 374; 1871, *State v. McAuley*, 4 Heisk. 424, 432.

In some of the above cases the testimony was excluded even when it favored the deceased, partly because of the erroneous view already noticed (*ante*, § 2334, par. 1), partly because of a too strict view of the principle of waiver

(*ante*, §§ 2329, 2340); a correct solution is seen in the following cases: 1888, *Stickney v. Stickney*, 181 U. S. 227, 237, 9 Sup. 677 (a widow held to be "at liberty, though not compellable, to state the directions given by her to her husband respecting the investment of her money"); 1897, *Smith v. Cook*, 10 D. C. App. 488, 492; *Posey v. Hanson*, ib. 497, 509 (the widow allowed to disclose communications with the deceased husband in a suit against her involving the title to property).

² 1885, *Owen v. State*, 78 Ala. 425, 428; 1888, *Long v. State*, 86 id. 36, 41, 5 So. 443; 1884, *Nolen v. Harden*, 43 Ark. 307, 315; 1890, *People v. Mullings*, 83 Cal. 138, 143, 23 Pac. 229; 1896, *Griffith v. Griffith*, 162 Ill. 368, 44 N. E. 820 (divorced wife not allowed to testify for the plaintiff in an action by the second wife for divorce); 1898, *Geer v. Goudy*, 174 id. 514, 51 N. E. 623; 1882, *Perry v. Randall*, 83 Ind. 143; 1901, *Evans' Estate*, 114 Ia. 240, 86 N. W. 283; 1872, *Anderson v. Anderson*, 9 Kan. 112, 115; 1890, *Com. v. Sapp*, 90 Ky. 580, 584, 14 S. W. 834; 1888, *Hitchcock v. Moore*, 70 Mich. 112, 116, 37 N. W. 914; 1886, *Leppla v. Tribune Co.*, 35 Minn. 310, 29 N. W. 127; 1900, *State v. Kodat*, 158 Mo. 125, 59 S. W. 73; *Ratcliff v. Wales*, 1 Hill N. Y. 63; 1861, *Chamberlain v. People*, 23 N. Y. 85, 89; 1849, *Cook v. Grange*, 18 Oh. 526, 529; 1887, *Brock v. Brock*, 116 Pa. 109, 113, 9 Atl. 486; 1900, *Robinson v. Robinson*, 22 R. I. 121, 46 Atl. 455; 1858, *Kimbrough v. Mitchell*, 1 Head 539, 540; 1870, *Cook v. Henry*, 25 Wis. 569, 571.

³ *Contra*: 1884, *Holtz v. Dick*, 42 Oh. St. 23, 26 (a wife's letters to a husband, while living separate from him, admitted on common-law principles; "that rule has not been limited by the present legislation, but enlarged").

⁴ 1831, *Wells v. Fisher*, 1 Moo. & Rob. 99 (here the man was a second husband, but the first husband, who had been supposed dead, had returned from foreign parts).

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

SUB-TOPIC IV: COMMUNICATIONS BY AND TO JURORS.

CHAPTER LXXXII.

§ 2345. General Principles involved.

A. PETIT JURY.

1. Privileged Communications Rule.

§ 2346. Scope of the Principle.

2. Parol Evidence Rule.

§ 2348. General Principle.

§ 2349. (a) Motives, Beliefs, Misunderstandings, or Intentions of Jurors, as immaterial.

§ 2350. Same: Examining the Jury before Discharge, to ascertain the Grounds of Verdict.

§ 2351. (b) Issues of the Trial, as material; Judge's Instructions, as considered by the Jury.

§ 2352. (c) Irregularities and Misconduct, as material; Jurors Impeaching their Verdict; History of the Rule.

§ 2353. Same: Policy of the Rule.

§ 2354. Same: State of the Law in Various Jurisdictions; Qualifications of the Rule.

§ 2355. (d) Mistake in Recording or Announcing the Verdict.

§ 2356. Same: Explaining the Verdict's Meaning; Mistake as to its Legal Effect; Retiring to Reconsider.

3. Arbitrators' Awards.

§ 2358. Foregoing Principles applied to Arbitrators' Awards.

B. GRAND JURY.

1. Privileged Communications Rule.

§ 2360. History and General Principle.

§ 2361. (a) Privilege of Grand Jurors; Secrecy of Vote and Opinion.

§ 2362. (b) Privilege of Witnesses before the Grand Jury; General Principle.

§ 2363. Same: Instances of the Cessation of the Privilege.

2. Parol Evidence Rule.

§ 2364. Grounds for Indictment; Illegal Evidence; Required Number of Votes; etc.

§ 2345. **General Principles involved.** The doctrine of privilege for confidential communications, when applied to jurors in their deliberations, found itself side by side with two other and totally distinct doctrines. To the natural risks of entanglement, add that one of these doctrines is not a principle of evidence at all, and that the other is a now discarded principle which at one time had great vogue in other relations; and it is easy to see that much obscurity of rule has resulted, together with much difference of judicial opinion. As the common formula has run, "a juror's testimony or affidavit is not receivable to impeach his own verdict." But this rule of thumb is in itself neither absolutely correct as a statement of the acknowledged law, nor at all defensible upon any principle in this unqualified form. It is a mere shibboleth, and has no intrinsic signification whatever. It resembles the popular notion in times of stringency that "the country needs more money," or the old tradal fallacy that a people's money ought to be spent within its own borders and not paid to foreign merchants for foreign goods, — both of which have a certain plausibility, and yet can only be exposed by a consideration of independent and fundamental economic principles which combine under certain circumstances to produce the facts that give plausibility to the popular dogmas. The dogma that a juror may not impeach his verdict is, then, in itself neither correct in law nor reasonable in principle; but it has reference to a group of rules deducible from three general and independent principles, which must be examined separately:

1. *Privileged communications.* The juror's subjective freedom of expression in consultation must be guaranteed. Hence the evidential principle of privileged communications (*ante*, § 2285) genuinely applies to the deliberations of a jury, so as to forbid any one of them to reveal the communications of another during retirement, without the latter's consent.

2. *Parol evidence (Integration).* The verdict of a jury is a written act, like a will or a contract or a judgment reduced to writing, and the "parol evidence" rule (*post*, § 2401) governs it, in a special application adapted to its circumstances. The results of this principle's application fall under four heads: *a.* The *negotiations* and *motives* preceding and leading up to the final act of uttering the verdict are immaterial and cannot be used to vary or set aside the verdict as uttered; *b.* The precise scope of the *issues* upon which the verdict is founded is always open to ascertainment; *c.* The failure to observe those forms of *behavior* which are essential to the validity of jurors' actions is always open to establishment; *d.* The incorrectness of the *foreman's declaration* or of the *clerk of court's record*, in not representing the actual terms of the verdict as finally assented to by the jury as a body, may always be established, for the purpose of correcting the record, by proceedings taken at a proper time; provided always that this permissible process is to be distinguished from the things prohibited by the rule of (*a*), above.

3. *Self-stultifying testimony.* In so far as the rule of 2, *c*, above, is attempted to be carried out by using a juror's testimony to prove his own misbehavior, this would be forbidden by the principle *nemo turpitudinem suam allegans audietur* (*ante*, § 525), if there were any such principle. But that principle of evidence has long ago disappeared from every other part of our law, and it should not survive for the present purpose.

The foregoing principles have application as well to *grand jurors* as to petit jurors, but naturally with some differences of result. The chief difference is that under the principle of 1, above (privileged communications), the communications of witnesses to the jurors, as well as of the jurors among themselves, are included, and a special development of the principle becomes necessary.

So also the award of *arbitrators* is governed by the same principles, the chief difference occurring in the application of 2, *b*, above, because of the arbitrators' combination of the functions of judge and jury.

A. PETIT JURY.

1. Privileged Communications Rule.

§ 2346. **Scope of the Principle.** The requirements of the general principle of privileged communications (*ante*, § 2285) are fully satisfied for communications between jurors during retirement. The communications originate in a confidence of secrecy; this confidence is essential to the due attainment of the jury's constitutional purpose; the relation of juror is clearly entitled to the highest consideration and the most careful protection; and the injury from

disclosure would certainly overbalance the benefits thereby gained.¹ It has therefore always been assumed and conceded that a juror is privileged not to have his communications with a fellow-juror disclosed upon the witness-stand against his consent.²

Nevertheless this principle has in practice not played a frequent part, and for three reasons: (a) The communications between jurors are seldom relevant in any way upon another trial;³ (b) even when they are desired to be used on motions for a new trial, they are usually excluded by virtue of the parol evidence rule in some aspect; when they are not so excluded, they are still usually without the privilege because they involve misconduct, which is perhaps not protected by the principle of the privilege;⁴ (c) even when the privilege would apply, the juror himself waives it by making voluntary affidavit.

It remains, however, to notice the practical differences between the application of the present principle, *i. e.* the genuine privilege, and the ensuing one, *i. e.* the parol evidence rule: (1) Under the parol evidence rule, the juror's testimony is excluded only when it is offered to prove facts nullifying the verdict, on a motion for a new trial. But under the privileged communications rule, the juror's testimony would be excluded for any purpose whatever, — for example, where upon another trial he was a witness and his bias was offered to be shown by his expressions during retirement with the former jury. Thus the genuine privilege may have a larger scope than the parol evidence rule. (2) Under the parol evidence rule, the juror's testimony is excluded (by the prevailing rule) in proving either his own misconduct or a fellow-juror's; but under the privileged communications rule the former is obviously not excluded, where the juror makes voluntary affidavit. Contrariwise, in the few jurisdictions which do not accept the rule prohibiting proof of misconduct, the juror might still be prevented from disclosing a fellow-juror's communications unless the latter consented. (3) Under the parol-evidence rule, the prohibitions, so far as they exist at all, are absolute and independent of the juror's consent; but under the privileged communications rule there is nothing left to prohibit if the privileged juror once consents.

2. Parol Evidence Rule.

§ 2348. **General Principle.** The principle of the Parol Evidence rule (the constitution of legal acts) is later examined in detail (*post*, §§ 2400-2478);

¹ 1834, Johnson, J., in *M'Kain v. Love*, 2 Hill S. C. 506 ("We know from experience that, in questions admitting of any doubt, the only possible means of arriving at unanimity of opinion amongst many is by a free interchange of thought, and to deny it to a jury would be to defeat the object of trial by jury").

² 1873, *R. v. Kahalewai*, 3 Haw. 465, 470 (rule applied); 1824, *State v. Powell*, 7 N. J. L. 244, 248 (knowledge of the condition of the body, acquired as a coroner's juror upon the same death, not privileged).

In 1757, Admiral Byng having been condemned to death by a court-martial, whose deci-

sion many thought harsh, a bill was presented to release from their oath of secrecy the members of the court-martial, so that an investigation might be had; this bill Lord Mansfield and Lord Hardwicke both opposed, and their arguments are analogous to those urged against the disclosure of a jury's deliberations and reasonings (Cobbett's Parl. Hist. 803-822, Campbell's Lives of the Chancellors, VI, 273).

³ They might be relevant to impeach the juror as a witness in a later trial; *e. g.* as attempted in *Phillips v. Marblehead*, 148 Mass. 326, 330, 19 N. E. 547 (1889).

⁴ *Post*, § 2354.

and a jury's verdict is one of the most important acts illustrating the application of that principle. To consider its application here is to separate the subject from its natural place, but is unavoidable.

That principle is that where the existence and tenor of a legal act — *i. e.* an utterance to which legal effects are attached — are in issue, the outward utterance as finally and formally made, and not the prior and private intention, is taken as exclusively constituting the act (*post*, §§ 2404, 2425); and therefore where the act is required (as judicial proceedings are) to be made in writing, the writing is the act (*post*, § 2450). But this assumes that there was an act; nothing therefore prohibits the investigation of the circumstances to determine whether an act of the alleged tenor was consummated by the will of the parties (*post*, § 2408). Moreover, if any formalities are essential to the validity of the act, their absence may of course be shown (*post*, § 2456). Finally, even when an act of the tenor alleged appears to have been done by written utterance, the failure of the written utterance to correspond with the private intention is good ground, in a proper proceeding, for judicial revision and correction of the writing, so far as there is no impolicy in unsettling the transaction and risking controversial uncertainty (*post*, §§ 2413, 2417).

In applying this principle to a jury's verdict, the subject naturally falls under four heads:

a. The *jurors' deliberations* during retirement, their expressions, arguments, motives, and beliefs, represent that state of mind which must precede every legal act and is in itself of no legal consequence. The verdict, as finally agreed upon and pronounced in court by the jurors, must be taken as the sole embodiment of the jury's act. Hence it stands, irrespective of what led up to it in the privacy of the jury-room, — precisely as the prior negotiations of the parties to a contract disappear from legal consideration when once the final agreement is reduced to writing and signed. The difference is that the parties need not have reduced their transaction to a single memorial (*i. e.* by integration) unless they wished to, while the law requires the verdict thus to be made; but the effect is the same, when the act is once done.

b. The *issues* submitted to a jury must be known before the scope of the verdict can be completely determined, because a general verdict purports only to state the net fact of a decision *pro* or *con*, and the subject of law and fact, upon which the decision is given, must still be sought in the pleadings, the testimony, and the instructions, — precisely as a written contract may by the parties' express intention cover only a part of a transaction and leave the rest to be determined from other materials (*post*, § 2430). Hence, properly, the issues covered by a verdict may always be established, in order to determine the scope of the judgment, and by a juror's testimony, if needed. Here, however, certain discriminations, as will be seen, come into play.

c. The jury's *failure to obey essential formalities of conduct* may invalidate the verdict, — just as the parties' failure to observe the required formality of recording a deed or attesting a will or stamping a contract (under the revenue

law) or making a memorandum (under the statute of frauds) may invalidate a transaction otherwise perfect (*post*, §§ 2454-2456). The transgression of these rules of formality may therefore of course be established as a ground for invalidating the verdict. What these formalities shall be is determined by the policy applicable to jury-trials, and is in no sense a question of evidence. There is, however, a rule of evidence, now generally but improperly accepted, that the fact of informality, so far as it involves improper conduct by the jurors, shall not be proved by one of the jurors themselves. This rule has nothing to do, in principle, with the trial rules of informality, nor with the parol evidence rule permitting informalities to be established.

d. The *correction of a mistake* in the jury's uttered verdict, occurring between the time of the act of voting or assenting in the jury-room and the final entry of the verdict by the clerk in court, may properly be made, upon the same principle that a deed may be reformed in equity for mutual mistake, so as to make it correspond with the expressed agreement of the parties as informally reached before the execution of the deed (*post*, § 2417), or that a judgment-roll may be corrected *nunc pro tunc* to correspond with the proceedings as originally contained in the pleadings or the clerk's minutes (*post*, § 2450). This process, however, has constantly to be distinguished from the improper attempt to violate the principle of (a) above by giving effect to the motives or beliefs of the jurors leading up to their final act of voting or assent.

From the general principle of the parol evidence rule, therefore, may be adequately deduced all the detailed rules that control the methods of correcting or setting aside the jury's verdict. So far as the privileged communications rule incidentally forbids anything which the parol evidence rule would permit, its effect will be noticed under the appropriate head. The effect of the supposed rule against self-stultification (*nemo turpitudinem suam*) will also thus be noticed. The rules defining the informalities fatal to a verdict will be assumed to be already prescribed by the law of trials.

§ 2349. (a) **Jurors' Motives, Beliefs, Misunderstandings, Intentions, and the like, as Immaterial.** For the reason already stated (*ante*, § 2348, par. a), the verdict as uttered is the sole embodiment of the jury's act, and must stand as such without regard to the motives or beliefs which have led up to their act. The policy which requires this is the same which forbids a consideration of the negotiations of parties to a contract leading up to the final terms as deliberately embodied in their deed, namely, the loss of all certainty in the verdict, the impracticability of seeking for definiteness in the preliminary views, the risk of misrepresentation after disclosure of the verdict, and the impossibility of expecting any end to trials if the grounds for the verdict were allowed to effect its overthrow:

1872, *Cleasby, B.*, in *Duke of Buccleuch v. Metropolitan Board*, L. R. 5 E. & I. App. 418, 434:¹ "As soon as the award is made, it must speak for itself. It must be applied, as

¹ This opinion is dealing with an arbitrator's jurors' verdicts, and it contains the soundest award, but its reasoning is expressly applied to statement of the principle.

in other cases, by extrinsic evidence to the subject-matter, but cannot be explained or varied or extended by extrinsic evidence of the intention of the person making it. There appear to me to be the strongest objections against allowing the umpire to be examined for the purpose of shewing what he intended to be included in the award. In the first place it is (and, indeed, must be) a written instrument, and the general rule is applicable, that its effect must be collected from the instrument itself. . . . The award taken by itself is something certain and fixed, and settles the rights of the parties; but if evidence be admitted of the intention and state of mind of the umpire when he made it, its certainty is destroyed, and its effect depends upon his memory, clearness of intellect, and perhaps upon his views and wishes taken up afterwards. Surely it would be a most dangerous thing, after an award has been made which becomes of itself the foundation of a right, to allow any one to retain the power of explaining it away, or even of defeating it. We can properly investigate the acts of a judge or arbitrator in prosecuting a particular inquiry, and his judgment founded upon it; but how can we investigate his secret thoughts or intentions? He is the only master of them, and what he says must be conclusive, as there is nothing which can contradict or explain it. The objection to such evidence would be more striking if, instead of the umpire being appealed to, two arbitrators had joined in an award. Could each have been questioned as to the composition of the award? Although they had agreed as to the result and amount of the award, it would not at all follow that they agreed in the steps by which it was arrived at. Indeed, we know that agreement in such a result is often only arrived at by some concession and compromise, and in a case of a difference in the evidence of what was intended, which is to govern and influence the award. Or it may be farther illustrated by supposing the case, instead of going to arbitration, to go to a jury. There is an assessor who presides, and he directs the jury to reject certain heads of claim and to compensate for others. The jurymen give a general verdict. Could the twelve jurymen be called as witnesses to shew to what extent they had severally acted upon the direction given, or against it, so as to vitiate the verdict by shewing that some jurymen included in it matters they could not properly include? I submit not, and that the verdict must speak for itself. . . . The state of the arbitrator's or judge's mind is of no importance, except so far as it is embodied in some judicial act done by him. His mind may fluctuate and change more than once until the decision is delivered, and then, whether it be upon an interlocutory or final matter, the case is so far bound."

1802, *Tyler, J., in Robbins v. Windover*, 2 Tyl. 11, 13: "The common law requires that the twelve jurors shall unite in a verdict. Whoever considers the variety and intricacy of causes they have to determine, the difficulty of bringing twelve persons of different habits and modes of thinking, and of unequal abilities, fortuitously elected, to concur in opinion, will perceive the wisdom of the Legislature in directing that their deliberations should be secret; for it was to be expected, that in bringing about a union of sentiment in the panel, the subject under consideration would be presented in various lights; that futile objections would be met with inconclusive arguments, theory opposed to practice, and legal science to common sense; that the reputations of witnesses would be scanned, the character of parties too often adverted to, and the whole investigation illustrated by relations of what each juror had heard or known in cases supposed similar; that the warmth of debate would excite an obstinacy of opinion, and a reluctant and tardy assent to the verdict, perhaps drawn from some one, which, on after reflection, might leave in the juror's mind a doubt of its rectitude. It would be of dangerous tendency to admit jurors by affidavit to detail these deliberations of the jury room, to testify to subjects not perfectly comprehended at the time, or but imperfectly recollected. From a natural commiseration for the losing party, or a desire to apologize for the discharge of an ungrateful duty, after the juror had been discharged from office, he would be too apt to intimate, that if some part of the testimony had been adverted to, or something not in evidence omitted, his opinion would have been otherwise, whilst others of the panel, with different impressions or different recollections, might testify favourably for the prevailing

party. This would open a novel and alarming source of litigation, and it would be difficult to say when a suit was terminated."

1836, *Turley, J.*, in *Hudson v. State*, 9 Yerg. 407, 410: "To establish the principle that jurors may file affidavits showing upon what particular parts of testimony they may have found their verdict, with a view of granting new trials if the Court shall be of opinion that the testimony thus made the basis of the verdict was not legal, and therefore ought not to have been received, would be casting obstacles in the way of criminal trials that would render it almost impossible ever to bring them to a conclusion."

1839, *Shaw, C. J.*, in *Murdock v. Sumner*, 22 Pick. 156: "The general rule is that affidavits of jurors will not be received to prove any mistake of the evidence or misapprehension of the law on the part of the jury. Different jurors, according to their different degrees of intelligence, of attention, and habits of thought, may entertain different views of the evidence and of the instructions of the Court in point of law. But the verdict, in which they all concur, must be the best evidence of their belief both as to the fact and the law, and therefore must be taken to be conclusive."

Accordingly, it is to-day universally agreed that, on a motion to set aside a verdict and grant a new trial, the verdict cannot be affected, either favorably or unfavorably, by the circumstance that one or more jurors *misunderstood* the judge's *instruction*, or were influenced by an *illegal paper* or by an *improper remark* of a fellow-juror, or *assented* because of *weariness* or illness or importunities, or *assented* under an *erroneous belief* that the judge would use clemency or have the legal right to vary the sentence, or had been *influenced* by *inadmissible evidence*, or had decided upon grounds which rendered newly-discovered evidence immaterial, or had *omitted to consider* important evidence or issues, or had miscalculated accounts by errors of fact or of law, — or that any other motive or belief, leading to their decision, had existed prior to their final assent and vote.²

² *Eng.*: 1754, *Canning's Trial*, 19 How. St. Tr. 283, 669 (the jury having brought in a verdict of "guilty of perjury, but not wilful and corrupt," and the Court refusing to receive it, the jury retired and brought in a verdict of "guilty of wilful and corrupt perjury"; and, upon a motion for a new trial, based on two jurors' affidavits, the foreman of the jury "was sent for by the Court," and stated that two of the jurors would not consent to the second verdict unless the jury recommended the accused for mercy, whereon they all agreed on that basis; and the motion, being argued before five of the superior judges among others, was overruled); 1770, *R. v. Almon*, 5 Burr. 2686 (a juror's affidavit, that he had understood the judge's direction to be that certain evidence was conclusive, and that "if he had apprehended that the jury were at liberty to exercise their own judgment, he would have acquitted the defendant," was excluded; *Aston, J.*: "A juryman's affidavit with regard to his sentiments in point of law, at the trial, ought not to be admitted"); 1832, *Ramadge v. Ryan*, 9 Bing. 333, 338 (a juror having been charged with expressions of bias before the trial, the foreman's affidavit that "the verdict was not occasioned by the practice of that individual" was excluded, the Court "observing that the

affidavits on the other side applied only to the conduct of the juror before he entered the jury-box"); *Can.*: 1900, *Fraser v. Drew*, 30 Can. Sup. 241 (misunderstanding the evidence); *Ark.*: 1881, *St. Louis I. M. & S. R. Co. v. Cantrell*, 37 Ark. 519, 523, 527 (juror's affidavit as to the effect of the Court's instruction upon his vote, excluded); *Cal.*: 1854, *Amsby v. Dickhouse*, 4 Cal. 103 (juror's affidavit that he was dissuaded from a contrary verdict by a fellow-juror's improper conduct, excluded); 1860, *People v. Wyman*, 15 id. 70, 75 (that the verdict was not "a fair expression of the opinion of the jury," excluded); 1865, *People v. Hughes*, 29 id. 258, 263 (that two jurors would not have agreed to a verdict but for fear of being shut up over night, excluded); *Colo.*: 1890, *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78 (jurors' affidavits not received to show "improper arguments advanced by their fellow-jurors"); 1891, *Wray v. Carpenter*, 16 id. 271, 27 Pac. 248 (jurors' affidavits as to the "theory or ground upon which they rendered their verdict," excluded); *Conn.*: 1852, *Haight v. Turner*, 21 Conn. 593, 596 (juror's affidavit that the jury had considered certain evidence contrary to the Court's instruction, excluded); *Fla.*: 1878, *Coker v. Hayes*, 16 Fla. 368, 392 (juror's affidavit not received to show that he assented to

The following discriminations, however, must be made: (1) Many Courts reach this result by merely pronouncing the shibboleth that "a juror cannot

the verdict "because of the discontent of many of the jurors at his not agreeing with them"; *Ga.*: 1850, *Bishop v. State*, 9 *Ga.* 121, 125 (juror's affidavit that he was induced to agree "by the persuasion of his fellow-jurors and by their misrepresentations as to the effect of the verdict," excluded); 1853, *Clark v. Carter*, 12 *id.* 500, 503 (juror's affidavit that he misunderstood the case in arriving at his verdict, excluded); 1855, *Mercer v. State*, 17 *id.* 146, 174 (juror's admissions that he yielded to the verdict only "because he could not control the rest of the jury," excluded); 1859, *Coleman v. State*, 23 *id.* 78, 84 (similar); 1867, *Rutland v. Hathorn*, 36 *id.* 380, 384, 386 (similar); 1873, *King v. King*, 49 *id.* 622 (similar); 1885, *Coleman v. Slade*, 75 *id.* 61, 72 (like *Clark v. Carter, supra*); *Haw.*: 1859, *Howland v. Jacobs*, 2 *Haw.* 155 (juror's affidavit as to fellow-jurors' improper reasons for the verdict, excluded); 1873, *R. v. Kahalewai*, 3 *id.* 465, 469 (affidavits of jurors and third persons as to the language of jurors during deliberation, indicating bias, excluded); *Ill.*: 1841, *Smith v. Eames*, 4 *Ill.* 76, 81 (jurors' affidavits as to their understanding of the judge's instructions, excluded); 1878, *Nicolls v. Foster*, 89 *id.* 386 (jurors' affidavits not admitted to show "what the jury thought and did in their retirement"); *Ind.*: 1846, *Ward v. State*, 8 *Blackf.* 102 (juror's affidavit as to his "particular view of the testimony," excluded); 1858, *Elliott v. Mills*, 10 *Ind.* 368, 371 (jurors' statements that they "unintentionally overlooked" a credit in defendant's favor, excluded); 1864, *Hughes v. Listner*, 23 *id.* 396 (juror's affidavit that he yielded his verdict only to avoid further confinement, excluded); 1872, *Withers v. Fiscus*, 40 *id.* 131 (jurors' affidavits not admissible to show that they had made a mistake in calculating the interest); *Ind. T.*: 1903, *Langford v. U. S.*, — *Ind. T.* —, 76 *S. W.* 111 (juror's affidavit as to his reason for consenting, excluded); *Ia.*: 1849, *Lloyd v. McClure*, 2 *G. Gr.* 139, 142 (jurors' affidavits not admitted to show "what items they had allowed and what rejected," in an action on an account); 1851, *Abel v. Kennedy*, 3 *id.* 47 (not admitted to show that "the reading of the deposition [after retirement] did not influence their verdict"); 1856, *Cook v. Sypher*, 3 *Ia.* 484, 486 (juror's affidavit that "the verdict was not voluntary on his part," excluded); 1859, *Butt v. Tuthill*, 10 *id.* 585 (obscurely reported); 1863, *Davenport v. Cummings*, 15 *id.* 219, 228 (jurors' affidavits that they understood by an instruction that "a preponderance of evidence was not required," excluded); 1863, *Jack v. Naber*, *ib.* 450, 452 (jurors' affidavits that they "misunderstood the testimony," excluded); 1866, *Wright v. Tel. Co.*, 20 *id.* 195, 212 (principle of the prior cases approved; quoted *post*, § 2353); 1871, *Cowles v. R. Co.*, 32 *id.* 515, 518 (juror's affidavit that he found his verdict upon certain evidence alone, excluded); 1877, *Brown v. Cole*, 45 *id.* 601 (juror's affidavit that he had assented

solely because of illness, excluded); 1878, *Ward v. Thompson*, 48 *id.* 538, 594 (jurors' affidavits as to their misunderstanding of the rule of damages, excluded); 1878, *State v. McConkey*, 49 *id.* 499, 504 (jurors' affidavits that they erroneously rejected evidence before them, excluded); 1884, *Fox v. Wunderlich*, 64 *id.* 187, 20 *N. W.* 7 (juror's affidavit that he assented to the verdict in order to shorten his confinement, excluded); 1885, *Wilkins v. Bent*, 66 *id.* 531, 24 *N. W.* 29 (jurors' affidavits that they erroneously deducted a certain amount, excluded); 1894, *State v. Beste*, 91 *id.* 565, 60 *N. W.* 112 (juror's affidavit that another juror argued that the defendant ought to have taken the stand, excluded); 1895, *State v. Lauderbeck*, 96 *id.* 258, 65 *N. W.* 158 (like sundry prior cases); 1896, *State v. Whalen*, 98 *id.* 662, 68 *N. W.* 554 (jurors' affidavits as to the influence upon them of an illegal reading of law books by another juror, excluded); 1896, *Kassing v. Walter*, — *id.* —, 65 *N. W.* 832 (jurors' affidavits that they erroneously reckoned interest, admitted for the purpose of argument); 1898, *Christ v. Webster City*, 105 *id.* 119, 74 *N. W.* 743 (jurors' affidavits as to a misunderstanding of instructions, excluded); *Kan.*: 1874, *Perry v. Bailey*, 12 *Kan.* 539, 544 (juror's affidavit not admissible to show "a matter resting in the personal consciousness"; quoted *post*, § 2353); 1885, *State v. Burwell*, 34 *id.* 312, 8 *Pac.* 470 (foreman's affidavit that he "would not have signed the verdict had he known its real meaning," excluded); 1885, *State v. Clark*, *ib.* 289, 8 *Pac.* 528 (jurors' affidavits that documents illegally read by them influenced the verdict, excluded); 1892, *State v. Plum*, 49 *id.* 679, 31 *Pac.* 308 (jurors' affidavits that they consented only to avoid a hung jury, excluded); *Ky.*: 1808, *Taylor v. Giger*, *Hardin* 595, 598 (jurors' affidavits not admissible "to explain the train of reasoning or the grounds either of law or fact assumed by them"; here, to show an improper consideration of future damage by a continuing trespass); 1826, *Doran v. Shaw*, 3 *T. B. Monr.* 411, 415 (preceding rule applied to exclude proof of being influenced by the sheriff's directions); *La.*: 1860, *State v. Millican*, 15 *La. An.* 557 (juror's testimony not received to show the jury's misunderstanding of the judge's charge); 1876, *State v. Frugé*, 28 *id.* 657 (juror's testimony that a juror had used fallacious arguments, excluded); 1879, *State v. Wallman*, 31 *id.* 146 (juror's testimony that he had consented only in the belief that a petition for clemency would secure a commutation of sentence, excluded); 1886, *State v. Bird*, 38 *id.* 497 (similar); 1886, *State v. Bates*, *ib.* 491 (similar); 1889, *State v. Morris*, 41 *id.* 785, 6 *So.* 639 (juror's affidavit and statements that he consented only because of illness and a desire to be released, held inadmissible); *Me.*: 1831, *Bishop v. Williamson*, 8 *Me.* 162, *semble* (juror's testimony as to misunderstanding the evidence, held inadmissible); 1868, *Heffron v.*

impeach his verdict," and do not appreciate the vital distinction between impeaching it in the manner of the present rule and impeaching it in the manner

Gallupe, 55 Me. 563, 566 (jurors' depositions as to the influence of a paper illegally introduced before them, excluded); 1874, *Greeley v. Mansur*, 64 id. 211, 213 (juror's affidavit that by reason of illness he did not understand the deliberations in the jury-room, excluded); *Id.*: 1766, *Bladen v. Cockey*, 1 H. & McH. 230, 235 (juror's testimony that "he gave his verdict because the witness A gave such evidence as he credited," said to be improper, because parol proof should not be used "to lessen the weight of the record"); 1831, *Bosley v. Ins. Co.*, 3 G. & J. 450, 473 (jurymen's depositions that they charged the plaintiff with interest to a certain time in estimating damages, excluded); *Mass.* (here the rule of *Pierce v. Woodward*, *infra*, was afterwards repudiated in *Hannum v. Belchertown*): 1809, *Whitney v. Whitman*, 5 Mass. 405 (the Court refused to examine jurors as to whether they had been influenced by a paper illegally delivered to them; "the Court must be governed by the tendency of the paper apparent from the face of it"); 1827, *Hix v. Drury*, 5 Pick. 296, 302 (jurors not examinable to the effect of papers accidentally delivered; "although the jury may think that they were not influenced by such paper, it is impossible for them to say what effect it may have had on their minds"); 1828, *Pierce v. Woodward*, 6 Pick. 206 ("Where the judge is surprised by the verdict, it is not unusual to ask the jury upon what principle it was found"; new trial granted because "the principle [of damages upon which they proceeded was incorrect]"); 1829, *Ferrill v. Simpson*, 8 Pick. 359 (juror's testimony admitted to show "that a misapprehension at the trial, in regard to a certain line, had no influence upon the verdict"; the Court's discretion being invoked); 1830, *Parrott v. Thacher*, 9 id. 426, 431 ("Where there are distinct grounds upon which the verdict may be given, perhaps it is not improper to ascertain which they adopted, as there may be little or no evidence upon one and sufficient upon another; and if it appears that they did not agree [unanimously] upon either of the grounds, I do not see how their verdict can stand"); 1832, *Dorr v. Fenno*, 12 Pick. 520, 526 (preceding case and its language, approved; "this is, however, a discretionary power, which the Court will exercise very sparingly and with great caution"; here the principle was held to permit an inquiry into the jury's principle of computing interest; but an inquiry into their mode of agreeing upon damages by striking an average was treated as involving an act of misbehavior and therefore not ascertainable through the jurors themselves); 1837, *Hannum v. Belchertown*, 19 Pick. 311 (jurors' depositions not admitted to show that they had obeyed the rule permitting double damages; *Dorr v. Fenno* approved, but its principle impliedly repudiated); 1839, *Murdock v. Sumner*, 22 id. 156 (jurors' affidavits not admitted to show that they made a mistake of law in believing themselves bound to accept the opinion of an expert witness;

quoted *supra*); 1854, *Boston & Worcester R. Co. v. Dana*, 1 Gray 83, 91, 105 (jurors' affidavits not admitted to show that they had averaged damages, on the principle of *Dorr v. Fenno*); 1867, *Bridgewater v. Plymouth*, 97 Mass. 382, 390 ("the affidavits or testimony of a part of the jury cannot be received to show that they misunderstood the instructions of the judge or that they were induced by misapprehension to assent to the affirmation of the verdict"; preceding cases not noticed; moreover the principle laid down in *Hannum v. Belchertown*, *supra*, was there applied even to the entire jury's unanimous testimony); 1871, *Woodward v. Leavitt*, 107 id. 453, 459, 471 (jurors' affidavits held not admissible to show that a juror B, alleged to have been prejudiced, did not take part in the discussion nor vote on the side of the alleged bias; *Dorr v. Fenno* and *Ferrill v. Simpson* disapproved, in this respect; yet their doctrine is accepted so far as it allows a questioning as to the grounds of verdict by the judge before the final delivery and affirmation of the verdict); 1887, *Warren v. Spencer Water Co.*, 143 id. 155, 165, 9 N. E. 527 (juror's subsequent declarations, or even his testimony, to the reasons for and manner of arriving at a verdict, held inadmissible); 1893, *Harrington v. R. Co.*, 157 id. 579, 580, 32 N. E. 955 (*Woodward v. Leavitt* approved); *Minn.*: 1868, *Knowlton v. McMahon*, 13 Minn. 386 (jurors' affidavits not received to show that the officer in charge "sought to, and did, influence the verdict"); 1870, *State v. Stokely*, 16 id. 249, 255 (juror's affidavit that "he would not have concurred in the verdict" had not his health compelled his release from confinement, excluded); *Mo.*: 1883, *State v. Fox*, 79 Mo. 109, 112 (some one threw a rope with a hangman's noose into the jury-room; juror's testimony as to the effect of this incident, excluded); 1893, *State v. Schaefer*, 116 id. 96, 22 S. W. 447 (jurors' affidavits that the evidence was misunderstood by them, excluded); 1896, *State v. Burk*, 132 id. 363, 34 S. W. 48 (jurors' affidavits that they consented to the verdict on the understanding that the Court would reduce the sentence, excluded); *Mont.*: 1895, *Fitzgerald v. Clark*, 17 Mont. 100, 42 Pac. 273 (juror's affidavit that he consented to the verdict because he was ill and desired to be released, excluded); *Nebr.*: 1888, *Harris v. State*, 24 Nebr. 803, 40 N. W. 317 (jurors' affidavits not admissible to impeach a verdict in a matter "which essentially inheres in the verdict itself"; following the rule in *Wright v. Tel. Co., Ia.*); *N. H.*: 1827, *Tyler v. Stevens*, 4 N. H. 116 (jurors' affidavits that they had "misunderstood the directions by the Court," excluded); 1829, *Page v. Wheeler*, 5 id. 91 (following *Whitney v. Whitman*, *Mass.*); 1833, *State v. Hascall*, 6 id. 352, 363 ("They state generally that they were influenced by nothing except the law and evidence given at the trial; but this we cannot consider"); 1850, *State v. Pike*, 20 id. 344 (juror's affidavit that the absence of a certain paper, improperly

of rule *c* (*post*, § 2352). (2) In consequence of the foregoing indiscrimination, a few Courts have occasionally received testimony of the juror's state of mind

withheld, did not affect the jury's opinion of its contents or affect, admitted; *State v. Hascall* not cited); 1852, *Folsom v. Brown*, 25 id. 114, 123 (like *Griffin v. Auburn*, *infra*; jurors' affidavits here excluded); 1855, *Leighton v. Sargent*, 31 id. 119, 122, 137 (jurors' affidavits as to their consultations and how they determined the amount of damages, excluded); 1856, *Walker v. Kennison*, 34 id. 257 (jurors' affidavits that a fellow-juror misrepresented the testimony, etc., excluded); 1879, *Griffin v. Auburn*, 59 id. 286 (jurors' admissions, after verdict, as to having considered the question of costs, excluded); *N. J.*: 1792, *Randall v. Grover*, 1 N. J. L. 151 (juror's affidavit stating the "insufficiency of the evidence to justify the verdict," excluded); 1798, *Jessup v. Cook*, 6 id. 434, 439 (juror's affidavit that the jury divided a debt between the partners, offered to show that new evidence was material; Court equally divided); 1872, *Hutchinson v. Consumers' Coal Co.*, 36 id. 24 (jurors' affidavits "to explain the reasons or motives of the jurors, or any of them, for giving or consenting to the verdict," inadmissible); *N. Mex.*: 1895, *U. S. v. Biena*, 8 N. Mex. 99, 42 Pac. 70 (juror's affidavit that the verdict was based upon the testimony of one L., subsequently convicted of perjury, apparently held admissible; the true solution here would have been to grant a new trial on the sole fact of L.'s perjury, if on a material point, without regard to its probable influence on the jury); *N. C.*: 1878, *State v. Smallwood*, 78 N. C. 560 (like *State v. Best*, *infra*); 1884, *State v. Royal*, 90 id. 755 (juror's affidavit that the verdict was influenced by the defendant's failure to call his son as a witness, excluded); 1887, *Jones v. Parker*, 97 id. 33, 2 S. E. 370 (jurors' affidavits that they did not understand the judge's charge and did not concur in the verdict, excluded); 1888, *Johnson v. Allen*, 100 id. 131, 5 S. E. 666, 670 (affidavits based on jurors' statements as to the mode of reckoning damages, excluded); 1892, *State v. Best*, 111 id. 638, 15 S. E. 930 (jurors' affidavits that they assented only on the supposition that a recommendation to mercy would save from the death penalty, excluded); 1896, *Purcell v. R. Co.*, 119 id. 728, 26 S. E. 161 (like *Johnson v. Allen*, *supra*); *Oh.*: 1858, *Holman v. Riddle*, 8 Oh. St. 384, 389 (jurors' affidavits that they misunderstood the judge's charge, excluded); *R. I.*: 1850, *Handy v. Ins. Co.*, 1 R. I. 400 (jurors' affidavits that they misunderstood the judge's charge, excluded; "the proper time . . . is immediately after the verdict is returned, while the jury may be polled"); 1859, *Tucker v. South Kingston*, 5 id. 558, 560 (similar affidavits, excluded); *S. C.*: 1855, *Smith v. Culbertson*, 9 Rich. L. 106, 111 (juror's affidavit "that his assent was forced, or was given under some misconception," said to be inadmissible); 1890, *State v. Senn*, 32 S. C. 392, 11 S. E. 292 (jurors' affidavits as to "the manner in which the verdict was reached," held inadmissible); 1894, *State v. Bennett*, 40

id. 308, 18 S. E. 886 (juror's affidavit that he consented only on the erroneous supposition that the recommendation to mercy would secure pardon or commutation, excluded); 1897, *State v. Aughtry*, 49 id. 285, 26 S. E. 619, 27 S. E. 199 (jurors' statement of their misunderstanding of the charge, not received); *Tenn.*: 1821, *Crawford v. State*, 2 Yerg. 60 (two jurors' affidavits admitted, that they had consented to a verdict of guilty for the sole reason that they believed that a new trial would be granted or that the Governor would by pardon act upon the recommendation to mercy which they made a condition of assenting to the verdict); 1836, *Hudson v. State*, 9 id. 407 (juror's affidavit that he had founded his verdict upon a fact improperly presented to the jury by a witness re-examined in open court after the trial, excluded; in effect repudiating *Crawford v. State* on this point; quoted *supra*); 1842, *Norris v. State*, 3 Humph. 333, 338 (preceding case approved; jurors' affidavits that they had misunderstood the judge's charge as to believing a witness, held not admissible); 1844, *Saunders v. Fuller*, 4 id. 514 (same ruling on similar facts); 1847, *Cochran v. State*, 7 id. 544, 547 (similar to *Crawford v. State*, *supra*); 1850, *Nelson v. State*, 10 id. 518, 532 (jurors' affidavits that they supposed a verdict of murder in the second degree to carry a possibility of sentence less than death, received on the facts, in consequence of the trial judge's conduct); 1856, *Larkins v. Tarter*, 3 Sneed 681, 686 (jurors' affidavits as to the influence of improper remarks of counsel, excluded); 1869, *Galvin v. State*, 6 Coldw. 283, 286 (juror's affidavit that he consented to the verdict only on the erroneous supposition that the Court could fix a punishment less than death, excluded; *Nelson v. State* treated as exceptional); 1872, *Wade v. Ordway*, 1 Baxt. 229, 234 (jurors' affidavits that they misunderstood the judge's statements, excluded); 1873, *Dunaway v. State*, 3 id. 206, 208 (affidavits of the entire jury as to basing their verdict upon a state of facts not in issue, excluded); 1875, *Richardson v. McLemore*, 5 id. 586, 589 (juror's affidavit as to the influence of part of the charge, excluded); 1880, *Roller v. Bachman*, 5 Lea 153, 159 (jurors' affidavits as to misunderstanding the charge and miscalculating the statutory period of limitation, excluded); 1891, *Scruggs v. State*, 90 Tenn. 81, 15 S. W. 1074 (juror's affidavit not received to show a misunderstanding of the judge's charge); *Tex.*: 1846, *Campbell v. Skidmore*, 1 Tex. 475 (juror's affidavit as to the influence of the judge's charge, excluded); 1856, *Kilgore v. Jordan*, 17 id. 342, 346 (jurors' affidavits that they misapprehended the law, excluded); 1858, *Little v. Birdwell*, 21 id. 597, 602, 612 (jurors' affidavits that evidence withheld from them would have influenced their verdict, excluded); 1865, *Johnson v. State*, 27 id. 758, 769 (jurors' affidavits that they misunderstood the judge's charge, excluded); 1888, *Wills Point Bank v. Bates*, 72 id. 137, 10 S. W.

in support of the verdict, — applying that part of the rule of thumb (rule c) which receives jurors' testimony to disprove misconduct and thus to support the verdict.³ There is of course no justification for this; the principle of the present rule accepts the jury's utterance as the final and exclusive expression

348 (jurors' affidavits as to their understanding of the facts, excluded); 1895, *McCulloch v. State*, 35 Tex. Cr. 263, 33 S. W. 230 (similar to *Johnson v. State*; "this practice is getting entirely too common, and the lower courts should take occasion to correct it"); 1903, *Blackwell v. State*, — id. —, 73 S. W. 960 (that the jurors misunderstood the testimony, excluded); *U. S.*: 1806, *Ladd v. Wilson*, 1 Cr. C. C. 305 (jurors' affidavits that "a mistake was made by the foreman in calculating upon the principles agreed on by the jury," said to be "dangerous," and the practice of receiving them not to be sanctioned); 1890, *Glaspell v. R. Co.*, 43 Fed. 900, 907, *Thomas, J.* (jurors' affidavits as to their method of reckoning the damages, offered to show that an erroneous instruction was not followed and was therefore harmless, excluded); 1890, *Fuller v. Fletcher*, 44 id. 34, 39 (jurors' affidavits not admissible to show that they were or were not influenced by certain motives); 1892, *Mattox v. U. S.*, 146 U. S. 140, 142, 147, 13 Sup. 50 (rule of *Perry v. Bailey*, Kan., and *Woodward v. Leavitt*, Mass., approved; quoted *post*, § 2352); *Utah*: 1891, *People v. Flynn*, 7 Utah 378, 26 Pac. 1114 (jurors' affidavits not admitted to show a misunderstanding of the judge's charge); *Vt.*: 1865, *Sheldon v. Perkins*, 37 Vt. 550, 557 (juror's affidavit, after separation, that a verdict was based on a particular ground, excluded; if the ground of the verdict is material, "the proper course is to suggest it to the Court so that it may be learned from the jury in open court while they are together and under the control and direction of the judge"); *Va.*: 1791, *Cochran v. Street*, 1 Wash. 79 (jurors' affidavits that four of them were opposed to the verdict, but yielded in the belief that they were legally bound to abide by the majority's view, admitted and a new trial ordered; the ensuing cases practically overrule this); 1822, *Shobe v. Bell*, 1 Rand. 39 (jurors' affidavits that they yielded only in order to avoid further detention, not considered); 1849, *Harnsberger v. Kinney*, 6 Gratt. 287, 300 (jurors' affidavits that they misunderstood the judge's instruction, excluded); 1854, *Koerner v. Rankin*, 11 id. 420, 431 (similar; "they will not readily be received to invalidate the verdict"); 1857, *Bull v. Com.*, 14 id. 613, 626 (jurors' affidavits that one of them agreed to the verdict only on the understanding that all should unite in a request for a pardon, excluded); 1872, *Read v. Com.*, 22 id. 924, 947 (affidavits of admissions of two of the jurors that they had decided because of the defendant's failure to explain certain evidence, excluded); 1879, *Danville Bank v. Waddill*, 31 id. 469, 482 (like *Harnsberger v. Kinney*, *supra*); 1879, *Stephens v. Flood*, ib. 323, 343 (two jurors' affidavits that the jury did not pass upon a document's genu-

ineness, contrary to the wishes of these two, who were "persuaded against our judgments to agree to the verdict," excluded); 1899, *Street v. Broadus*, 96 Va. 823, 32 S. E. 466 (jurors' affidavits that certain elements of damage were not allowed for, excluded); *W. Va.*: 1872, *Lewis v. McMullin*, 5 W. Va. 582 (juror's affidavit that the verdict would have been for defendant, if certain evidence had been believed, excluded); 1883, *Reynolds v. Tompkins*, 23 id. 229, 234 (jurors' affidavits that they misunderstood the judge's charge, excluded); 1884, *Probst v. Bravenlich*, 24 id. 356, 360 (jurors' affidavits as to the items of claim entering into their consideration, excluded); 1892, *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982 (juror's affidavit that his absence from the jury-room did not influence his verdict, not received); 1895, *State v. Cobbs*, 40 id. 718, 22 S. E. 310 (jurors' affidavits that they misunderstood the law as to the effect of a verdict of murder in the first degree, in respect to the Court's discretion in sentencing, excluded); *Wis.*: 1891, *Schultz v. Catlin*, 78 Wis. 611, 614, 47 N. W. 946 (juror's affidavits that they misunderstood the judge's charge, excluded).

³ 1892, *Fulton Co. v. Phillips*, 91 Ga. 65, 16 S. E. 260 (jurors' affidavits admitted to "sustain the verdict," by showing that they did not read and were not influenced by a verdict in a former case contained in the pleading); 1903, *Davis v. Huber Mfg. Co.*, 119 Ia. 66, 93 N. W. 78 (affidavit as to the items of claim allowed); 1894, *Ewers' Adm'r v. National I. Co.*, 63 Fed. 562, *Paul, J.* (jurors' affidavits admitted to show that a fellow-juror's prejudice had no influence on them); 1877, *Zickefoose v. Kuykendall*, 12 W. Va. 23, 27, 35 (that the juror could not have been biased because he voted at first against the party for whom he was said to be biased, allowed; this would probably not be followed, since *State v. Cartwright*, *post*, § 2353). In California the cases originally exhibiting this view have been overruled: 1888, *People v. Goldenson*, 76 Cal. 352, 19 Pac. 161 (juror's affidavit that a paper did not influence him, held admissible); 1890, *People v. Murray*, 85 id. 350, 361, 24 Pac. 666 *semble* (same); 1892, *People v. Murray*, 94 id. 212, 29 Pac. 494 (preceding cases approved; *De Haven and Harrison, JJ.*, diss.; *Garoute, J.*, concurred in the judgment); 1894, *People v. Stokes*, 103 id. 193, 37 Pac. 207 (preceding cases repudiated; "A juror is not allowed to say, 'these matters had no influence upon my mind when casting my vote in the jury-room'; . . . there are intimations [!] in the cases of *People v. Goldenson* and *People v. Murray* tending to oppose the foregoing views, but they do not express the law"); 1895, *People v. Azoff*, 105 id. 632, 39 Pac. 59 (approving the preceding case).

of their views and declines to investigate for any purpose their prior and preliminary states of mind. (3) The jurors' *motives* or *beliefs*, as ineffective to control the uttered verdict, are to be distinguished from the facts that may properly be considered under rules *b* and *d*, *post*; though the distinction is sometimes a subtle one. (4) Where the jurors' belief is offered as material *for any other purpose* than that of controlling the verdict upon a motion for a new trial, it may be considered, so far as no other rule of evidence prevents, — as, for example, on a prosecution for corruptly rendering a verdict contrary to his belief.⁴ (5) Where the jurors' belief is so embodied in their *inquiries to the judge*, and in his answers, that a case of misinstruction by the judge is presented, this can of course be made a ground for invalidating the verdict;⁵ but here it is not because of their belief, but because of his instructions.

§ 2350. **Same: Examining the Jury before Discharge, to Ascertain the Grounds of Verdict.** The reasons for the foregoing rule, namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired takes place *before their discharge* and separation, or before the recording of the verdict. Accordingly, some Courts, chiefly in New England, concede the propriety of examining the jurors while still in their box, after verdict pronounced, and of ascertaining the particular issues on which a general verdict is founded or the detailed propositions of fact or of law which entered into the verdict; so that it may then and there be set aside if for the issue upon which it rested there is not in the judge's opinion sufficient evidence, or if they proceeded on a palpable mistake of law.¹ This process of making more precise the details of their finding has the same purpose as the expedient of a special verdict or a special finding on interrogatories, and is related in principle to rule *b*, *post*. There can be no doubt that in the traditional English practice this was common,² and it doubtless continues there. Under the system in the United

⁴ The following ruling is therefore erroneous, for the Opinion rule (*ante*, § 1963), upon which it was made, would present no obstacle: 1861, *Hatch v. Lewis*, 2 F. & F. 467, 475 (action against attorneys for negligent management of the plaintiff's case whereby he was convicted; to show that the conviction would not have occurred had the defendant called certain witnesses, the jurymen at the former trial were not allowed to be asked what verdict they would have rendered, on the ground of the Opinion rule).

⁵ The first of the New York rulings *infra* is apparently erroneous: *Wis.* 1892, *McBean v. State*, 83 Wis. 206, 53 N. W. 497 (the jury sent to the trial judge a message, "If we bring in a verdict of guilty, can we depend on the clemency of the Court?" to which the judge answered "Yes," on which a verdict of guilty was brought in; this was allowed to be shown, the judge's answer being equivalent to an instruction in open court, and therefore an error demanding a new trial); *N. Y.* 1825, *Sargent v. —*, 5 Cow. 106, 120 (affidavits of two jurors, that the jury considered, and supposed

that the judge had so permitted them, in estimating damages for seduction, the expense of maintaining the child, admitted, on the theory that "this is in effect equivalent to a misdirection of the judge," misleading the jurors; but this decision was reached "not without some hesitation"); 1826, *Ex parte Caykendoll*, 6 id. 53 (jurors' affidavits as to a mistake in reckoning damages, arising from a misreading of the written contract, excluded; preceding case distinguished, as "equivalent to a positive misdirection of the judge," the counsel having there laid down in his argument a rule of law which the judge did not expressly deny); *Tenn.* 1850, *Nelson v. State*, 10 Humph. 518 (cited *ante*, § 2349).

¹ *Parrott v. Thacher*, *Woodward v. Leavitt*, Mass., and cases in N. C., R. I., and Vt., *supra*, § 2349.

² *Thayer*, Preliminary Treatise on Evidence, pp. 145, 155, and the following later case: 1697, *Ash v. Ash*, Comberb. 357 (Holt, C. J.: "The jury were very shy of giving a reason of their verdict, thinking they have an absolute despotic power; but I did rectify that mistake, for the

States, in which the judges tend to degenerate into mere umpires, it is not likely to be often seen; but there is no reason why such a control of the verdict should not be exercised, for it merely assumes to remedy the verdict's aberrations before it has become a recorded finality and before the crucial line has been passed which must somewhere always be recognized in order that there may be an end of controversy. At the same time, this expedient is practically not of frequent utility, because the misapprehensions which it is designed to cure can seldom become the subject of suspicion and investigation by the parties until the jurors after their discharge have by public conversation disclosed the nature of the mistake.

§ 2351. (b) **Issues of the Trial, as Material; Judge's Instructions, as considered by the Jury.** (1) The tenor of the issues at the trial, as submitted to the jury, may be material for the purpose of *ordering a new trial in the same cause*. These issues will be ascertainable in part from the pleadings, which of course speak for themselves, and in part from the *judge's instructions*. An erroneous statement of the issue by the judge, or of the law applicable to the issue, being sufficient to justify a new trial, by the rules of new trials, may of course be proved; and there is no reason why it may not be proved by the testimony of one or more of the jurors. This will not be a frequent case, for other materials for proof are usually at hand; but there is no objection to it in principle, for the fact to be proved is separate from the jury's deliberations upon the issue, and the process does not consist in putting their deliberations in conflict with their verdict. The line between this and the preceding principle may be seen closely drawn in the distinction already noted (*ante*, § 2349, par. 5).¹

(2) The tenor of the issues as submitted to the jury may also become important, *upon a different trial* for a related claim, as determining the scope of matters adjudicated at the first trial. Our system of general verdicts does not adequately provide for the precise statement of details of claim covered by the jury's award. In cases of continuing trespasses, of consequential damages, of repeated libels, of running accounts, and the like, the matters actually included in the verdict depend as much upon the instructions as upon the pleadings, and do not always even then become precise. In particular, an affirmative finding, *i. e.* for the plaintiff, may leave it uncertain whether the jury has in fact passed at all upon some of the items of the plaintiff's claim. In such a case it is therefore proper to prove what issues were submitted to the jurors; and, as a part of the criteria of definition, the *judge's instructions* limiting the matter for their consideration may be proved, and of course by jurors as well as by any one else who heard them. In so doing, the offer sometimes is to show that the *jury did or did not "consider"* a certain item. This offer, though incorrect in form, may practically be sufficient; for though the jury's belief and reasoning upon the issues, as distinct from the Court's

jury are to try causes with the assistance of the judges, and ought to give reasons when required, that if they go upon any mistake, they may be set right").

¹ In revising an arbitrator's award the same question arises, though the solution is slightly different (*post*, § 2358).

definition of the issues, is immaterial, upon the principle already examined (*ante*, § 2349), yet where no attempt is being made to overthrow the original verdict, the jury's understanding of the issues is merely a convenient though loose mode of ascertaining the issues as actually submitted.²

§ 2352. (*c*) **Irregularities and Misconduct, as material; Jurors Impeaching their Verdict; History of the Rule.** The deliberations of a jury must be conducted with strict regard to certain formalities of conduct during retirement, — formalities which, though not vital in a particular case, yet are indisputably wholesome as requirements of general policy. They are mere outward marks or conventions, but they are the more technically strict because the impossibility, under the principle already examined (*ante*, § 2349), of regarding jurors' actual motives and reasonings, makes it the more necessary to depend upon the conventional canons of behavior for confidence in the verdict. Like the analogous formalities of other legal acts, already mentioned (*ante*, § 2348, *par. c*; *post*, § 2456), they are not inherent logical elements, but formal marks of precaution. A particular will may have been genuine and deliberate, though not executed in the presence of attesting witnesses; but the propriety of attestation as a fixed general rule cannot be doubted. So a particular jury's verdict may be a just and well-reasoned one, when the jurors during retirement have separated or talked with the parties or drunk intoxicating liquors; yet as a general rule it is proper to invalidate verdicts marked by such conduct.

Now the law of trials in general, and of verdicts in particular, must prescribe these requisite formalities of conduct for the jurors, and define those informalities and irregularities which *per se* invalidate the verdict. What those shall be is thus elsewhere in the law predetermined. The principle of the

² Compare with the following examples those cited *ante*, § 2349, *par. 5*, and *post*, § 2358 (arbitrators' awards); *N. H.*: 1870, *Smith v. Smith*, 50 N. H. 212, 219 (jurors' statements that they did not include in the former verdict in trespass certain fences, etc., now in issue in trespass, excluded; but here the judge's instructions were not offered to be shown, and the offer also included other doubtful matters; moreover the Court held that "it appears here that the whole matter was in point of fact submitted to the jury; . . . thus it appears that the issues presented by the declaration were in fact tried"); *N. Y.*: 1848, *Brownell v. McEwen*, 5 Denio 367 (affidavits of individual jurors, *pro* and *con*, as to having considered, in an action for seduction, the breach of promise of marriage and other claims as covered by the amount awarded, held inadmissible; but the Court further declared that proof of their unanimous consideration of the point would have been admissible); *Pa.*: 1817, *Haak v. Breidenbach*, 3 S. & R. 204 (continuing trespass by overflow; a former verdict for the same trespass being pleaded, and the plaintiff replying that the former verdict was confined to a different period, the testimony of one of the prior jurors was received that "the jury was directed by the Court not to

include that period of time in estimating the damages, and that they therefore only included the damages subsequently to the 4th August, 1786"); 1841, *Leonard v. Leonard*, 1 W. & S. 342 (account rendered; plea, former judgment for the defendant in assumpsit for the same claim; the plaintiff was then allowed to prove by a prior juror that "the verdict was given in pursuance of the instruction of the Court exclusively on the ground that the agreement was fraudulent, and that the respective claims of the parties were not considered"); 1873, *Follansbee v. Walker*, 74 Pa. 306, 309 (assumpsit by F. and W.; plea of former judgment for the defendants on a suit by F. for the same promise; replication, that the former suit alleged a promise by F. alone and that the defendant there claimed that the promise if any was to F. and W. jointly, and that the judge charged the jury, on this preliminary issue, that if they believed the defendant's allegation the verdict must be for the defendant and another action must be brought on the promise to F. and W. jointly; on this issue, testimony of the prior jurors was admitted that that jury "decided only on the preliminary question submitted by the Court, whether the transaction was with the firm of W. and F.").

parol evidence rule (*ante*, § 2346, par. *c*; *post*, § 2456) then enters and declares that the lack of such formalities, for this as for every other legal act (whatever the respective required formality may be), is always proper to establish as a ground for declaring the act void. Whatever misconduct of the jury, therefore, is an irregularity fatal to the verdict may always be proved.

But by whom? Naturally, by one or more of the jurors themselves, who will commonly be the sole witnesses, — at least to misconduct during retirement. Should the misconduct consist in improper utterances, the privilege proper (*ante*, § 2346) would apply, if the juror to be informed against should claim it. But if he does not, and if he is even willing by affidavit to avow his utterance, all question of privilege ceases. In that case, and in all cases of misconduct other than utterances, what is there to prevent the use of jurors' testimony in proof, as well as any other person's? Nothing in the world, except a curious doctrine of evidence once and temporarily in vogue, long ago discarded in every other relation, and now here persisting through the sponsorship of Lord Mansfield's great name, — the doctrine that a witness shall not be heard to allege his own turpitude; *nemo turpitudinem suam allegans audietur*.

The gradual appearance of this doctrine in the early 1700s, and its rapid spread under the earnest patronage of Lord Mansfield in the last quarter of the 1700s, has already been traced in another connection (*ante*, § 525). Its chief application was to forbid the drawer of commercial paper from proving usury or other illegal consideration, and to forbid similar occasional sorts of testimony; but, after two generations of controversy, these important aspects of it, together with the principle at large, were utterly repudiated, both in England and America (*ante*, §§ 525-531). Besides this, however, it led in Lord Mansfield's hands to the rule prohibiting married parents to testify to non-access in proof of bastardy (*ante*, § 2063); and here, the relation of the original principle having been early lost sight of, the rule survived. Furthermore, however, it received application, at his hands, to the present subject, — the testimony of a juror to his own misconduct.¹ Here it thrived, — apparently because new supposed reasons of policy were found, which buoyed up Lord Mansfield's rule long after the general repudiation of that favorite maxim, which had for him served apparently as its only justification.

The curious feature of his doctrine is that it came, in all these three of its chief applications, as an innovation upon the prior practice. Having no sound basis of policy (as its modern repudiation now testifies), it had also no basis of precedent. This appears abundantly for the other two rules already mentioned (*ante*, §§ 525, 2063). It is also true for the present rule. Up to Lord Mansfield's time, and within half a decade of his decision in *Vaise v.*

¹ 1785, *Vaise v. Delaval*, 1 T. R. 11, K. B. (two jurors' affidavits of a decision based upon chance were rejected; L. C. J. Mansfield: "The Court cannot receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor;

but in every such case the Court must derive their knowledge from some other source, such as some person having seen the transaction through a window or by some such other means").

Delaval, the unquestioned practice had been to receive jurors' testimony or affidavits without scruple. There were of course variances of ruling as to the sufficiency of this or that misconduct to invalidate a verdict; but the proof of it was received equally from jurors and others, without discrimination.² If corroboration were needed, it is found in the early American practice, where many rulings were made upon the jurors' affidavits of misconduct.³ But *Vaise v. Delaval*, with the prestige of the great Chief Justice, soon prevailed in England,⁴ and its authority came to receive in this country an adherence almost unquestioned.

² In *Prior v. Powers*, *infra*, the sole case of doubt, the affidavit was not actually rejected; moreover, the last clause of the ruling is inconsistent with the practice of the times: 1590, *Metcalf v. Deane*, Cro. El. 189 (complaint having been made to the judge of the jury's having re-summoned one of the witnesses during retirement, "he examined the inquest, who confessed all the matter," and a new trial was awarded); 1595, *Vicary v. Farthing*, ib. 411 (foregoing case cited, in dealing with a jury's inspection of a written document handed them by the party); 1623, *Haylor v. Hall*, *Palmer* 325 (the solicitor having handed certain depositions to the jurors when about to retire, they were examined on oath whether more had been read to them after retirement than had been read in court, and how they had been inclined to give their verdict before reading the depositions; apparently the verdict was held bad); 1665, *Prior v. Powers*, 1 Keb. 811 (a new trial, on the ground that the verdict was obtained by lot, was denied, "because it appeared only by pumping a jurymen, who confessed all; but, being against himself, it was not much regarded; also the Court cannot grant new trial without punishing the jury, which cannot be by this confession against themselves"); 1675, *Lord Fitzwater's Case*, *Freeman* K. B. 415 (verdict set aside because determined by lot; the jurors' affidavits must have been received, but no question was made); 1696, *Dent v. Hertford*, 2 Salk. 645 ("a new trial was granted upon affidavit that the foreman declared the plaintiff should never have a verdict, whatever witnesses he produced"); 1719, *Melish v. Arnold*, *Bunbury* 51 (new trial granted because damages were determined by lot; the affidavits "were made by persons who heard the jurymen talk of the matter, and the jurymen did not think fit to make any affidavit to clear themselves"); 1734, *Parr v. Seames*, *Barnes*, 3d ed., 438 (on a motion to set aside a verdict because determined by "hustling halfpence in a hat," "this matter not appearing upon the oath of any of the jurors, but by affidavit that two of them had confessed the same," the Court stayed judgment "to give plaintiff an opportunity to procure affidavits from some of the jurors"); 1735, *Philips v. Fowler*, ib. 441, *Comyns* 525 ("it being disclosed to defendant by two of the jurors" that lots had been cast, "defendant moved to set aside the verdict upon an affidavit of the fact made by the two jurors"; "the fact as to the jurors determining by chance

being undisputed, the verdict was set aside"); 1744, *Norman v. Beamont*, *Willes* 484, 487 (in admitting an affidavit of a juror as to his disqualification, the Court added: "In cases of this sort where the objection could not appear of record, we always admitted of affidavits, — as in respect to a misbehaviour of any of the jury, or any declaration made by any of them either before or after the verdict to show that a jurymen was partial"); 1779, *Aylett v. Jewel*, 2 W. Bl. 1299, C. P. (new trial not granted on the affidavit of the attorney that "some of the jury had confessed to him" that the verdict had been reached by lot; "there being no affidavit by the jurymen, or any other that was cognizant of this transaction, but merely this hearsay affidavit, the Court, *absente* De Grey, C. J., thought it too dangerous to call a verdict in question that had been so deliberately given, upon so loose and slight a suggestion").

³ 1793, *Talmadge v. Northrop*, 1 Root 522 (cited *infra*); 1792, *Bradley v. Bradley*, Pa., 4 Dall. 112 (jurors' affidavits "that the jury had misbehaved by hearing testimony which was not delivered in open court," admitted); 1805, *Smith v. Cheetham*, 3 *Caines* 57 (constable's affidavit, based partly on jurors' admissions, that damages had been reached by average, admitted; general principle of receiving jurors' affidavits to show misconduct, sanctioned; *Kent*, C. J., diss.); 1805, *Grinnell v. Phillips*, 1 *Mass.* 530, 542, per *Sewall*, J. (jurors' testimony admissible to prove "overt acts which may be the subject of legal inquiry," such as "gross misbehavior or legal impropriety of conduct sufficient to destroy the credit of a verdict"; *semble*, *Thacher*, J., *contra*). Compare also the early cases in New York, Virginia, and elsewhere, admitting such affidavits even in cases under the principle of § 2349, *ante*.

⁴ 1807, *Owen v. Warburton*, 1 B. & P. N. R. 326 (juror's affidavit, not receivable to show a decision by lot; quoted *post*, § 2353); 1839, *Straker v. Graham*, 7 *Dowl. Pr.* 223, 4 *M. & W.* 721 (juror's affidavit that a verdict was reached by tossing up, held inadmissible; *Alderson*, B.: "It is entirely against policy to allow a jurymen to make an affidavit of anything which passes in agreeing to a verdict"; quoted *post*, § 2353); 1843, *Burgess v. Langley*, 5 *M. & Gr.* 722 (affidavit of the attorney as to declarations in open court, by one juror in the others' hearing, just after verdict rendered, that they had reached a verdict by lot, excluded; *Cresswell*, J.: "Had

§ 2353. **Same: Policy of the Rule.** What is to be said in support of this supposed rule, which distinguishes so sharply between the testimony of the juror himself and that of any other person? The question, it is to be remembered, is not whether certain conduct constitutes a fatal irregularity, or whether it can be proved at all, but whether a juror alone is to be forbidden to prove it:

1807, *Mansfield, C. J.*,¹ in *Owen v. Warburton*, 1 B. & P. N. R. 326, 329: "The affidavit of a juryman [to the jury's misconduct] cannot be received. It is singular indeed that almost the only evidence of which the case admits should be shut out; but considering the arts which might be used if a contrary rule were to prevail, we think it necessary to exclude such evidence. If it were understood to be the law that a juryman might set aside a verdict by such evidence, it might sometimes happen that a juryman, being a friend to one of the parties, and not being able to bring over his companions to his opinion, might propose a decision by lot, with a view afterwards to set aside the verdict by his own affidavit, if the decision should be against him."

1839, *Straker v. Graham*, 4 M. & W. 721; an attorney's affidavit that a juror had admitted the drawing of lots for a verdict was offered: Serjt. *Atcherley* (for admission): "The affidavit of the juryman himself is rejected because the conduct which he admits is such as would render him liable to punishment"; L. C. B. *Abinger*: "No; it is because otherwise no verdict would be safe"; *Parke, B.*: "When the jury have openly concurred in a verdict in open court, which ought to be their binding decision on the case, it would be most dangerous and lead to the greatest fraud and abuse to set it aside on such statements as that which is made in this case."

1811, *Yeates, J.*, in *Cluggage v. Swan*, 4 Binn. 150, 155: "I frankly confess that I feel the utmost repugnance to such testimony, although I am fully aware, that I thereby exclude almost the only evidence, which the case naturally admits of. But, by admitting it, I as readily perceive that I should open a door to the exercise of the most pernicious arts, and tampering with jurors; and that the practice would be replete with dangerous consequences. Jurors, who would have been sworn or solemnly affirmed to give a verdict according to evidence, come with a bad grace into a tribunal of justice to prove their own dishonorable conduct, and affix a stigma on their companions who may be unheard in their defence. Besides, in the language of some of the cases, I cannot see how such testimony could be heard by the Court, without proceeding against the jurors criminally. Should this happen, will it not justly be deemed entrapping the jurors whose affidavits have been used? And will it not expose others implicated in the charge, to the temptations naturally incident to persons in a state of accusations? But above all, I greatly fear that the practice, if adopted, would tend to an inquisition over the consciences of jurors, as to the grounds and reasons of their verdict, and bring questions of fact more frequently before the Court for their decision than is consistent with sound policy. I am opposed to penetrating into the recesses of a jury-room, through the instrumentality of jurors, who are kept together until they have agreed upon their verdict."

As to these various reasons, it is unnecessary to refute the argument drawn in *Owen v. Warburton* from a fantastic imagination of what an occasional scheming juryman might conceivably try to do. As well abolish appeals, because a wicked judge might give a wrong reason for a decision against a party whom he favored, so that there might be a new trial. Nor need

the statement made in the affidavit come from the officer who had charge of the jury we might have attended to it; but it has long been decided that the affidavit of a juryman as to the mode in which the jury arrived at their verdict cannot be received."¹ This of course was not Lord Mansfield (Murray), but a judge of the next generation.

the original notion of Lord Mansfield, rejecting self-stultifying testimony, be further noticed. Of the remaining arguments, this much can be said, that they prove, if anything, much more than the rule in question. That is, they prove that certain facts of misconduct, such as the casting of lots or the communication of a juror's personal knowledge, should not as facts be considered at all, for the purpose of overturning the verdict, but should rather be regarded, under the principle already examined (*ante*, § 2349), as part of the motives and methods of deliberation leading up to the verdict, and therefore as immaterial. So far as any argument can be founded on the uncertainty that results from investigating the jury's deliberations, it rests virtually on the assumption that their methods or grounds of decision should be ignored, and that is another principle entirely. Whether a given piece of conduct during retirement should be classed as a formal and fatal irregularity (which may be proved) or as an erroneous ground of the verdict (which may not be proved) is often an arguable question (as noticed *post*, § 2354); but that is very different from the question whether, conceding that it is a fatal irregularity, the juror alone is to be prohibited from proving it. Finally, it must be pointed out that while Lord Mansfield's own statement of the rule obliged the proof of the misconduct to depend solely on the testimony of "some person having seen the transaction through a window or by some such other means," his successors have committed an absurdity which he would hardly have condoned. A bailiff or other court officer, who may have been present at the jury's deliberations, may by universal concession (*post*, § 2354) prove their misconduct, though it is a gross breach of duty (except in one or two jurisdictions) for him to attend or overhear. Thus, not only does the rule tempt the parties to seduce the bailiffs to tricky expedients and surreptitious eavesdroppings; but the law, furthermore, while with one hand it sanctimoniously puts away the juror who reports his own misconduct done during the privacy of retirement, yet with the other hand it inconsistently invites to the same witness-stand the bailiff whose shameless disregard of his duty, in intruding upon that privacy, forms his only qualification as a witness and the sole tenor of his testimony. If there cannot be any principle in this rule, it should at least possess logic.

In the following passages, its defects have been sufficiently exposed :

1805, *Livingston, J.*, in *Smith v. Cheetham*, 3 Caines 57, 59 : "With proper submission to his lordship [Mansfield], it appears the best and highest evidence of which the case admits. If a man will voluntarily charge himself with a misdemeanor, why should he not be indulged ? Are not criminals in England every day convicted and even executed on their own confession ? And is not our State prison filled in the same way ? . . . If we ask for stronger proofs, and at the same time adopt Lord Mansfield's rule of shutting the mouths of the jurors, we may as well at once close the door on all inquiries of the kind, and leave them to act and decide as they please."

1821, *Whyte, J.*, in *Crawford v. State*, 2 Yerg. 60, 67 : "[The observation of Chief Justice Mansfield in *Owen v. Warburton*, is] 'It was singular indeed that the only evidence the case admits should be shut out,' and yet that decision excluded it. It might be added, that it is also the best evidence the case admits of ; the jury from their recluse and retired situation are not subject to inspection, nor their proceedings to observation, at least of

that kind to admit of a correct account to be given of them by an indifferent person. They themselves are alone adequate to a development of their own conduct and proceedings. In *Vaux v. Delavel*, Lord Mansfield says, the Court must derive their knowledge from other sources. What source? The law contemplates their seclusion; the only alternative is the ignominious eavesdropper. Surely the jurors who fill this important office are not to be put on a level with those who by their own conduct have debased themselves. But it is said in the argument, the receiving the affidavit of jurors is against public policy; it would expose them to the being tampered with, the effect of which would be numerous applications to set aside verdicts. The like objection applies to every witness — the possibility of being practiced upon. But this does not produce the effect; the danger is imaginary; jurors in general are above attacks of this kind; and for the honor of human nature, I think there are few that would be found capable of making the attempt. Again, it is said, public policy forbids that a man should attempt to invalidate what he has himself done; a juror to defeat, to contradict, to impeach the verdict he has given. We have seen that this was not the public policy of the period of our law before the time of Lord Mansfield, . . . and in England at this day a man may come forward as a witness in all the above cases [of alleged turpitude], except as a juror to impeach his verdict, which we have seen does not constitute the rule here; and which is not the better opinion in my humble judgment, as it is in opposition to all the other analogies of law. . . . A verdict under such circumstances is to be approached with great caution and great circumspection; but it is not altogether intangible, and beyond the reach of the redressing power of the Court; if it were, I for one would think it a defect in the administration of the justice of the country, and a defect in the policy of the law."

1866, *Cole, J.*, in *Wright v. Telegraph Co.*, 20 Ia. 195, 210: "While we do not feel entirely confident of its correctness, nor state it without considerable hesitation, yet we are not without that assurance which, under the circumstances, justifies us in laying down the following as the true rule: That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as, that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average, or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself,² as, that the juror did not assent to the verdict; that he misunderstood the instructions of the Court, the statements of the witnesses, or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow-jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast. That the verdict was obtained by lot, for instance, is a fact independent of the verdict itself, and which is not necessarily involved in it. While every verdict necessarily involves the pleadings, the evidence, the instructions, the deliberation, conversations, debates, and judgments of the jurors themselves; and the effect or influence of any of these upon the juror's mind, must rest in his own breast, and he is and ought to be concluded thereon by his solemn assent to and rendition of the verdict (*veredictum* — a true declaration). To allow a juror to make affidavit against the conclusiveness of the verdict by reason of and as to the effect and influence of any of these matters upon his mind, which in their very nature are, though untrue, incapable of disproof, would be practically to open the jury room to the importunities and appliances of parties and their attorneys, and, of course, thereby to unsettle verdicts and destroy their sanctity and conclusiveness. But to receive the affidavit of a juror as to the independent fact that the verdict was obtained by lot, or game of chance, or the like, is to receive his testimony as to a fact, which, if not true, can be readily and certainly disproved by his fellow-jurors; and to hear such proof

² This is the principle of § 2349, *ante*.

would have a tendency to diminish such practices and to purify the jury-room, by rendering such improprieties capable and probable of exposure, and consequently deterring jurors from resorting to them. . . . While it is certainly illegal and reprehensible in a juror, to resort to lot or the like to determine a verdict, which ought always to be the result of a deliberate judgment, yet such resort might not evince more turpitude tending to the discredit of his statement than would be evinced by a person not of the jury, in the espionage indicated by Lord Mansfield and necessary to gain a knowledge of the facts to enable him to make the affidavit. At all events the superior opportunities of knowledge and less liability to mistake, which the juror has over the spy, would entitle his statement to the most credit. And if, as is universally conceded, it is the *fact* of improper practice, which avoids the verdict, there is no reason why a Court should close its ears to the evidence of it from one class of persons, while it will hear it from another class, which stands in no more enviable light and is certainly no more entitled to credit. Nor does the consideration of the affidavits of jurors, for the purposes stated, contravene sound public policy. It is true, however, that public policy does require that when a juror has discharged his duty and rendered a verdict, such verdict should remain undisturbed and unaffected by any subsequent change of opinion upon any fact or pretext whatever; and, therefore, a juror should not be heard to contradict or impeach that which, in the legitimate discharge of his duty, he has solemnly asseverated. But when he has done an act entirely independent and outside of his duty and in violation of it and the law, there can be no sound public policy which should prevent a Court from hearing the best evidence of which the matter is susceptible, in order to administer justice to the party whose rights have been prejudiced by such unlawful act. In other words, public policy protects a juror in the legitimate discharge of his duty, and sanctifies the result attained thereby; but if he steps aside from his duty, and does an unlawful act, he is a competent witness to prove such fact, and thereby prevent the sanction of the law from attaching to that which would otherwise be colorably lawful."

1874, *Brewer, J., in Perry v. Bailey*, 12 Kan. 539, 544: "As to all those matters lying outside the personal consciousness of the individual juror, those things which are matters of sight and hearing, and therefore accessible to the testimony of others, and subject to contradiction, — 'overt acts,' as the Massachusetts Court expresses it, — it seems to us that the interests of justice will be promoted, and no sound public policy disturbed, if the secret of the jury-box is not permitted to be the safe cover for the perpetration of wrongs upon parties litigant. If the jury has been guilty of no misconduct, no harm has been done by permitting their testimony to be received. If the jury has been guilty of misconduct, but such misconduct was not of such a nature as to prejudice the rights of the parties, the modern rule is to let the verdict stand, and simply punish the offending juror. But if such misconduct has wrought prejudice, not only should the juror be punished, but the verdict also should be set aside. Public policy forbids that a matter resting in the personal consciousness of one juror should be received to overthrow the verdict, because, being personal, it is not accessible to other testimony. It gives to the secret thought of one the power to disturb the expressed conclusions of twelve. Its tendency is to induce bad faith on the part of a minority; to induce an apparent acquiescence with the purpose of subsequent dissent; to induce tampering with individual jurors subsequent to the verdict. But as to overt acts, they are accessible to the knowledge of all the jurors. If one affirms misconduct, the remaining eleven can deny. One cannot disturb the action of the twelve. It is useless to tamper with one, for the eleven may be heard."

§ 2354. **Same: State of the Law in Various Jurisdictions; Qualifications of the Rule.** The doctrine of Lord Mansfield was so rapidly accepted that most of the Courts had committed themselves upon the subject long before the opinion of Mr. Justice Cole of Iowa, in 1866, was delivered. The exposition of Mr. Justice White, in Tennessee, in 1821, which had accurately pointed

out the true nature of the innovation, seems to have received no consideration from other Courts. Except in six jurisdictions, where the rule of Iowa is accepted,¹ the rule of Lord Mansfield seems now too firmly settled in most jurisdictions to be repudiated by judicial decision.²

¹ Iowa, Kansas, Nebraska, Tennessee, Texas (criminal cases), and Federal Courts; in Ohio there is some doubt; in nearly a dozen Codes there is one express exception.

² The various rulings and statutes are as follows; certain distinctions made in some of them are noticed later in the text above: *Arkansas*: 1853, Stanton v. State, 13 Ark. 317, 319 (juror's affidavit as to a fellow-juror's absence from the room, said to be "subject to many serious objections"); 1855, *Pleasants v. Heard*, 15 id. 403, 408 (jurors' affidavits that damages were determined by average, held inadmissible, as well as jurors' admissions out of doors after verdict); *Gantt's Dig.* § 1971, Mansfield's Dig. § 2298, *Sandels & Hill's Dig.* 1894, § 2269 ("a juror cannot be examined to establish [in criminal cases] a ground for a new trial, except it be to establish as a ground for a new trial that the verdict was made by lot"); 1874, *Wilder v. State*, 29 id. 293, 298 (statute applied to exclude jurors' testimony as to a bailiff's undue influence); 1879, *Fain v. Goodwin*, 35 id. 109, 113 (statute applied to exclude an affidavit as to jurors acting upon personal knowledge); 1887, *Ward v. Blackwood*, 48 id. 396, 3 S. W. 624 (juror's affidavit that damages were determined by drawing lots, excluded, following *Pleasants v. Heard, supra*); 1894, *Smith v. State*, 59 id. 132, 26 S. W. 712 (juror's affidavit not received to show the taking of evidence after retirement); *California*: 1854, *Amsby v. Dickhouse*, 4 Cal. 103 (juror's affidavit as to improper remarks during retirement, excluded); 1855, *Wilson v. Berryman*, 5 id. 44, 46 (computing damages by average; jurors' affidavits excluded); 1862, *Practice Act*, § 193, C. C. P. 1872, § 657 (where "any one or more of the jurors have been induced to assent" to a verdict by "a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors"); 1863, *Donner v. Palmer*, 23 Cal. 40, 47 (statute applied to a verdict based upon guessing the face of a coin); 1864, *Turner v. Water Co.*, 25 id. 398, 401 ("as the law now stands, there are certain irregularities fatal to a verdict which may be proved by the affidavits of the jurors, and certain other irregularities equally fatal which can only be proved in the manner authorized by the common law"; here, the reckoning of damages by average was held improper, but not a "chance verdict," and therefore not provable by jurors' affidavits); 1864, *Boyce v. Stage Co.*, ib. 460, 474, 477 (preceding opinion approved and the same ruling made; the history of the above statute explained); 1882, *People v. Gray*, 61 id. 164, 183 (jurors' affidavits as to intoxication, excluded); 1891, *People v. Deegan*, 88 id. 602, 26 Pac. 500 (same); 1893, *Dixon v. Pluns*, 98 id. 384, 33 Pac. 268 (jurors' affidavits admitted to show determination of damages by average; *Turner v. Water*

Co., *supra*, repudiated on this point); 1893, *Weinburg v. Soms*, ib., 33 Pac. 341 (same); 1895, *People v. Azoff*, 105 id. 632, 39 Pac. 59 (jurors' affidavits that papers were illegally transmitted to them, excluded); 1901, *Siemens v. Electric R. Co.*, 134 id. 494, 66 Pac. 672 (jurors' affidavits to prove misconduct in visiting the premises in question, excluded); *Colorado*: C. C. P. 1895, § 217 (juror's affidavit receivable to show a "determination by chance"); 1890, *Knight v. Fisher*, 15 Colo. 176, 25 Pac. 78 (jurors' affidavits offered to show a determination of damages by average; question reserved); 1895, *Heller v. People*, 22 id. 11, 43 Pac. 124 (jurors' affidavits not received to show intoxication and other misconduct of fellow-jurors); *Connecticut*: 1824, *State v. Freeman*, 5 Conn. 348 (jurors' affidavits as to a fellow-juror's communication of personal knowledge on a fact not in evidence and not admissible, excluded; repudiating the earlier local practice to the contrary, as indicated in *Talmadge v. Northrop*, 1 Root 522, in 1793); 1824, *Meade v. Smith*, 16 id. 346, 356 (foregoing case approved); 1844, *State v. Fasset*, ib. 457, 466 (rule applied to grand jurors' testimony as to illegal testimony before them); *Delaware*: 1881, *Crossdale v. Tantum*, 6 Houst. 218 (jurors' affidavits not received to show a determination of damages by average); *Florida*: 1897, *Kelly v. State*, 39 Fla. 122, 22 So. 303 (general principle against impeachment, applied); *Georgia*: 1811, *State v. Doon*, R. M. Charl. 1 (Lord Mansfield's doctrine in *Vaise v. Delaval*, approved *obiter*); 1850, *Bishop v. State*, 9 Ga. 121, 125 (general principle that jurors cannot "impeach their own verdict," conceded *obiter*); 1853, *Clark v. Carter*, 12 id. 500, 503 (same); 1859, *Brown v. State*, 28 id. 199, 200, 217 (juror's affidavit that a fellow-juror gave private testimony to them, excluded); 1860, *McElven v. State*, 30 id. 869, 871 (same); 1867, *O'Barr v. Alexander*, 37 id. 195, 200, 203 (juror's affidavit as to the jurors' drinking of whiskey, excluded); 1869, *Hoye v. State*, 39 id. 718, 723 (like *Brown v. State, supra*); 1877, *Moughon v. State*, 59 id. 308 (juror's affidavit to a fellow-juror's improper bias during retirement, excluded); 1877, *Oatis v. Brown*, ib. 711, 717 (like *Brown v. State, supra*); 1893, *Hill v. State*, 91 id. 153, 16 So. 976 (like *Moughon v. State, supra*); 1892, *McTyier v. State*, ib. 254, 13 So. 140 (apparently similar); 1893, *Cornwall v. State*, ib. 277, 13 So. 154 (apparently similar); 1895, *Carr v. State*, 96 id. 284, 22 So. 570 (jurors' affidavits that newspaper reports were read, excluded); 1897, *Bolden v. R. Co.*, 102 id. 558, 27 S. E. 664 (general principle affirmed); *Hawaii*: 1882, *Kapohaku v. Koa*, 6 Haw. 326 (juror's affidavit as to another juror's conversation with an officer during the deliberations, admitted); *Idaho*: Rev. St. 1887, § 4439, subdiv. 2, Code Civ. Pr. 1901,

It remains to notice certain discriminations and qualifications.

(1) What *kinds of misconduct* of jurors shall constitute an irregularity sufficient to avoid the verdict is to be determined by the law of jury-pro-

§ 3524, subdiv. 2 (like Cal. C. C. P. § 657); 1893, *Flood v. McClure*, 3 Ida. 587, 32 Pac. 254 (jurors' affidavits that damages were determined by average, held admissible under the statute, such a verdict being a "determination of chance"; the California rulings upon the like statute, repudiated); 1895, *Griffiths v. Montandon*, 4 id. 377, 39 Pac. 548 (rule of the California Code, as adopted in the Idaho statutes, § 4439, and interpreted in *Boyce v. Stage Co.*, Cal., applied, notwithstanding erroneous punctuation in the Idaho Code; here applied to misconduct in taking a private view); *Illinois*: 1820, *Sawyer v. Stephenson*, 1 Ill. 24 (juror's affidavit of personal knowledge communicated by another juror after retirement, admitted; no question raised); 1823, *Forester v. Guard*, ib. 74 (similar facts, affidavit excluded); 1860, *Martin v. Ehrenfels*, 24 id. 187, 189 (unspecified misconduct; jurors' affidavits excluded); 1863, *Reins v. People*, 30 id. 256, 266, 274 (similar to *Forester v. Guard*, *supra*); 1867, *Allison v. People*, 45 id. 37, 39 (jurors' affidavits, and others' affidavits founded on jurors' statements, not admitted to show misconduct in permitting the constable to join in their discussions); 1868, *Peck v. Brewer*, 48 id. 54, 62 (like *Martin v. Ehrenfels*, *supra*); 1871, *Chicago v. Dermody*, 61 id. 431, 435 (general principle affirmed); 1873, *Bertholf v. Quinlan*, 68 id. 297, 303 (similar); 1878, *Reed v. Thompson*, 88 id. 245, 247 (similar; applying it to the determination of damages by average); 1885, *Roy v. Goings*, 112 id. 656, 667 (similar, forbidding a questioning of the jurors upon rendering the verdict); 1893, *Sanitary District v. Cullerton*, 147 id. 385, 389, 35 N. E. 723 (jurors' affidavits of unspecified misconduct, excluded); *Indiana*: 1840, *Drummond v. Leslie*, 5 Blackf. 453 (affidavit or admission of jurors that damages were determined by average, excluded); 1846, *Dunn v. Hall*, 8 id. 32, 34 (same); 1851, *Bennett v. State*, 3 Ind. 167, 170 (jurors' affidavits not received to show an improper agreement as to the balloting); 1861, *McCray v. Stewart*, 16 id. 377 (general principle affirmed); 1867, *Haun v. Wilson*, 30 id. 296, 298 (like *Drummond v. Leslie*, *supra*); 1876, *Stanley v. Sutherland*, 54 id. 339, 356 (jurors' statements or affidavits as to fellow-jurors' communication of personal belief, excluded); 1883, *Jones v. State*, 89 id. 82, 87 (jurors' affidavits that a book had been improperly read, held inadmissible); 1884, *Long v. State*, 95 id. 481, 485 (similar); 1887, *Taylor v. Garnett*, 110 id. 290, 11 N. E. 309 (jurors' affidavits excluded, as in *Stanley v. Sutherland*, *supra*; prior doctrine confirmed in a careful opinion by Zollars, J.); 1890, *Houk v. Allen*, 126 id. 569, 25 N. E. 897 (jurors' affidavits that a verdict was obtained by majority-agreement, excluded); *Iowa*: 1851, *Abel v. Kennedy*, 3 G. Gr. 47 (jurors' affidavits, held inadmissible, when alone offered as the basis of the motion, to prove their

misconduct); 1856, *Forshee v. Abrams*, 2 Ia. 571, 578 (jurors' affidavits as to misconduct in determining damages by average, apparently held admissible under Code § 1810; but jurors held not compellable to make affidavits); 1856, *Cook v. Sypher*, 3 id. 484, 486 (jurors' affidavits said *obiter* to be inadmissible in general to impeach their verdict); 1857, *State v. Grady*, 4 id. 461 (like *Forshee v. Abrams*, *supra*, on the point of non-compellability); 1858, *Manix v. Malony*, 7 id. 81, 83 (juror's affidavit held admissible to show a determination of damages by average); 1858, *Ruble v. McDonald*, ib. 90 (same, for a verdict reached by lot); 1859, *Schanler v. Porter*, ib. 481 (like *Manix v. Malony*, *supra*); 1860, *Stewart v. R. Co.*, 11 id. 62, 65 (jurors' affidavits held admissible to show the reading of a paper illegally in their hands); 1860, *State v. Accola*, ib. 246 (similar); 1861, *Crumley v. Adkins*, 12 id. 363 (like *State v. Grady*, *supra*); 1863, *Shepherd v. Brenton*, 15 id. 84, 89 (preceding cases approved); 1866, *Wright v. Tel. Co.*, 20 id. 195, 212 (jurors' affidavits held admissible to prove misconduct and irregularity; quoted *supra*); 1873, *Bingham v. Foster*, 37 id. 339 (jurors' affidavits that fellow-jurors gave personal testimony during retirement, excluded; erroneously applying the rule in *Wright v. Tel. Co.*, *supra*); 1874, *Dunlavy v. Watson*, 38 id. 398, 402 (similar); 1888, *Griffin v. Harriman*, 74 id. 438, 38 N. W. 139 (similar); 1896, *State v. Whalen*, 98 id. 662, 68 N. W. 554 (jurors' affidavits that a law-book was unlawfully read and expounded by a juror, admitted; this is correct, but of course inconsistent with the preceding three rulings); *Kansas*: 1874, *Perry v. Bailey*, 12 Kan. 539, 543 (juror's affidavit to show overt acts of misconduct in general, held admissible; here, to show a fellow-juror's intoxication; quoted *supra*); 1879, *Johnson v. Husband*, 22 id. 277, 285 (jurors' affidavits admitted to show a determination of damages by average); 1885, *State v. Clark*, 34 Kan. 289, 8 Pac. 528 (jurors' affidavits that certain documents were illegally read and considered by the jury, admitted); 1889, *Atchison T. & S. F. R. Co. v. Bayes*, 42 id. 609, 22 Pac. 741 (jurors' affidavits admitted to show another juror's improper statements of personal knowledge); 1896, *State v. McCormick*, 57 id. 440, 46 Pac. 777 (like the preceding case); 1898, *Wichita v. Stallings*, 59 id. 779, 54 Pac. 689 (jurors' affidavits admitted to show a determination of damage by averaging; *Doster, C. J.*, diss., on the ground that "the method by which a conclusion of fact is reached by the jury" is not within the principle); *Kentucky*: 1808, *Taylor v. Giger*, *Hardin* 595, 597 (jurors' affidavits not admissible to show "misbehavior in themselves and their fellow-jurors"); 1826, *Doran v. Shaw*, 3 T. B. Monr. 411, 415 (preceding rule approved); 1821, *Steele v. Logan*, 3 A. K. Marsh. 394, 396 (jurors' affidavits that a

cedure; given such irregularities, and the present rule applies. Of this sort, plainly, are the acts of intoxication, separation, private view, consultation of

fellow-juror gave personal testimony during retirement, excluded, on the principle that they were inadmissible to prove "anything which may have transpired in the jury-room whilst consulting of their verdict"); 1830, *Johnson v. Davenport*, 3 J. J. Marsh. 390, 393 (preceding rule approved); 1896, *Pittsburg Coal Co. v. Withers*, — Ky. —, 37 S. W. 684 (jurors' affidavits of unspecified tenor, excluded); *Louisiana*: 1823, *Campbell v. Miller*, 1 Mart. N. S. 514, 518 (juror's affidavit not admitted to show a fellow-juror's communication of personal evidence after retirement); 1877, *Hawkins v. Publishing Co.*, 29 La. An. 134, 139 (juror's affidavit to his receipt of a bribe, through the court crier, during the jury's presence in court, apparently treated as admissible, but not "decided authoritatively"); 1878, *State v. Beatty*, 30 id. 1266 (juror's statements as to a fellow-juror's offer of a bribe during retirement, excluded); 1880, *State v. Nelson*, 32 id. 842 (juror's testimony to misconduct, apparently in reading law-books, excluded); 1883, *State v. Chretien*, 35 id. 1031 (general principle affirmed that jurors may not impeach their verdict); 1890, *State v. Richmond*, 42 id. 299, 7 So. 459 (juror's affidavit as to improper separation, excluded); 1903, *State v. Riggs*, 110 La. 509, 34 So. 655 ("an overt act can be shown by the testimony of a juror"; here, intimidation of a juror; following *Mattox v. U.S., Fed.*, and *Perry v. Bailey*, Kan.); *Maine*: 1867, *Heffron v. Gallupe*, 55 Me. 563, 566 (juror held not admissible to prove irregularity or misconduct during the jury's deliberations; except perhaps "such gross misconduct" as a party's attempt to bribe, etc.); 1876, *State v. Pike*, 65 id. 111, 117 (juror's affidavit that a legal report was read to the jury, excluded); 1890, *Shepherd v. Camden*, 82 Me. 535, 20 Atl. 91 (juror's testimony that he communicated personal knowledge during retirement, excluded); *Massachusetts*: 1832, *Dorr v. Fenno*, 12 Pick. 520, 525 ("The rule is now perfectly well-settled in both countries, and may be laid down to be that the testimony of jurors is inadmissible to show their own misbehavior, but may be received to explain or contradict other evidence tending to impeach their conduct"; here not received to show a determination of damages by averaging); 1837, *Hannum v. Belchertown*, 19 id. 311, 313 (same; doubling damages under a statute requiring double damages); 1852, *Cook v. Castner*, 9 Cush. 266, 278 (like the next case); 1853, *Folsom v. Manchester*, 11 id. 334, 337 (misconduct of a juror in stating his personal knowledge privately to the others; excluded); 1854, *Boston and Worcester R. Co. v. Dana*, 1 Gray 83, 91, 105 (like *Dorr v. Fenno*); 1855, *Chadbourne v. Franklin*, 5 id. 312, 315 (taking a private view of the locality in issue; excluded); 1885, *Rowe v. Canney*, 139 Mass. 41, 29 N. E. 219 (unspecified improper utterance by one juror to another; excluded); 1888, *Com. v. White*, 147 id. 76, 80, 16 N. E. 707 (juror's testimony to another's expressions of opinion during trial and to threats

by him and the foreman, excluded; the rule applying equally to misconduct out of the courtroom, if during the pendency of the trial); 1892, *Com. v. Meserve*, 156 id. 61, 30 N. E. 166 (jurors' affidavits, and testimony of others as to admissions out of court, about a juror's giving of personal testimony during retirement, excluded); *Michigan*: 1896, *Merriman's Appeal*, 168 Mich. 454, 462, 66 N. W. 372 (jurors' affidavits to their own misconduct, excluded; here the misconduct was unspecified, except that it included expressions of bias); *Minnesota*: 1853-7, *St. Martin v. Desnoyer*, 1 Minn. 156, 159 (jurors' affidavits not admitted to show damages determined by average); 1879, *State v. Mims*, 26 id. 183, 2 N. W. 494, 683 (unspecified misconduct; jurors' affidavits excluded); 1880, *Bradt v. Rommel*, ib. 505, 5 N. W. 680 (similar); 1891, *State v. Lentz*, 45 id. 177, 47 N. W. 720 (jurors' affidavits as to the reading of newspaper reports and the misstatements of a juror as to the law, excluded); 1897, *Rush v. R. Co.*, 70 id. 5, 72 N. W. 733 (general principle applied); *Mississippi*: 1839, *Prussel v. Knowles*, 4 How. 90, 95 ("the rule is well settled that a juror shall not impeach his verdict"); *Missouri*: 1862, *Pratte v. Coffman*, 33 Mo. 71, 77 (jurors' testimony to misconduct, held generally inadmissible, with exceptions for serious cases where a foundation has been laid by other evidence; here, not received to show the improper reading of law-books); 1866, *Sawyer v. R. Co.*, 37 id. 240, 263 (juror's affidavit that the damages were determined by average, excluded); 1867, *State v. Coupenhaver*, 39 id. 430 (similar ruling, as to a verdict by majority vote); 1877, *State v. Branstetter*, 65 id. 149, 156 (jurors' affidavits that a sentence was determined by average, excluded; repudiating the qualification intimated in *Pratt v. Coffman*, *supra*); 1877, *State v. Alexander*, 66 id. 148, 163 (juror's affidavit as to his improper communication with the judge, excluded); 1878, *Philips v. Stewart*, 69 id. 149 (juror's affidavit that damages were determined by average, excluded); 1883, *State v. Dunn*, 80 id. 681, 694 (principle applied to misconduct in the manner of reaching the verdict); 1884, *State v. Cooper*, 85 id. 256, 261 (principle applied to misconduct in giving personal testimony during retirement); 1888, *State v. Rush*, 95 id. 99, 8 S. W. 221 (like the preceding case); 1892, *Easley v. R. Co.*, 113 id. 236, 20 S. W. 1073 (principle applied to misconduct in taking a private view); 1894, *State v. Wood*, 124 id. 412, 27 S. W. 1114 (like *State v. Branstetter*, *supra*); *Montana*: C. C. P. 1895, § 296, subdiv. 2 (like Cal. C. C. P. 657); 1893, *Gordon v. Trevarthan*, 18 Mont. 387, 34 Pac. 185 (statute applied to admit jurors' affidavits that damages were determined by average; *Turner v. Water Co.*, Cal., *supra*, not followed in its interpretation of "determination of chance"); *Nebraska*: 1888, *Harris v. State*, 24 Nebr. 803, 40 N. W. 317 (juror's misconduct in procuring law-books, etc., and

witness or party, acceptance of bribes, and reading of illegal documents. But there are some kinds of behavior which, though commonly classed as mis-

reading from them, allowed to be proved by other jurors' affidavits; rule in *Perry v. Bailey*, Kan., followed, as "much more reasonable and promotive of justice"; 1892, *Johnson v. Parrotte*, 34 id. 26, 51 N. W. 290 (jurors' admissions that he had given personal testimony and that he was prejudiced, excluded); 1895, *Gran v. Houston*, 45 id. 813, 64 N. W. 245 (jurors' affidavits as to conversations in the jury-room showing prejudice and improper motives, excluded); 1903, *Falls City v. Sperry*, — id. —, 94 N. W. 529 (expressions of personal knowledge); *New Hampshire*: 1827, *Tyler v. Stevens*, 4 N. H. 116 (general principle of exclusion laid down); 1851, *State v. Ayer*, 59 id. 301, 321 (same); 1879, *Dodge v. Carroll*, 59 id. 237 (jurors' affidavits that damages were determined by average, excluded); 1882, *Knight v. Epsom*, 62 id. 356, 361 (like the preceding case, which however is not cited); 1888, *Clark v. Manchester*, 64 id. 471, 13 Atl. 867 (like the preceding case); 1890, *Palmer v. State*, 65 id. 221, 19 Atl. 1003 (general principle held to exclude a juror's expressions of bias); *New Jersey*: 1790, *Brewster v. Thompson*, 1 N. J. L. 32 (a juror's affidavit that the verdict was reached by lot, excluded); 1823, *Den v. M'Allister*, 2 id. 46, 51 (jurors' affidavits stating a communication to them of private knowledge by a fellow-juror, excluded, because "it is a high misdemeanor" and "criminate the jurors themselves"; *Rossell, J., diss.*); 1842, *Kennedy v. Kennedy*, 18 id. 450, 454 (principle affirmed); 1849, *Deacon v. Shreve*, 22 id. 176, 181 (jurors' affidavits as to a private meeting with the parties, held inadmissible, as also testimony to the jurors' admissions of the fact during a recess of court; otherwise, if the juror's statement had been "part of the transaction and while the alleged payment was being made"); 1893, *Peters v. Fogarty*, 55 id. 386, 26 Atl. 855 (general principle affirmed); *New York*: 1809, *Dana v. Tucker*, 4 John. 487 (damages determined by average; "the better opinion is, and such is the rule adopted by the Court, that the affidavits of jurors are not to be received to impeach a verdict"; *Smith v. Cheetham, ante*, § 2352, not mentioned; *Kent, C. J.*, who there dissented, was still on the bench, and *Livingston, J.*, the champion of the contrary view in the earlier decision, had retired); 1825, *Sargent v. —*, 5 Cow. 106, 120 (*Dana v. Tucker* approved; *Smith v. Cheetham* treated as overruled); 1843, *Clum v. Smith*, 5 Hill 560 (jurors' affidavits not received to show misconduct in separating and obtaining information outside); 1875, *Williams v. Montgomery*, 60 N. Y. 648 (jurors' affidavits of unspecified misconduct, excluded); *North Carolina*: 1821, *State v. M'Leod*, 1 Hawks 344 (unspecified misconduct; jurors' affidavits excluded); 1883, *State v. Britain*, 89 N. C. 481, 504 (jurors not allowed to be examined to show undue influence by the deputy-sheriff); 1886, *Lafoon v. Shearin*, 95 id. 391, 394 (juror's affidavit that he gave personal

testimony after retirement, excluded); *North Dakota*: *Rev. C.* 1899, § 5472, par. 2 (like Cal. C. C. P. § 657); *Ohio*: 1841, *Hulet v. Barnett*, 10 Oh. 459 (jurors' affidavits that the jury took evidence from the constable after retirement, excluded); 1853, *Farrer v. State*, 2 Oh. St. 54, 73, 77 (jurors' affidavits held admissible to show misconduct in reading newspapers, etc., but only in an "exceptional case," and after a foundation laid "by other means than the affidavits of the jurors themselves"); *Oregon*: 1853, *Cline v. Broy*, 1 Or. 89 (juror's affidavit that damages were determined by average, excluded); *Pennsylvania*: 1811, *Cluggage v. Swan*, 4 Binn. 150, 155 (juror's affidavit that the verdict was reached by lot, held inadmissible, per *Yeates, J.*; *Tilghman, C. J.*, and *Brackenridge, J.*, expressing no opinion; quoted *supra*); 1821, *Ritchie v. Holbrooke*, 7 S. & R. 458 (juror's affidavit of another juror's having admitted consulting privately with a party to the cause, held admissible; *Tilghman, C. J.*, distinguishing *Cluggage v. Swan* as involving the juror's own misconduct); 1835, *White v. White*, 5 Rawle 61, 63 (jurors' affidavits "are inadmissible to inculcate their fellows or themselves"; here, to prove damages reckoned by average); 1893, *Smalley v. Morris*, 157 Pa. 349, 27 Atl. 734 (preceding cases approved); 1900, *Stull v. Stull*, 197 id. 243, 47 Atl. 240 (verdict reached by lottery; jurors' affidavits excluded); *Rhode Island*: 1891, *Luft v. Lingaine*, 17 R. I. 420, 22 Atl. 942 (jurors' affidavits not received to show determination of damages by average); *South Carolina*: 1814, *Price v. M'Ilvain*, 3 Brev. 419 (jurors' declarations or affidavits not receivable to prove a fellow-juror's statement of personal knowledge and expression of bias after retirement); 1834, *M'Kain v. Love*, 2 Hill 506 (juror's testimony to a fellow-juror's statement, after retirement, of personal belief as to a witness' character, admitted, but on the ground that such communication of personal belief was not improper in respect to a witness's character); 1855, *Smith v. Onibertson*, 9 Rich. L. 106, 111 (jurors' affidavits that the verdict was reached by lot, held inadmissible; good opinion by *Wardlaw, J.*); 1856, *State v. Tindall*, 10 id. 212 ("We never listen to the affidavit of a jurymen ascribing misconduct to himself or fellows in the jury-room"; here, the reading of papers improperly before them during retirement); *South Dakota*: *Stats.* 1901, § 6306, par. 2 (like Cal. C. C. P. § 657); 1891, *Gaines v. White*, 1 S. D. 434, 441, 47 N. W. 524 (unspecified misconduct; statute applied); 1891, *Ulrick v. Dakota L. & T. Co.*, 2 id. 285, 294, 49 N. W. 1054 (jurors' affidavits that damages were determined by average, excluded; following *Boyce v. Stage Co., Cal.*); 1897, *Thompson Co. v. Gunderson*, 10 id. 42, 71 N. W. 764 (jurors' affidavits not received to show an improper separation); *Tennessee*: 1821, *Crawford v. State*, 2 Yerg. 60 (jurors' affidavits admissible "to exhibit to the Court matter for setting aside the

conduct constituting an irregularity, ought perhaps rather to fall under the head of methods of reasoning and grounds of verdict, and thus to be governed by the other principle (*ante*, § 2349):

(a) The determination of a *verdict by lot* or other chance, and the estimation of *damages by average*, seem to be of this sort.³ Under the rule of Lord

verdict they themselves have rendered"; quoted *supra*); 1833, *Booby v. State*, 4 id. 111 (juror's affidavit that a fellow-juror had stated his own knowledge after retirement, admitted); 1836, *Hudson v. State*, 9 id. 407, 411 (preceding case approved on this point); 1839, *Elledge v. Todd*, 1 *Humph.* 43 (juror's affidavit that the verdict had been reached by averaging, held admissible); 1842, *Norris v. State*, 3 id. 333, 337 (preceding cases approved on this point); 1872, *Wade v. Ordway*, 1 *Baxt.* 229, 236, 244 (juror's affidavit that another juror had taken a private view and communicated his observations, admitted); *Texas*: 1846, *Mason v. Russell*, 1 *Tex.* 721, 726 (jurors' affidavits, not admitted to show unspecified "irregularities of their proceedings, while out and considering of their verdict"); 1848, *Cannon v. State*, 3 id. 31 (same general principle affirmed); 1852, *Burns v. Paine*, 8 id. 159 (same principle implied); 1852, *Handleigh v. Leigh*, ib. 129 (like the next case); 1888, *International & G. N. R. Co. v. Gordon*, 72 id. 44, 11 *S. W.* 1033 (juror's affidavit that damages were determined by average, excluded); *C. Cr. P.* 1895, § 817, par. 8 (new trial allowable "where from the misconduct of the jury the Court is of opinion that the defendant has not received a fair and impartial trial, and it shall be competent to prove such misconduct by the voluntary affidavit of a juror; and a verdict may in like manner in such cases be sustained by such affidavit"); 1895, *Mitchell v. State*, 36 *Tex. Cr.* 278, 33 *S. W.* 367, 36 *S. W.* 456 (jurors' affidavits that fellow-jurors had stated their personal knowledge after retirement, admitted); 1896, *Ray v. State*, 35 id. 354, 33 *S. W.* 869 (similar); *United States*: 1851, *U. S. v. Reid*, 12 *How.* 361, 362, 366 (jurors' affidavits that they read a newspaper report of the evidence during retirement but were not influenced by it; question not decided; "it would perhaps hardly be safe to lay down any general rule upon this subject"); 1890, *Hyman v. Eames*, 41 *Fed.* 676, *Hallett, J.* (jurors' affidavits as to a fellow-juror's statements of personal knowledge during retirement, admitted, to corroborate evidence of prejudice expressed before trial); 1890, *Fuller v. Fletcher*, 44 id. 34, 39, *Gray, J.* (jurors' affidavits admitted to show that a paper was not read by them); 1892, *Mattox v. U. S.*, 146 *U. S.* 140, 142, 147, 13 *Sup.* 50 (jurors' affidavits that newspaper comments were read to them during retirement and that the bailiff made statements concerning the cause, admitted; rule of *Woodward v. Leavitt*, *Mass.*, and *Perry v. Bailey*, *Kan.*, approved); 1893, *Consolidated I. M. Co. v. Trenton H. I. Co.*, 57 *Fed.* 898, *Green, J.* (juror's affidavit not admitted to show a determination of damages by average); *Utah*: *Rev. St.* 1898, § 3292, par. 3 (like *Cal. C. C. P.* § 657); 1893, *Homer v.*

Inter-Mountain A. Co., 9 *Utah* 193, 33 *Pac.* 700 (jurors' affidavits not received to show the jurors' improper reading of a book of accounts); 1895, *People v. Ritchie*, 12 id. 180, 42 *Pac.* 209 (juror's testimony "cannot be received to defeat his own verdict," — here, by showing an unauthorized view; the statute not applying to criminal cases, nor permitting self-impeachment other than on the specified charge of resorting to chance); 1903, *Black v. R. M. B. Tel. Co.*, 26 id. 451, 73 *Pac.* 514 (preceding case approved); *Vermont*: 1802, *Robbins v. Windover*, 2 *Tyl.* 11 (juror's affidavit that fellow-jurors "related certain matters and things, in relation to the issue, to others of the panel after the cause was submitted to them, not witnessed on the trial of the cause in court," excluded); 1865, *Sheldon v. Perkins*, 37 *Vt.* 550, 557 (jurors' affidavits not admissible to show "any impropriety in the conduct of the jury or improper mode of arriving at the verdict"); 1893, *Carpenter v. Willey*, 65 id. 168, 26 *Atl.* 488 (jurors' affidavits that damages were determined by average, excluded); *Virginia*: 1812, *Com. v. McCaul*, 1 *Va. Cas.* 271, 275, 302 (juror's affidavit as to his separation from the jury, admitted; no question raised on this point); 1851, *Thompson v. Com.*, 8 *Gratt.* 637, 650 (jurors' affidavits as to determining a sentence by average; not decided, "because it has never yet been so maturely considered and solemnly adjudged in Virginia . . . as to render it a settled question in causes either civil or criminal"); 1884, *Moses v. Cromwell*, 78 *Va.* 671, 675 (jurors' affidavits that damages were determined by average, not admitted); 1889, *Elam v. Commercial Bank*, 86 id. 92, 9 *S. E.* 498 (jurors' affidavits as to unspecified misconduct, excluded); 1893, *Taylor v. Com.*, 90 id. 109, 17 *S. E.* 812 (general principle affirmed); *West Virginia*: 1876, *Chesapeake & O. R. Co. v. Patton*, 9 *W. Va.* 648, 662 (juror's affidavit that damages were determined by average, excluded); 1889, *Bartlett v. Patton*, 33 id. 71, 10 *S. E.* 21 (jurors' affidavits that a fellow-juror gave personal testimony after retirement, excluded); *Wisconsin*: 1864, *Edmister v. Garrison*, 18 *Wis.* 594 (jurors' affidavits to unspecified misconduct, excluded); 1867, *Shaw v. Fisk*, 21 id. 368 (jurors' affidavits that they were incompetent by ignorance of English, and had to have an interpreter in the jury-room, excluded on the latter point); 1894, *Peppercorn v. Black River Falls*, 89 id. 38, 61 *N. W.* 79 (jurors' affidavits that they took a private view, admitted, the rule applying only to "matters taking place during their retirement"); *Wyoming*: 1895, *Bunce v. McMahon*, 6 *Wyo.* 24, 42 *Pac.* 23 (jurors' affidavits that a paper was illegally introduced and read in the jury-room, excluded).

³ They were so considered by Baron Parke,

Mansfield, the result is of course the same in either class of cases; but under the Iowa rule the effect would be to exclude under the other principle (*ante*, § 2349) what would otherwise be admissible under the present one. The curious circumstance is that the single exception made to the prohibitive rule by the Codes following the California Code is directed to this kind of misconduct, *i. e.* the very one of all upon which no exception should exist. Moreover, of the usual rule (excluding jurors' testimony upon this point) it may be said that since a determination by lot can hardly ever be established by other than jurors' testimony, it becomes a mere pretence to declare a certain irregularity fatal and yet to exclude all practical means of proving it;⁴ so that the franker plan would be to decline to recognize it as falling under the class of irregularities of conduct. The only substantial reason for treating it as such is that it virtually signifies that the jury never deliberated at all, — which however is seldom the fact.

(*b*) The *communication of a juror's personal knowledge during retirement* is of course improper, since the juror ought to offer himself upon the stand as a witness (*ante*, § 1800). Nevertheless, his use and his fellows' use of that information during their deliberations is rather to be regarded as affecting the grounds of their verdict, and thus as falling under the other principle (*ante*, § 2349).

(2) Under the Iowa rule, a juror's *expressions of personal knowledge* and of *bias*, uttered during retirement, are provable. But the genuine privilege for confidential communications (*ante*, § 2346) ought to exclude them, when offered from any one but the juror himself voluntarily. The object of the privilege is to enable the jurors to speak out freely; and if a juror has stated that he knows the plaintiff to be a villain or that he will always vote against a money-lender like the defendant, surely it is precisely such statements which he is entitled to prevent from being afterwards disclosed without his consent. The only opposing argument could be that the privilege ought not to cover statements by the juror involving his own breach of duty; yet there is no such limitation for the other classes of privileged communications, and none should exist here.

(3) The usual rule of exclusion, on Lord Mansfield's theory of forbidding self-stultification, (*a*) ought equally to prohibit his own affidavit of his own *expressions of disqualifying bias uttered before entering or after leaving the panel*;⁵ and (*b*) it ought equally to prohibit his own proof of his misconduct during the trial but *outside the jury-room*⁶ and (*c*) it ought equally to prohibit a juror's proof of similar misconduct in a *fellow-juror*, since the prin-

in *Straker v. Graham*, and by Chief Justice Doster, in *Wichita v. Stallings* (Kansas).

⁴ 1894, Field, C. J., in *Wright v. Abbott*, 160 Mass. 395, 397, 36 N. E. 32 ("Either the law that a verdict must be set aside if determined by lot is nugatory, because the fact cannot be proved; or there must be a possible means of proving it").

⁵ 1851, *People v. Baker*, 1 Cal. 404, 406

(juror's affidavit that he had expressed an opinion before trial, excluded).

⁶ *Contra*: 1863, *Heffron v. Gallupe*, 55 Me. 563, 566 (juror's obtaining evidential papers from a party by calling at his house, admitted); 1901, *Pierce v. Brennan*, 84 Minn. 422, 86 N. W. 417; 1901, *Hempton v. State*, 111 Wis. 127, 86 N. W. 596.

ciple regards the jurors as a single body and the shibboleth of "impeaching the verdict" applies equally to the impeachment of a fellow-juror's conduct.⁷

(4) On the other hand, the same usual rule ought to admit a juror's testimony *in support of a verdict* attempted to be impeached by other testimony, whether the juror's testimony goes to deny or explain *expressions of bias before the trial*,⁸ or to deny or explain *misconduct during retirement*.⁹ The Iowa rule leads to the same result. Moreover, this object of disproving bias alleged to have existed before trial may be attained by showing the juror's expressions and conduct during retirement, as an evidential fact relating back and negating the supposed prior bias.¹⁰ But where the object is to determine the grounds or motives of the verdict as in themselves important for sustaining it (for example, to show that a certain illegal paper or erroneous charge did not influence the verdict), here the other principle (*ante*, § 2349) applies to forbid this.¹¹ The distinction is that in the former case the juror's expres-

⁷ 1841, *Cain v. Cain*, 1 B. Monr. 213 (juror's affidavit of a fellow-juror's expressions of bias since the finding, excluded).

⁸ 1883, *Irvin v. State*, 19 Fla. 872, 890; 1886, *Hughes v. People*, 116 Ill. 330, 337, 6 N. E. 55; 1887, *Spies v. People*, 122 id. 1, 264, 12 N. E. 865, 17 N. E. 898; 1824, *Haskell v. Becket*, 3 Me. 92; 1824, *Taylor v. Greeley*, ib. 204; 1871, *Woodward v. Leavitt*, 107 Mass. 453, 459, 471.

⁹ *Ark.*: 1853, *Stanton v. State*, 13 Ark. 317, 319; 1855, *Pleasants v. Heard*, 15 id. 403, 408; *Cal.*: 1888, *People v. Goldenson*, 76 Cal. 352, 19 Pac. 161; 1892, *People v. Murray*, 94 id. 212, 29 Pac. 494; 1894, *People v. Stokes*, 103 id. 193, 37 Pac. 207, *semble*; 1895, *People v. Azoff*, 105 id. 632, 39 Pac. 59; *Ill.*: 1871, *Chicago v. Dermody*, 61 Ill. 431, 435; 1878, *Reed v. Thompson*, 88 id. 245, 247; *Ind.*: 1827, *Barlow v. State*, 2 Blackf. 114; 1865, *Alexander v. Thomas*, 25 Ind. 268; 1867, *Haun v. Wilson*, 28 id. 296, 298; 1883, *Jones v. State*, 89 id. 82, 88; *Ky.*: 1902, *Howard v. Com.*, — Ky. —, 69 S. W. 721 (juror's affidavit "may always be received to sustain the verdict"); *La.*: 1898, *State v. Favre*, 51 La. An. 434, 25 So. 93 (juror's disqualification by a previous bet on the trial); *Mass.*: 1827, *Hix v. Drury*, 5 Pick. 296, 302; 1871, *Woodward v. Leavitt*, 107 Mass. 453, 459, 466; *Minn.*: 1853-7, *St. Martin v. Desnoyer*, 1 Minn. 156, 160; *Mo.*: 1874, *State v. Underwood*, 57 Mo. 40, 52 (tampering by outsiders); 1888, *State v. Rush*, 95 id. 99, 8 S. W. 221; *Mont.*: 1896, *State v. Gay*, 18 Mont. 51, 44 Pac. 411; *N. H.*: 1833, *State v. Hascall*, 6 N. H. 352, 362; 1843, *Tenney v. Evans*, 13 id. 462 (jurors' affidavits received, "in exculpation of themselves and in support of the verdict," "where evidence has been introduced *abundante* to impeach the verdict"; here the affidavits to rebut bias stated that the juror in question had expressed no opinion on retirement until after the others; good opinion); 1845, *State v. Howard*, 17 id. 171, 187 (to repel evidence of bias expressed before trial, jurors' affidavits were admitted that they had at first, during retirement, proposed a finding of murder

in the second degree, instead of the verdict for the first degree as finally rendered); 1851, *State v. Ayer*, 23 id. 301, 303, 321 (juror's testimony denying and explaining alleged expressions of bias, held admissible); 1864, *Boynton v. Trumbull*, 45 id. 408 (reaching a verdict by lot); 1882, *Knight v. Epsom*, 62 id. 356; 1890, *Palmer v. State*, 65 id. 221, 19 Atl. 1003; *N. J.*: 1842, *Kennedy v. Kennedy*, 18 N. J. L. 450, 453 (jurors' affidavits received to disprove a determination of damages by average); *Nevins and Elmer, JJ., diss.*; *N. Y.*: 1808, *Hackley v. Hastie*, 3 John. 252; 1809, *Dana v. Tucker*, 4 id. 487 (damages determined by average); *S. D.*: 1897, *Thompson Co. v. Gunderson*, 10 S. D. 42, 71 N. W. 764; *Tex.*: 1848, *Cannon v. State*, 3 Tex. 31; *U. S.*: 1799, *U. S. v. Fries*, 3 Dall. 515, 517 (juror admitted to disprove expressions of prejudice alleged to have been uttered after being summoned); *Vt.*: 1857, *Downer v. Baxter*, 30 Vt. 467, 475; 1882, *State v. Cartwright*, 20 W. Va. 32, 41 (jurors' affidavits in exculpation said to be inadmissible both in "reason and the theory of criminal proceedings"; yet "the practice has been" to receive them); 1882, *State v. Robinson*, ib. 713, 756 (jurors' testimony admissible "to disprove or explain any such separation, misconduct, or irregularity; but their testimony will not be received to show by what motives they were actuated, or that any admitted fact, misconduct, or irregularity had no influence or effect upon their minds in producing the verdict"); 1892, *State v. Harrison*, 36 W. Va. 729, 15 S. E. 982. *Contra*: 1822, *Coster v. Merest*, 3 B. & E. 272, C. P. (to rebut affidavits that prejudicial papers had been seen by the jury, affidavits of all the jurors, denying that they had seen them, were rejected; no authority cited).

¹⁰ As in *Tenney v. Evans*, *State v. Howard*, N. H., *supra*, note 9, on the principle of §§ 387, 950, *ante*.

¹¹ Yet a few Courts, misunderstanding the principle, have admitted this; the rulings are noted *ante*, § 2349. Compare *State v. Robinson*, W. Va., *supra*, note 9.

sions are not considered in their aspect as establishing motives for the verdict, but merely as part of his whole conduct going to determine the question of his former bias.

(5) The usual rule, upon Lord Mansfield's theory of forbidding self-stultification, (a) does not exclude the juror's testimony to the *misconduct of a party or a court officer*; ¹² though a few Courts, taking literally the phrase about "impeaching a verdict" have reached a contrary conclusion; ¹³ and it is true that, so far as the third person's misconduct involves also the juror's own misconduct, the latter would be prohibited. (b) Nor does the rule of thumb interpose to prohibit a *court officer* from testifying to the juror's misconduct, ¹⁴ — in spite of the plain inconsistency of principle, already noted (*ante*, § 2353). But, apart from that inconsistency, it would seem that the genuine privilege for confidential communications (*ante*, § 2346) should suffice to protect jurors completely against the disclosure of their utterances by a third person present at their deliberations, especially when his presence is unlawful.

(6) So far as any of the foregoing facts may be proved at all by jurors, they should be proved by the juror's own testimony under oath, either by affidavit or on the stand, and not by his *hearsay statements* reported by others. ¹⁵

§ 2355. (d) **Mistake in Announcing or Recording the Verdict.** The act of assent to the terms of a document is constituted by the act of signing. The act of assent to a verdict is constituted by the express answer to the clerk at the polling in open court, or by the silence which implies an assent. ¹ This outward act is final. Just as the act of the party to a deed is judged and determined by his outward conduct, so the act of a juror is judged and determined by the jury's polling, irrespective, on the one hand, of motives or beliefs which may have led up to the verdict's terms (*post*, § 2413), and, on the other hand, of the deliberations and utterances of the juror during retirement (*post*, § 2425). The very purpose of the formality of

¹² 1895, *Heller v. People*, 22 Colo. 11, 43 Pac. 124 (bailiff's misconduct); 1858, *Spurek v. Crook*, 19 Ill. 415, 426 (juror may testify to improper conduct of the party in furnishing evidence after the hearing in court or to other acts of corruption or impropriety by the party); 1868, *Knowlton v. McMahon*, 13 Minn. 386 ("perhaps" they are admissible to show "the misconduct of the prevailing party"); 1850, *Nelms v. State*, 13 Sm. & M. 500, 508 (Clayton, J., diss.; officer's misconduct).

¹³ 1893, *Sanitary District v. Cullerton*, 147 Ill. 385, 392, 35 N. E. 723 (officer's misconduct); 1891, *Gardner v. Minea*, 47 Minn. 295, 50 N. W. 199 (bailiff's misconduct); 1883, *State v. Brittain*, 89 N. C. 481, 504 (jurors not allowed to be examined to show the deputy-sheriff's undue influence).

¹⁴ 1855, *Wilson v. Berryman*, 5 Cal. 44, 46 (sheriff); 1890, *Houk v. Allen*, 126 Ind. 569, 25 N. E. 897; 1894, *Wright v. Abbott*, 160 Mass. 395, 36 N. E. 62 (deputy-sheriff); 1880,

Bradt v. Rommel, 26 Minn. 505, 5 N. W. 680 (sheriff); 1864, *Boynton v. Trumbull*, 45 N. H. 408 (officer).

¹⁵ 1839, *Straker v. Graham*, 7 Dowl. Pr. 223; 1903, *People v. Dobbins*, 138 Cal. 694, 72 Pac. 339; 1891, *Cain Bros. Co. v. Wallace*, 46 Kan. 138, 26 Pac. 445; this is universally accepted. Whether the juror is *orally examinable* in court is sometimes said to lie in discretion; 1903, *State v. King*, 88 Minn. 175, 92 N. W. 965.

Distinguish the offer of a juror's expressions of bias before or during trial as *ground for disqualification to serve*: for here his utterances are themselves the disqualifying facts to be proved, and the Hearsay rule is not violated (*ante*, § 1770).

¹ For the manner of polling, the right to a poll, and the sort of expression that is equivalent to a dissent at the polling, see the following cases: 1852, *Nichols v. Suncook Mfg. Co.*, 24 N. H. 431; 1903, *Smith v. Paul*, 133 N. C. 66, 45 S. E. 348.

polling is to afford an opportunity for free expression, unhampered by the fears or the errors which may have attended the private proceedings:

1805, *Sewall, J.*, in *Grinnell v. Phillips*, 1 Mass. 530, 542 (rejecting an affidavit "that he thought it his duty to coincide with the rest of the jury, but in his mind he had never approved of the verdict or consented to it"); "He is not to be believed or heard. The record of a verdict implies a unanimous consent of the jury, and is conclusive and incontrovertible evidence of the fact. Besides, the secret or mental act of a juror can never be a subject of legal inquiry; and, from the necessity of the case, his conduct before the court is the best and only evidence that can be admitted of his assent to a verdict delivered in his presence."

(1) Hence, the fact that the verdict as delivered was *by one or more individual jurors not assented to* by them in the jury-room, or is different from the one there informally assented to by them, is no ground for later correcting or setting aside the verdict. Much less is the fact that the juror in his own mind was mistaken or unwilling in the assent which he confessedly gave in the jury-room; for here he has doubly committed himself to the verdict as delivered.² It may be added that this principle is to be discriminated from

² The rulings seldom distinguish between the above two cases; but the principle is best illustrated and tested by the former of the two. The rulings are unanimous: 1753, *Lawrence v. Boswell*, Sayer 100 (at the rendering of the verdict in open court, no objection was made by any juror; held, that five of them "shall not now be received to say that they did not acquiesce"); 1876, *Torque v. Carrillo*, 1 Ariz. 336, 25 Pac. 526 (juror's affidavit that he "did not agree to the verdict," excluded, where the verdict had been read aloud by the clerk and the jury had replied that it was their verdict); 1844, *Meade v. Smith*, 16 Conn. 346, 351, 356 (the foreman, before delivering the verdict, handed to the judge a paper stating that "the jury have agreed on a verdict handed in; the minority, however, desiring to have it understood that they come in silent"; the verdict was then read aloud and no dissent made by any juror; the jurors' affidavits were excluded, and the facts were further held not to avoid the verdict); 1853, *McCombs v. Chandler*, 5 Harringt. 423 (juror's affidavit that he "did not agree to the verdict and did not answer when polled," excluded); 1811, *State v. Doon*, R. M. Charl. 1 (two jurors' affidavits that they "did not in fact agree to the verdict which was rendered," excluded); 1880, *Hill v. State*, 64 Ga. 453, 466 (juror held to have signified his assent, when polled; his "affidavit afterwards taken," excluded); 1871, *Garretty v. Brazell*, 34 Ia. 100, 104 (jurors' affidavits that the findings "were not assented to by all of the jury," excluded); 1895, *Hallenbeck v. Garst*, 96 id. 509, 65 N. W. 417 (juror's affidavit that his ballot for "plaintiff" was wrongly read out as "defendant" by the foreman in the jury-room, not admitted, since he did not there dissent and did afterwards answer for the defendant with the others when polled in court); 1830, *Johnson v. Davenport*, 3 J. J. Marsh. Ky. 390, 392 (juror's affida-

vit that he did not consent to the verdict, though on the calling of the clerk "So say you all," he made no dissenting expression, held not admissible); 1837, *Cire v. Rightor*, 11 La. 140 (the jurors were polled and answered "verdict for Rightor"; affidavit of two jurors, "that they were mistaken in their verdict, that when they rendered it they were under the impression it granted the land to the plaintiffs," excluded); 1848, *State v. Caldwell*, 3 La. An. 435 (affidavit of two jurors "that they were overawed by abuse and threats from other jurors and forced to render a verdict contrary to their judgment," excluded); 1851, *State v. Brette*, 6 id. 652, 657 (preceding case approved); 1885, *State v. Price*, 37 id. 215, 218 (apparently like *State v. Caldwell*, *supra*); 1805, *Grinnell v. Phillips*, 1 Mass. 530, 542, per *Sewall, J.* (affidavit that "he thought it his duty to coincide with the rest of the jury," but had not really approved the verdict, excluded; quoted *supra*); 1817, *Bridge v. Eggleston*, 14 id. 245, 247 (similar); 1890, *State v. McNamara*, 100 Mo. 100, 13 S. W. 938 (juror's affidavit that he intended to find a verdict of carrying concealed weapons, and not of shooting with intent to kill, excluded); 1819, *Clark v. Read*, 5 N. J. L. 486 ("Some time after the jury was dismissed, one of the jurors swore that he was not agreed to the verdict, previous to judgment being rendered"; excluded); 1805, *Suttrell v. Dry*, 1 Murph. 94 (juror's affidavit "that he did not consent to the verdict," excluded); 1888, *State v. Harper*, 101 N. C. 761, 7 S. E. 730 (certain jurors' "surrender of convictions" to the majority, not allowed to be shown, where at the polling in court they were unanimous); 1858, *Boetge v. Landa*, 22 Tex. 105, 107 (on the polling of the jury, one juror denied his assent; the jury then retired again, and upon returning to court, this juror assented with the others when polled; his subsequent affidavit that he had been coerced

that of certain cases under the prior principle (*ante*, § 2349) about the grounds of a verdict (though the result is the same) for there the assent is conceded and the motive for the assent is the fact offered to be shown, while here the assent itself is desired to be negatived.

(2) But where the error at the time of announcement of the verdict is a *unanimous one*, by all the jury, the situation is a different one. When the verdict as announced or delivered is different unanimously from the verdict as assented to in the jury-room at the time of voting, the case is the same as that of a deed which by mutual or common mistake does not conform to the original agreement as avowedly made by the parties to the deed. Just as such a deed may be reformed in equity, upon satisfactory proof of the error (*post*, § 2417), so such a verdict may be corrected to represent the verdict actually agreed upon by the jury as a whole. The same reasons of policy here also permit a departure from the general rule that formal acts of assent are conclusive; for a unanimous or mutual error can safely be inquired into and easily established, while an individual error opens a wide door for vacillation and uncertainty. As individuals, they must be judged by their open acts; but as an entire jury they may be trusted to correct that which is merely an error in the transmission of their act from the jury-room to the court-room:

1839, *Trotter, J.*, in *Prussel v. Knowles*, 4 How. Miss. 90, 96 (action of trespass against the defendant and six others, including Allen and McDonald; verdict for the plaintiff; after verdict announced and entered, when all but one jurymen had left the court, he stated, on suggestion from the counsel and the judge, that the jury had intended not to include in their finding either Allen, who was dead, or McDonald, who was not concerned; "the Court then directed the verdict to be changed so as to correspond with this statement; immediately after this, the whole panel came into court and confirmed the statement of the juror"; this alteration was approved on appeal): "[In a case cited] it was decided that the Court might send the jury back to re-consider their verdict, if it appears to be a mistaken one. This is constantly done; sometimes upon an intimation from the judge and more frequently from a suggestion of one of the parties or his counsel. It is highly conducive to justice to suffer mere slips of the jury to be remedied. Can there be any distinction in principle, between the case at bar, and that of sending the jury back before they are divested of the case by a manual delivery of the papers to the clerk? Does the naked fact of their separation before the discovery of the error deprive the Court of this salutary power? . . . In the case before us, the jury had a right to find some of the defendants guilty, and others not; and if they thought McDonald not guilty, he was entitled to the benefit of their verdict, and ought not to be deprived of it by a mistake which occurred at the time of delivering it. Nor was the Court bound to send the case to a new jury."

1860, *Bigelow, C. J.*, in *Capen v. Stoughton*, 16 Gray 364 (admitting the jurors' testimony to show that "after agreeing on a verdict for the petitioners and filling up a blank form accordingly, the jury by mistake signed the form of verdict for the respondents"): "The evidence of the jurors is offered only to show a mistake, in the nature of a clerical error, which happened after the deliberations of the jury had ceased, and they had actually agreed on their verdict. The error consisted, not in making up their verdict on wrong principles or on a mistake of facts, but in an omission to state correctly

to assent was excluded); 1891, *Letcher v. Morrison*, 79 id. 240, 14 S. W. 1010 (affidavits by a majority only, excluded).

in writing the verdict to which they had, by a due and regular course of proceeding, honestly and fairly arrived. . . . No considerations of public policy require that the uncontradicted testimony of jurors to establish an error of this nature should be excluded. Its admission does not in any degree infringe on the sanctity with which the law surrounds the deliberations of juries, or expose their verdicts to be set aside through improper influences, or upon grounds which might prove dangerous to the purity and steadiness of the administration of public justice. On the contrary, it is a case of manifest mistake, of a merely formal and clerical character, which the Court ought to interfere to correct, in order to prevent the rights of parties from being sacrificed by a blind adherence to a rule of evidence, in itself highly salutary and reasonable, but which upon principle has no application to the present case."

It has occasionally been said that this correction must be claimed before the jury are discharged;³ but this seems unsound, because such errors are seldom ascertained until after the jury have separated and conversed out of court; and if the error is satisfactorily established, there can hardly be any fixed time to limit its correction. Subject to this qualification, it is universally conceded that a unanimous error of the jury in delivering the verdict as already unanimously agreed on in the jury-room may be shown for the purpose of correcting it to correspond, or, when this is not safely to be done, of ordering a new trial.⁴

³ 1835, *Bridgewood v. Wynn*, 1 Harr. & Woll. 574 (affidavits of two of the jurors that the verdict was by mistake given for the defendant instead of the plaintiff, the jury being "misled by the circumstance of the defendant beginning the case" and thinking that they were finding for the plaintiff, held not sufficient, "the jury as such being now separated"); 1853, *Breck v. Blanchard*, 27 N. H. 100, 103 (the jury having rendered a signed and written but informal verdict, and having been discharged with the understanding that the foreman should afterwards draw up a formal verdict, a further inquiry of the jurors, and the affidavits of some of them, as to their non-assent to the verdict as first signed and read aloud, was refused; "there must be a limit fixed, beyond and after which no such inquiry can be made; and we think that time is well settled to be the time when the verdict is recorded").

⁴ *England*: 1781, *Parker v. Thornton*, 21 Vin. Abr. 484, "Trial," T, g, pl. 12 (new trial granted "upon an affidavit of eleven of the jury that they had agreed on a verdict for the plaintiff, and 5s. damages, but by mistake the foreman gave a verdict for the defendant"); s. c., s. v. *Baker v. Miles*, *Cooke* 66 (98); 1757, *Cogan v. Edden*, 1 Burr. 383, L. C. J. Mansfield and others (there being two different issues, and the foreman having given in a "general verdict for the defendant upon both issues," affidavits of eight of the jury were received that "it was the meaning and intention of the whole jury" to find the former issue for the defendant, and the latter for the plaintiff, and that this mistake was discovered by them an hour afterwards, but not till the judge was gone to his lodgings; the Court holding, first, that the intent of the whole jury was sufficiently proved, and, next,

that it indicated "a mistake, arising from the jury's being unacquainted with business of this nature, and from the associate's omission in not asking the jury particularly how they found each respective issue and in not making the jury fully understand their own finding"); 1845, *Bentley v. Fleming*, 1 C. B. 479 (the judge's substitute having failed to take the answers separately to three issues submitted by the judge, and the colloquy in court showing that the verdict recorded for the plaintiff was probably a misrepresentation of the jury's findings, a new trial was ordered); *United States*: 1808, *Taylor v. Giger*, *Hardin Ky.* 595, 597, *semble* (jurors' affidavits admissible to show "that there was in truth no verdict," as by a mistaken announcement); 1830, *Johnson v. Davenport*, 3 J. J. Marsh. 390, 394 (preceding case apparently doubted); 1822, *Little v. Larabee*, 2 Me. 37 (jurors' affidavits that they had "misunderstood the legal terms in which they had drawn up their verdict and that they had returned a verdict for the defendant instead of one for the tenant, which last was their sole intention," admitted; the verdict was not corrected, but a new trial granted); 1860, *Capen v. Stoughton*, 16 Gray 364 (a mistake of the entire jury in filling up the wrong blank form, allowed to be shown; quoted *supra*); 1839, *Prussel v. Knowles*, 4 How. Miss. 90, 95 (jurors' testimony admitted to correct a mistake in the delivery of the verdict; quoted *supra*); 1893, *Peters v. Fogarty*, 55 N. J. L. 386, 26 Atl. 855 (jurors' depositions as to a mistaken announcement by the foreman of a verdict for the defendant, "the jury having agreed upon a verdict for the plaintiff," admitted; procedure for correcting the record, explained); 1875, *Dalrymple v. Williams*, 63 N. Y. 361, 363 (jurors' affidavits

(3) It follows, for the same reason, that an error in the *clerk's entry* of the verdict, making it to appear different from the verdict as actually pronounced by the foreman and assented to by the other jurors, may be shown,⁵

that "the verdict as agreed upon by them was in favor of defendant W. and against the other defendant, . . . and that the announcement of the foreman [against both defendants] was made through mistake and inadvertence," admitted; "it is in the nature of an attempt to correct a clerical mistake"); 1824, *Cohen v. Dubose*, Harp. Eq. 102 (the foreman wrote a verdict for "two hundred and four dollars with interest," the agreement having been for \$244 with interest; the jurors discovering the error in omitting the word "forty," the verdict was re-written with the correct sum, but this time the words "with interest" were inadvertently omitted; this was allowed to be shown by jurors' testimony, on a bill to correct the verdict); 1890, *Murphy v. Murphy*, 1 S. D. 316, 320, 47 N. W. 142 (jurors' affidavits offered that they had agreed on a verdict for the defendant for \$2, but through a misunderstanding as to the proper form of stating their verdict, due to the existence of set-off claims, they handed in a verdict for \$690 "over and above the amount claimed in the complaint," believing that this would net \$2 for the defendant; excluded, on the words of the statute; the Court nevertheless admitting that the plaintiff's purpose was in fact to correct a formal error, and was "just and right and highly salutary and reasonable"; this case falls fairly on the line between the present principle and that of § 2356, *post*, but it also illustrates the unfortunate effect of patchwork statutes); 1885, *Burlingame v. Central R. Co.*, 23 Fed. 706, *Wheeler, J.* (a verdict for \$3500 was allowed to be corrected to \$3500 with interest, by reassembling the jurors on the second day after the verdict and ascertaining from their unanimous answers that the original verdict as handed in did not represent their consensus); 1896, *Pelzer Mfg. Co. v. Hamburg-Bremen F. I. Co.*, 71 Fed. 826, *Simonton, J.* (jurors' testimony that "the jury, with the full purpose and intention to find a verdict upon both policies set out in the complaint, inadvertently and by mistake brought in their verdict upon one policy only," held admissible, the case being that the jury had actually voted and agreed and the error came in reducing the verdict to writing; *Capen v. Stoughton*, Mass., followed); 1896, *Hamburg-Bremen F. Ins. Co. v. Pelzer Mfg. Co.*, 22 C. C. A. 283, 76 Fed. 479 (allowing the correction of a clerical error by the foreman in announcing the verdict). *Contra*: 1889, *McKinley v. Bank*, 118 Ind. 375, 21 N. E. 36 (answers to interrogatories by special findings; after verdict and before judgment, jurors' affidavits were offered to show that "by inadvertence and mistake the word 'yes' was written and returned as the answer," instead of "no"; excluded, on the ground that it was an impeachment of the verdict; clearly unsound; *Elliott, C. J.*, diss.).

Distinguish the case of a *directed verdict*,

where the jury's unwillingness to assent to it is immaterial: 1828, *Saville v. Farnham*, 2 Man. & R. 216 (the judge having directed a verdict for the defendant, a juror's affidavit that "the jury gave no verdict at all" was excluded); 1898, *Turney v. Barr*, 75 Ia. 763, 38 N. W. 550 (jurors' affidavit that they did not deliberate on their verdict, but merely signed a written verdict by order of the Court, excluded, partly on the present principle, but partly also because the offer was made on an application for *habeas corpus* and not a motion for a new trial).

⁵ *England*: 1599, *Madox v. Dawson*, Cro. El. 678 (the "note given by the jury to the clerk" was resorted to for amending a verdict erroneous in form "by the mis-entry of the clerk"); 1634, *Eliot v. Skyppe*, Cro. Car. 338 (the clerk returning the *postea* with a verdict for the plaintiff in 10s. and for the defendant in 19l., the return was amended "because that issue was tried before Justice Berkley and he well remembered that the jury found for the plaintiff in 10s. of freehold rent, etc."); 1751, *R. v. Simons*, Sayer 35, 19 How. St. Tr. 680, 684 (the jury having found a verdict of guilty, a new trial was asked upon affidavits of the twelve jurors, substantially coinciding, that they had agreed to find the defendant guilty of "putting the said three ducats into the prosecutor's pocket," and that "the deponent apprehended that he and the rest of the jury had given such a verdict," "but the deponent hath since been informed that the verdict recorded finds the defendant guilty on the third count in the indictment," which alleged a putting into the pocket with intent to make it believed that the prosecutor had robbed the defendant, "whereas the deponent and the rest of the jury did not find that the same was done with such intent or any intent whatever"; these affidavits were considered by the King's Bench, no doubt of their propriety being expressed, and a new trial granted; which was said to be the first precedent of a new trial for a criminal offence); 1841, *Roberts v. Hughes*, 9 M. & W. 399 (juror's affidavit received as to "what passed on the delivery of their verdict," to show a mistaken entry of it; "the rule does not exclude jurymen from swearing to what took place in open court, but only as to what took place in their private room on the grounds upon which they found their verdict"); *United States*: 1855, *Castro v. Gill*, 5 Cal. 40, 42 (affidavits of several jurors, held not sufficient to overthrow the correctness of the record of the verdict); 1818, *Jackson v. Dickenson*, 15 John. 309, 317 (affidavits of five jurors, admitted to show that a mistake in recording the verdict was made, in omitting the answer to a question by the Court).

The following ruling is not law, in its limitation of time: 1818, *Davis v. Taylor*, 2 Chitty 268 (affidavits based on conversations with jurymen that "the verdict was entered by mistake,"

just as any judicial record may be corrected *nunc pro tunc* (*post*, § 2450). Whether the verdict as entered should be corrected, or a new trial be ordered, would depend on whether under the circumstances the precise tenor of the verdict as pronounced could be satisfactorily ascertained.

§ 2356. **Same: Explaining the Verdict's Meaning; Mistake as to its Legal Effect; Retiring to Reconsider.** (1) When the jury *brings in its verdict*, the judge, in his just and usual control of the proceedings, may *refuse to accept it* as final, and may require the jury to retire again to make the verdict more specific or more clear. This procedure is a traditional part of jury-trial (*ante*, § 2350); and in principle it is equivalent to holding the first utterance of the foreman as tentative and informal only. It is not that the jury adds explanations to the verdict; there *is* no verdict as yet; and they retire to restate it and to give it a final form:

1832, *Morton, J.*, in *Dorr v. Fenno*, 12 Pick. 520, 526: "It sometimes happens that the verdict first returned by the jury is not entirely certain, or does not precisely meet the issue joined, or some of the issues do not appear to be definitely found; in such cases, before the verdict can be drawn in form, it is not only proper but necessary to ascertain from the jury the real meaning of their finding, that when the verdict is affirmed it may with certainty express the intent of the jury, or that the jury may again be sent out for further deliberation if any material question appears not to have been determined by them." ¹

No doubt this practice of questioning upon the delivery of verdict might be abused, for the purpose of browbeating a jury out of their sincere verdict. This was sometimes done in the older days, notably in Erskine's celebrated scene:

1784, *R. v. Dean of St. Asaph's*, 18 How. St. Tr. 1203, 1230; seditious libel; the great legal controversy at this time was whether the jury could lawfully find, not only upon the fact of publication, but also upon the fact of criminal intent, and here Mr. Justice Buller had charged the jury that they could not find upon the latter; the jury returned a verdict of "Guilty of publishing *only*"; then the judge endeavored to have the jury withdraw the word "only," on the theory that it went beyond their function, which concededly they did not intend to do; *Buller, J.*: "You say he is guilty of publishing the pamphlet, and that the meaning of the innuendoes is as stated in the indictment?" *A Juror*: "Certainly." *Mr. Erskine*: "Is the word 'only' to stand as part of your verdict?" *A Juror*: "Certainly." *Mr. Erskine*: "Then I insist it shall be recorded." *Buller, J.*: "Then the verdict must be misunderstood. Let me understand the jury." *Mr. Erskine*: "The jury do understand their verdict." *Buller, J.*: "Sir, I will not be interrupted!" *Mr. Erskine*: "I stand here as an advocate for a brother citizen, and I desire the word 'only' may be recorded." *Buller, J.*: "Sit down, sir! Remember your duty, or I shall be obliged to proceed in another manner." *Mr. Erskine*: "Your lordship may proceed in what manner you think fit. I know my duty as well as your lordship knows yours. I shall not alter my conduct." In the end, the jury accepted the judge's statement of what their verdict ought to be.

But there is nowadays, in this era of judicial self-abnegation, no likelihood of the abuse repeating itself.

excluded; "it must be whilst the jury are together").

Miss. 90, 95; 1885, *Cattell v. Dispatch Pub. Co.*, 88 Mo. 356.

¹ *Accord*: 1839, *Prussel v. Knowles*, 4 How.

(2) *After the verdict*, however, has once been pronounced by the jury and accepted by the judge, it is final, as regards its meaning and effect; and *no statements by the jurors*, whether on affidavit or on examination, either unanimously or individually, can be resorted to for *explaining or changing its meaning or legal effect*. This must be so by virtue of the general principle that a legal act is to be construed by the words used in it, and not by the private meaning or intention of the person uttering them (*post*, § 2413). To resort to the jurors' motives, beliefs, or intentions, would be to violate the general principle already examined (*ante*, § 2349); and would be equally improper for the purpose of altering the uttered terms of the verdict (as here) as for the purpose of repudiating it altogether (as there). In the former application of the principle (*ante*, § 2349), the motive or ground of decision was sought to be shown as an improper one, invalidating the whole verdict; in the present application, though preserving it, yet as changing its effect; but, in either case, principle requires that the verdict as uttered be a finality in its terms. It may be so uncertain or inconsistent as to be incapable of application, and therefore void. But in any case its meaning and effect must be drawn from its terms alone:

1770, *Mansfield*, L. C. J., in *R. v. Woodfall*, 5 Burr. 2661, 2667 (the jury brought in a verdict, on a charge of seditious libel, of "guilty of the printing and publishing only"; on a subsequent motion to omit the word "only" and enter up a verdict of guilty, a juror's affidavit of what he intended by the verdict was rejected). "Where there is a doubt, upon the judge's report, as to what passed at the time of bringing in the verdict, there the affidavits of jurors or bystanders may be received, upon a motion for a new trial or to rectify a mistake in the minutes; but an affidavit of a juror never can be read as to what he then thought or intended. . . . No argument can be urged for omitting the word 'only' which does not prove that it can have no effect though inserted; and therefore it is a question of law upon the face of the verdict. . . . The question is whether any meaning can be put upon the word 'only,' as it stands upon the record, which will affect the verdict. . . . It is impossible to say with certainty what the jury really did mean. Probably they had different meanings. If they could possibly mean that which, if expressed, would acquit the defendant, he ought not to be concluded by the verdict. . . . If a doubt arises from an ambiguous and unusual word in the verdict, the Court ought to lean in favor of a *venire de novo*."

This principle has ever been conceded;² although its application is sometimes difficult to distinguish from that which permits the correction of a unanimous mistake in delivering or recording the verdict (*ante*, § 2355).

² *England*: 1738, *Palmer v. Crowle*, Andrews 382 (the defendant having paid 23*l.* 7*s.* into court, and the law being that this was regarded as part payment received, a verdict for 23*l.* 17*s.* was rendered; the jurors' affidavits that the jury by mistake gave that verdict, intending only to give 10*s.* over and above the 23*l.* 7*s.* were held insufficient to call for a correction or a new trial); 1772, *Clark v. Stevenson*, 2 W. Bl. 803 (action against an executor; the jury rendered a verdict for \$1,000; but "after some interval," to a question by the judge, gave an answer of fact inconsistent with this verdict; a new trial was refused, "for the danger that might happen

if a subsequent declaration of the jury might be let in to explain a general verdict given upon full consideration"); 1788, *Jackson v. Williamson*, 2 T. R. 281 (trespass for personality; a verdict having been rendered and entered for £30, the entire jury's affidavits that they meant this to be for damages additional to the value of the goods, and that they had supposed that the clerk would add the two together, were excluded; the Court holding that "if any doubt had arisen, as to the meaning of the jury, if they had found a sum inadequate to the value proved, the proper time for requiring an explanation was at the trial; it was too late now"); 1855,

(3) From the foregoing principle must be distinguished also that by which the precise *scope of the issues* submitted to the jury may be investigated in order to determine whether a particular issue is *res judicata* (*ante*, § 2351). In such cases it is sometimes said that the jurors may testify to the matters which they considered and intended to include; but this loose form of statement, which is in apparent violation of the present principle, signifies properly nothing more than that certain issues were in fact submitted to their consideration.

3. Arbitrators' Awards.

§ 2358. **Foregoing Principles applied to Arbitrators' Awards.** The arbitrator appointed to make an award includes in his functions that of a jury; he hears evidence, and investigates and determines the facts in issue. But he has also a judge's function, in that he determines the rules of right governing his decision. Furthermore, in combining these functions, his procedure makes more difficult the discrimination between the two. To his function as jury, the foregoing principles apply, subject to such modifications as are involved in the peculiar nature of his authority:

Raphael v. Bank of England, 17 C. B. 161 (the questions being put by the judge to the jury on an issue of *bona fide* purchase of a bank-note, whether the purchaser had been notified and had the means of knowing that it was stolen, and these questions being answered in the affirmative, jurymen's affidavits that they did not suppose that these answers, as given in open court, were to be taken by the judge as equivalent to a verdict for the plaintiff and that they would not have concurred in such a verdict, were held inadmissible, chiefly on the ground that they amounted in effect to stating that the jury were prepared to disobey the rule of law as contained in the instructions of the judge relative to the meaning of *bona fides*); *United States*: 1872, *Anderson v. Green*, 46 Ga. 361, 374, 375 (jurors' affidavits, or their examination after verdict returned, as to whether "they intended to find defendant individually liable," held improper; "to justify such a course, the verdict must at least be so ambiguous as to convey no definite meaning upon one or more of the issues involved"); 1856, *Conner v. Winton*, 8 Ind. 315 (verdict "for the plaintiff one cent, and costs to the defendant"; juror's affidavit that the verdict meant the defendant to pay costs, excluded); 1860, *Sinclair v. Roush*, 14 id. 450 (similar); 1888, *Alexander v. Humber*, 86 Ky. 565, 6 S. W. 453 (a verdict finding "for the plaintiff, \$1000, jointly"; jurors' testimony and affidavits that the effect of this was mistaken, in that they intended to sever the damages and charge \$500 against each defendant, excluded); 1880, *Stevens v. Montgomery*, 27 Minn. 108, 6 N. W. 456 (testimony of all the jury, through the foreman, two days after discharge, that a verdict for \$27.50 was intended to be a verdict for the full claim of \$91.84 less a counterclaim of \$27.50, excluded; but apparently this was merely a case of mistaken announcement, falling under § 2355, *ante*); 1852, *Folsom v. Brown*,

25 N. H. 114, 123 (jurors' affidavits not admissible to show a misapprehension as to the effect of the verdict upon the costs); 1808, *Schenck v. Stevenson*, 2 id. 386 (affidavit of one of a jury of inquiry, as to the "items allowed by the jury," excluded, as being "nothing less than calling on the juror to disclose to this Court the ground and foundation of the verdict"; *Rossell, J.*, diss.); 1879, *Lindauer v. Teeter*, 41 id. 255, 259 (juror's affidavit, in replevin, with a verdict for the plaintiff and damages for \$225, not admitted to show that they intended to find that "of the goods in dispute, so much of them as were of the value of \$225 only, belonged to the plaintiff"); 1828, *People v. Columbia Common Pleas*, 1 Wend. 297 (jurors' affidavits that their verdict finding a fraudulent judgment was supposed by them to have the effect of allowing recovery for a limited sum and not of denying recovery entirely, not received); 1833, *Hutchinson v. Sandt*, 4 Rawle 234 (an inquisition of lunacy found H. unsound in mind "for the space of five years last past and upwards"; at a trial in ejectment, the inquisition having been admitted, two members of the jury of inquest were offered to prove that "at the time of signing the inquisition they did not mean to overreach the period of five years"; excluded); 1893, *Smalley v. Morris*, 157 Pa. 349, 17 Atl. 734 (jurors' affidavits, as to a verdict for \$1500 on a note, that they all supposed that they were awarding a sum equal to the amount of the note in suit less a credit of \$1500, excluded); 1888, *Tarbell v. Tarbell*, 60 Vt. 494, 15 Atl. 104 (five jurors' affidavits that they had disallowed certain items, intending to deduct them, but did not deduct them, as appeared in the special verdict, excluded); 1871, *Howard v. McCall*, 21 Gratt. 205, 212 (affidavits of six jurors that they intended the verdict to entitle the defendant to the allowance of a certain credit, excluded).

1870, *Blackburn, J.*, in *Duke of Buccleuch v. Metropolitan Board*, L. R. 5 Exch. 221, 229: "An award is the decision of one having a limited authority to determine those matters submitted to him by the parties, or, as in the present case, by a statute, and no other. And from this it follows that if that limited authority has not been pursued and the arbitrator has awarded something beyond the authority, the award is *pro tanto* void, and if the void part is so mixed up with the rest that it cannot be rejected, the award is void altogether, otherwise those against whom the award is made would be compelled to fulfil the void part. And I think, both on authority and principle, this is a matter which may be pleaded as a defence to an action. In old times the only way of enforcing an award was by action upon it, and the only mode of resisting the enforcement of the award was by pleading to that action, and consequently all the old authorities, to the effect that an award is void for an excess of jurisdiction, are authorities that it may be shewn in evidence at the trial under a proper plea. . . . Now, in cases where an award is good on the face of it, but the arbitrator has made a mistake either of law or fact, if that mistake has been as to a matter within the arbitrator's authority, then, inasmuch as there is no court of appeal from the arbitrator, the mistake cannot be remedied; nor can the Court, even in the exercise of its equitable jurisdiction, set aside the award, unless it can be shewn there was misconduct or some other equitable ground for interference; and in the case of the verdict of a compensation jury, inasmuch as the *certiorari* is taken away, there is no remedy at law at all unless there be excess of jurisdiction. But if the mistake has been as to the extent and nature of the arbitrator's authority, leading him to exceed it, then, inasmuch as an excess of authority by mistake is just as much an excess as if it had been in consequence of a wilful disregard of the limits of the authority, the award may be impeached as being made without jurisdiction. Were this otherwise, no one who submits to a reference of one thing could be safe from having an award put upon him as to anything else. . . . Of course any attempt to annoy an arbitrator by asking questions tending to shew that he had mistaken the law [upon matters within his authority], or found a verdict against the weight of evidence, should be at once checked, for these matters are irrelevant. But where the question is whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire. I wish to guard against being supposed to express an opinion that a jurymen might be asked on what grounds he and his fellows gave their verdict; that involves very different considerations."

In applying the foregoing principles of the Parol Evidence rule, *mutatis mutandis*, the following results would be reached:

a. The evidence and the facts forming the *grounds for the award* are immaterial and cannot be used to invalidate the award, and this upon the general principle (*ante*, § 2349). Thus, the arbitrator's mistake of fact or improper consideration of evidence, or his misapplication of the law, or his motives or intentions, in deciding the facts, are immaterial.¹ Moreover, his errors of law, in framing as judge the law to be applied by himself as juror, are immaterial, because there is by the nature of the proceeding no appeal from him in his capacity as judge.

¹ 1800, *Habershon v. Troby*, 3 Esp. 38 (arbitrator held not examinable to the evidence before him, in a suit for malicious arrest in the proceeding which had been submitted to arbitration; partly because "the arbitrator might have proceeded to cut the knot, rather than to unloose it according to the strict rules of law, from a wish to do complete justice between the parties"); 1868, *Duke of Buccleuch v. Metropolitan Board*

(quoted *ante*, § 2349); 1895, *Re Christie & T. Junction*, 22 Ont. App. 21, 33, per Osler, J.); 1845, *Withington v. Warren*, 10 Metc. 431, 433 ("he could not be received thus by his parol testimony to contradict his formal award in writing"); 1849, *Bigelow v. Maynard*, 4 Cush. 317, 321; 1902, *Corrigan v. Rockefeller*, 67 Oh. 354, 66 N. E. 95 (arbitrator's written statement of reasons for award, excluded).

b. The *scope of the issues* submitted to him defines the limit of his authority to award; hence, the award as made may always be invalidated by the circumstance that it exceeds that scope. In a jury trial, this is ascertainable from the pleadings and the judge's instructions; and the scope of a verdict and a judgment may always be examined in that respect (*ante*, § 2351). In an award, the terms of the contract of submission serve in part the corresponding purpose. But, furthermore, since the judge's and jury's functions are united in the arbitrator, and since he does not by distinct instructions to himself define the issues which he submits to himself, the ascertainment of the issues which he has actually investigated and decided may have to be made by inquiring of him *whether he considered certain issues*, in order to learn whether those issues, as considered, are within the scope of his authority. Such inquiries, however, must be distinguished from an inquiry as to the grounds of fact *believed* by him, within the scope of the issues actually submitted; for the latter inquiry would fall within the prohibition of *a*, above. This distinction between the scope of authority assumed by him and the grounds of belief reached by him is plain enough; but, the similarity of the concrete questions put to the arbitrator, properly for the one purpose and improperly for the other, has naturally led to some confusion of judicial language and an apparent conflict of rulings.²

c. That an arbitrator's *misconduct* is material to invalidate the award cannot be doubted. Whether he himself can be received to prove his own misconduct depends upon the same principle applicable to jurors. The sound doctrine (*ante*, §§ 2352-2354) admits them to testify.³ That there is, in the arbitrator's function as *judge*, nothing which should make it improper to testify (apart from the question of impeaching his award) has been elsewhere noticed (*ante*, § 1912).⁴

d. That the arbitrator by inadvertence *incorrectly stated the award* as reached by him could properly be shown, on the same principles as for verdicts (*ante*, §§ 2355-2356), and with the same limitations, *mutatis mutandis*.

The principles applicable to arbitrators might be equally applicable to *other officials* exercising similar functions.⁵ But the arbitrator is to be distinguished

² The opinion of Lord Blackburn (above quoted) sufficiently clears up the principles involved. The following cases illustrate them: 1868, *Re Dare Valley R. Co.*, L. R. 6 Eq. 429; 432, 435 (damages for land taken; Giffard, V. C. held the arbitrator's testimony admissible "if there is a mistake in point of subject-matter, — that is, if a particular thing is referred to an arbitrator and he has mistaken the subject-matter on which he ought to make his award, or if there is a mistake in point of legal principle going directly to the basis on which the award is founded"); and admitted the arbitrator's "paper of reasons for his award"); 1868-1871, *Duke of Buccleuch v. Metropolitan Board*, L. R. 3 Exch. 307, 314, 324, 327, 329 (damages for land taken; held that the arbitrator's testimony was admissible to show that the "sum awarded includes an amount for something over which he

had no jurisdiction"; Bramwell, B., diss., with hesitation); 5 id. 221, 225, 229, Exch. Ch. on appeal (Blackburn, J., delivered an opinion collating prior cases and approving the ruling below; quoted *supra*); on appeal, L. R. 5 E. & I. App. 418, 421, 433, 442, 449, 457, 462; 1858, *Spureck v. Crook*, 19 Ill. 415, 426 (arbitrators may testify that certain evidence was given or that "certain matters were or were not examined or acted upon by them or that there is a mistake in the award"). Compare *Morse on Arbitration* (1872), cc. X and XXI.

³ But, as with jurors, their hearsay admissions will not suffice: 1891, *Whiteley and Roberts' Arbitration*, 1 Ch. 558, 567.

⁴ For the once supposed *privilege* of an arbitrator not to be harassed by questions as to his award, see *post*, § 2372.

⁵ 1882, *Phillips v. Marblehead*, 148 Mass.

from the *referee* (from whose rulings an appeal may lie),⁶ from the *master in chancery*, and from the officer known in New England practice as *auditor*. It is sufficient here to note that differences of function and procedure may produce differences of result in the application of the Parol Evidence rule.

B. GRAND JURY.

1. Privileged Communications Rule.

§ 2360. **History and General Principle.** That the proceedings of the grand jury, in taking testimony and in deliberating, must be held in privacy, has been the customary practice from early times. The traditional and peculiar form of oath administered to the grand jurors testifies to this :

“ The foreman, by himself, lays his hand on the book, and the marshal administers to him the following oath : ‘ My lord, or sir (as the foreman’s name may be), you, as the foreman of this grand inquest for the body of the county of A, shall diligently inquire and true presentment make of all such matters and things as shall be given you in charge ; the king’s counsel, your fellows’, and your own, you shall keep secret ; You shall present no one for envy, hatred, or malice ; but you shall present all things truly as they come to your knowledge, according to the best of your understanding : So help you God.’ The rest of the grand jury, by three at a time, in order, are sworn in the following manner : ‘ The same oath which your foreman hath taken on his part, you and every of you, shall well and truly observe and keep on your part : So help you God.’ ”¹

But the legal privilege of the jurors to hold their inquiries and deliberations in secret seems not to have been established until a comparatively late period. Under the last Stuart, attempts were frequently made to control the verdicts of petit juries in political causes, — though in this respect the efforts were rather survivals of the earlier Tudor and Stuart methods than original innovations.² As a part of this general effort, the control of the grand jury of indictment, by requiring the publicity of their proceedings, was also attempted, and for the time successfully. The colloquy on this notable occasion is interesting as expounding the reasons which were then advanced to justify the grand jury’s privacy of investigation :

1681, *Earl of Shaftesbury’s Trial*, 8 How. St. Tr. 759, 771 ; Sir F. Withins moved, after the charge to the grand jury, that the evidence be heard in court ; and L. C. J. Pemberton declared that he would grant the motion ; the jury then desired to have a copy of their oath, which was given them, and they withdrew ; after returning shortly, the following colloquy ensued : *Foreman* : “ My lord Chief Justice, it is the opinion of the jury that they ought to examine the witnesses in private, and it hath been the constant practice of our ancestors and predecessors to do it ; and they insist upon it as their right to examine in private, because they are bound to keep the king’s secrets, which they cannot do if it be done in court ” ; L. C. J. *Pemberton* : “ Look ye, gentlemen of the jury, it may very

326, 330, 19 N. E. 547 (board of selectmen, condemning land).

⁶ 1899, *Story v. De Armond*, 179 Ill. 510, 53 N. E. 990.

¹ 8 How. St. Tr. 771.

² In 1616, L. C. J. Coke, when the grand jury did not satisfy him in his effort to indict for premunire those persons who went to Chancery

to prevent the enforcement of common-law judgments, “ caused them to be called by the poll, and perceiving that 17 of the 19 were agreed to return *ignoramus*, seemed much offended, and said . . . he would have a more sufficient jury, and evidence given openly at the bar ” (Campbell’s *Lives of the Chancellors*, II, 363).

probably be, that some late usage has brought you into error that it is your right; but it is not your right in truth. . . . What you say concerning keeping your counsels, that is quite of another nature, that is, your debates, and those things, there you shall be in private, for to consider of what you hear publicly. But certainly it is the best way, both for the king, and for you, that there should, in a case of this nature, be an open and plain examination of the witnesses, that all the world may see what they say"; *Foreman*: "My lord, if your lordship pleases, I must beg your lordship's pardon, if I mistake in anything, it is contrary to the sense of what the jury apprehend. First, they apprehend that the very words of the oath doth bind them, it says, 'That they shall keep the counsel's, and their own secrets:' Now, my lord, there can be no secret in public; the very intimation of that doth imply, that the examination should be secret; besides, my lord, I beg your lordship's pardon if we mistake, we do not understand anything of law"; *Mr. Papillon* [a juror]: "If it be the ancient custom of the kingdom to examine in private, then there is something maybe very prejudicial to the king in this public examination; for sometimes in examining witnesses in private, there come to be discovered some persons guilty of treason, and misprision of treason, that were not known, nor thought on before. Then the jury sends down to the court, and gives them intimation, and these men are presently secured; whereas, my lord, in case they be examined in open court publicly, then presently there is intimation given and these men are gone away. Another thing that may be prejudicial to the king, is, that all the evidences here, will be foreknown before they come to the main trial upon issue by the petty jury; then if there be not a very great deal of care, these witnesses may be confronted by raising up witnesses to prejudice them, as in some cases it has been. Then besides, the jury do apprehend, that in private they are more free to examine things in particular, for the satisfying their own consciences, and that without favour or affection; and we hope we shall do our duty;" *L. C. J. Pemberton*: "The king's counsel have examined whether he hath cause to accuse these persons, or not; and, gentlemen, they understand very well, that it will be no prejudice to the king to have the evidence heard openly in court; or else the king would never desire it;" *Foreman*: "My lord, the gentlemen of the jury desire that it may be recorded, that we insisted upon it as our right; but if the Court overrule, we must submit to it."

This attempt was never repeated, and the investigations of grand jurors were thereafter invariably made in privacy. But, owing perhaps to this ruling and to the earlier uncertainty of the law, the inviolability of the proceedings, when their disclosure was sought upon some later occasion, appears to have remained without defined limits in English precedents for a century or more.³ At some early period in our own practice, the principle received a tacit though firm acceptance. In most of the statutes regulating criminal

³ 1613, *Scarlet's Case*, 12 Co. 98 (indictment for fraudulently procuring himself to be sworn on the jury with malicious intent to indict innocent men; it appeared that the judges had discovered the fraud through noticing the number of "honest men" indicted and demanding then of the jurors on what testimony they had proceeded; whereon *Scarlet's* testimony appeared to have been the foundation); 1641, *Dr. Micklethwait's Case*, *Clayt.* 84, pl. 140 ("The judge would not suffer a grand jurymen to be produced as a witness to swear what was given in evidence to them, because he is sworn not to reveal the secrets of his companions. See, if a witness is questioned for a false oath to the grand jury, how it shall be proved if some of the jury be not sworn in such case"); 1641, *Mass. Body of Liberties* (Whitmore's ed.),

§ 61 ("No magistrate, juror, officer, or other man, shall be bound to inform present or reveale any private crim or offence, wherein there is no perill or danger to this plantation or any member thereof, when any necessarie tie of conscience binds him to seeresie grounded upon the word of God, unlesse it be in case of testimony lawfully required"; repeated in the revisions of 1660 and 1672, under "Jurors"); 1817, *Watson's Trial*, 32 *How. St. Tr.* 107 (*Mr. Solicitor-General*: "My lord, I apprehend it is not competent for my learned friend to ask him what he deposed before the grand jury"; *Mr. Wetherell*: "I ask him only to facts, — the day of his attendance, and whether he produced the note [of the speeches]"; *Ellenborough, L. C. J.*: "On that subject I have a considerable doubt").

procedure it was recognized; though the statement of its limitations is found to have various phrasings.⁴

⁴ The following list does not include statutes which merely prescribe that the jurors must keep secret their proceedings, for those do not have direct bearing on the rule of evidence; nor the statutes providing that the juror "shall not be questioned for anything he may say" during deliberation, for those refer to a civil or criminal liability for his utterances: *Ala.* Code 1897, § 4805 (a grand juror may testify that a witness privileged against prosecution for an offence testified to before the grand jury has so testified); *Alaska* C. Cr. P. 1900, § 27 (like Or. Annot. C. 1892, § 1257); *Ariz.* P. C. 1887, § 1418 (grand juror may be examined to a witness' testimony to ascertain "whether it is consistent with that given by the witness before the court," or on the charge of a witness' perjury); *Ark.* Stats. 1894, § 2055 (disclosure compellable of the testimony of an examined witness "for the purpose of ascertaining its consistency with the testimony given by the witness on trial" or on a charge of the witness' perjury); *Cal.* P. C. 1872, § 926 ("Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any Court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the Court or to disclose the testimony given before them by any person upon a charge against such person for perjury in giving his testimony or upon trial therefor"); *Fla.* Rev. St. 1892, § 2813 (a grand juror is not allowed "to state or testify in any court in what manner he or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question"); § 2814 (a grand juror is compellable to testify whether a witness' testimony "is consistent with or different from the evidence given by such witness before such court," and also to disclose testimony on a charge of perjury); *Ga.* Code 1895, § 5198, par. 3, § 5199 (communications "among grand jurors," excluded, but they "shall disclose everything which occurs in their service, whenever it becomes necessary"); *Ill.* Rev. St. 1874, c. 38, § 412 ("No grand juror or officer of the court or other person shall disclose that an indictment for felony is found or about to be found against any person not in custody or under recognizance, except by issuing process for his arrest, until he is arrested; nor shall any grand juror state how any member of the jury voted or what opinion he expressed on any question before them"); *Ind.* Rev. St. 1897, § 1754 (a grand juror may be required to disclose a witness' testimony "for the purpose of ascertaining whether it is consistent with that given by the witness before the court," or on his trial for perjury); *Ia.* Code 1897, § 5267 ("Every member of the grand jury must keep secret the proceedings of that body and the testimony given

before it, except as provided in the next section, nor shall any grand juror or officer of the court disclose the fact that an indictment for a felony has been found against a person not in custody or under bail, otherwise than by presenting the same in court or issuing or executing process thereon, until such person has been arrested"); § 5268 (disclosure of a witness' testimony may be made to ascertain its consistency or to prove perjury); § 5269 ("No grand juror shall be questioned for anything he may say or any vote he may give in the grand-jury room relative to a matter legally pending before it," except for perjury); *Kan.* Gen. St. 1897, c. 102, §§ 110, 111 (a grand juror shall not disclose the evidence or name of a witness except when lawfully required as a witness; he may be required to testify whether testimony of an examined witness "is consistent with or different from the evidence given by such witness before such court," and to disclose such testimony on a charge of perjury); § 112 (he is not obliged or allowed to disclose the vote or expressed opinion of any grand juror); *St.* 1901, c. 233 (no person shall disclose any evidence or witness' name, in an inquisition in liquor cases, "except when lawfully required to testify as a witness in relation thereto," until the person charged has been arrested); *Ky.* C. Cr. P. 1895, § 113 (similar to *Tenn.* Code § 7043); *La.* Rev. L. 1897, § 2141 (a grand juror may testify to another's neglect of duty); *C. Pr.* 1894, §§ 530, 531 (the vote of a sick or deceased juror after adjournment may be ascertained by the testimony of himself or another juror); *Me.* Pub. St. 1883, c. 134, § 8 (no grand juror or court officer shall disclose an indictment until after arrest, "nor shall any grand juror state how any member of the jury voted, or what opinion he expressed, on any question before them"); *Mass.* Pub. St. 1882, c. 213, § 13, *Rev. L.* 1902, c. 213, § 13 (a grand juror is not allowed to state "in what manner he or any other member of the jury voted" or "what opinion was expressed in relation to such question" before them); *Mich.* Comp. L. 1897, § 11887 (a grand juror may be required to testify "whether the testimony of a witness examined before such jury is consistent with or different from the evidence given by such witness before such court," and also his testimony on a charge of perjury therein; but not to disclose the vote or expression of opinion of any juror); *Minn.* Gen. St. 1894, § 7216 (may be required by Court to disclose testimony "for the purpose of ascertaining whether it is consistent with that given by the witnesses before the court," or on a perjury charge); *Miss.* Annot. Code 1892, § 2381 (a grand juror, "except when called as a witness in court," shall not disclose the proceedings; "nor shall any grand juror disclose the name or testimony of any witness who has been before it"); *Mo.* Rev. St. 1899, § 2506 (grand juror compellable to disclose whether a witness' testimony "is consistent with or different from the evidence given by such witness

What those limitations ought to be must depend upon the reasons for the principle; and these reasons find exposition in the following passages:

1846, *Ruffin, C. J.*, in *State v. Broughton*, 7 Ired. 96: "By the policy of the law, grand juries act in secret; and, with a view of sustaining that policy, it is prescribed that a grand juror shall, amongst other things, swear, that 'the State's counsel, your fellows', and your own, you shall keep secret.' The whole sense in which those words are to be received, or the duration of the secrecy imposed, we do not find accurately stated by any ancient writer on the common law. There are some reasons for the rule, which are obvious enough; and as far as the public interests can be subserved by it, the secrecy ought to be kept, not only while the grand jury continues empanelled, but it ought also to be subsequently observed. The principal ground of policy is, no doubt, to inspire the jurors with a confidence of security in the discharge of their responsible duties, so that they may deliberate and decide without an apprehension of any detriment from an accused or any other person, but be free 'true presentment to make.' Therefore it is clear, that at no time nor upon any occasion ought a grand juror to make known who concurred in or opposed the presentment; as the power to do so would or might in some degree impair that perfect freedom from external bias, which a grand juror ought to feel. It is probable, likewise, that another ground is, that it might lead to the escape of criminals, if their friends or others on the grand jury were at liberty to make known the institution and progress of an inquisition into their guilt. But as that reason can operate only while the accused is at large, it would seem, that, as far as the rule depends on that, it would not be obligatory after his arrest. We think, too, that, in furtherance of justice, the law may have intended to forbid a grand juror from giving aid to one indicted, and thus found to be probably guilty, in his efforts to defeat the prosecution, by publishing the evidence before the grand jury, and thus enabling him to counteract it, perhaps by foul means, after he knew where the case pinched. That would be betraying 'the State's counsel,' which is necessarily opened to the grand jury. But that is the immunity of the public, and not the privilege of the witness; and, therefore, it would seem that the rule should create an obligation on the conscience of the juror and be

before such court," or to disclose testimony on charge of perjury); § 2507 (a grand juror is not compellable nor allowable to disclose votes or opinions expressed); *Mont.* P. C. 1895, § 1789 (like Cal. P. C. § 926); *Nev.* Gen. St. 1885, § 4095 (like Cal. P. C. § 926); *N. M.* Comp. L. 1897, § 988 (a grand juror may be required to disclose testimony to ascertain "whether it is consistent with that given before them, by any other person, upon a charge against him for perjury, or in giving his testimony, or upon his trial thereof"); *N. Y.* C. Cr. P. 1881, § 266 (disclosure is compellable of the testimony before grand jury, to ascertain its consistency with testimony in court or to prove perjury of the witness); *N. D.* Rev. C. 1895, §§ 8021, 8022 (like Cal. P. C. § 926); *Oh.* Rev. St. 1898, § 7205 (a grand juror is not to testify to the tenor of vote or expression of opinion of any juror); *Okl.* Stats. 1893, §§ 5057, 5058 (like Cal. P. C. § 926); *Or.* Annot. C. 1892, § 1257 (substantially like Cal. P. C. § 926, beginning at "may be required," etc.); *S. D.* Stats. 1899, §§ 8482, 8483 (like Cal. P. C. § 926); *Tenn.* Code 1896, § 7043 (a grand juror may be examined as to a witness' testimony to "ascertain whether it is consistent" with his testimony at trial, or to prove testimony charged as perjured); *Tex.* C. Cr. P. 1895, § 404 (the grand juror's oath is to be: "The State's counsel,

your fellows', and your own, you shall keep secret, unless you are required to disclose the same in the course of a judicial proceeding in which the truth or falsity of evidence given in the grand-jury room in a criminal case shall be under investigation"); *Utah* Rev. St. 1898, § 4721 (like Cal. P. C. § 926); *Wash.* C. & Stats. 1897, § 6820 ("No grand-jury juror shall be allowed to state or to testify in any court in what manner he or any member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question, or what question was before them"); *Wis.* Stats. 1898, § 2553 (no grand juror or court officer shall disclose an indictment before arrest, if the Court so order); § 2554 ("No grand juror shall be allowed to state or testify in any court in what manner he or any other member of the jury voted on any question before them, or what opinion was expressed by any juror in relation to such question"); § 2555 (grand jurors "may be required by any Court to testify whether the testimony of a witness examined before such jury is consistent with or different from the testimony given before them by any person upon a complaint against such person for perjury or upon his trial for such offense"); *Wyo.* Rev. St. 1887, § 3234 (like *Oh. Rev. St.* § 7205).

enforced by a Court, when the public justice may be advanced by it, and that it cannot be urged by the witness himself, when it would defeat justice, and thus encourage witnesses before that body to commit perjury, by false statements or the suppression of the truth. For it is obvious, that if grand jurors are, through all time and to all purposes, prohibited from disclosing and proving the testimony of witnesses before them, there is a perfect exemption from temporal penalties of perjury before a grand jury. The consequences of such a doctrine would be alarming; for, besides the danger of tempting the witnesses to commit so great a crime without the fear of punishment, grand jurors would have no credible evidence on which to act, on the one hand, and the citizen, on the other, would be deprived of one of his most boasted and valuable protections against arbitrary accusations and arrests. It would be extraordinary were witnesses thus enabled to perjure themselves without responsibility."

1849, *Thacher, J.*, in *Sands v. Robinson*, 12 Sm. & M. 704, 710: "It would certainly be a great breach of duty for a grand juror, while the inquest was in session, to disclose the business of that body, by means whereof persons accused and not yet arrested, might make their escape, or take other measures to defeat the course of public justice. Indeed, in a certain state of case, a grand juror might thereby render himself liable to a criminal charge as an accessory, after the fact, in the commission of a crime. So, as many charges are confided to that body against individuals, which, for want of sufficient proof, or from want of foundation in fact, do not mature to a presentment or indictment, common prudence and charity, and a regard for the peace of society, and innocent men's reputations, imperatively should close the mouths of grand jurors, as to their proceedings, after the expiration of their session. It is the interest of all good citizens to observe this rule, in order to secure freedom of deliberation and opinion, which would be to a great extent impaired if the occurrences of a session were afterwards made the subject of comment and loose and malicious conversation. Indeed, thus a grand juror might well subject himself to an action of slander. But the policy of the law was never designed to injure or punish the innocent, or to obstruct the course of justice; nor can that rule be upheld, by which a grand-jury room shall be converted into an occasion for the safe and irresponsible utterance of false and malicious slander against upright and honorable citizens. Hence it will be seen that so much depends upon time and circumstances, that the competency of a grand juror to testify is peculiarly a matter of discretion with the Court to discriminate as to it."

1858, *Bigelow, J.*, in *Com. v. Mead*, 12 Gray 167: "The reasons on which the sanction of secrecy which the common law gives to proceedings before grand juries is founded are said in the books to be threefold. One is that the utmost freedom of disclosure of alleged crimes and offences by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented by withholding the knowledge of facts testified to before the grand jury, which, if known, it would be for the interest of the accused or their confederates to attempt to disprove by procuring false testimony. The third is to conceal the fact that an indictment is found against a party, in order to avoid the danger that he may escape and elude arrest upon it, before the presentment is made."⁵

These reasons are obviously fourfold in their bearing. (a) The *grand jurors themselves* are to be secured in freedom from the apprehension that their opinions and votes may be subsequently disclosed by compulsion. (b) The *complainants* and the *witnesses* summoned are to be secured in freedom from the apprehension that their testimony may be subsequently disclosed by compulsion, and this in order that the State may secure willing witnesses. (c) The *guilty accused* is not to be provided with such clues as will enable

⁵ For another exposition of the reasons for Report to the Code of Criminal Procedure secrecy, see Edward Livingston's Introductory (Works, ed. 1872, I, 370).

him to flee from arrest or to suborn false testimony or tamper with witnesses. (d) The *innocent accused*, who is charged by complaint before the jury, but is exonerated by their refusal to indict, is entitled to be protected from the compulsory disclosure of the fact that he has been groundlessly accused.

Of these four classes of reasons, the third and the fourth disappear practically from consideration as a ground of privilege for witnesses. (c) The third disappears, in regard to the accused's opportunity of escape, as soon as he either escapes or is arrested, and cannot therefore have any bearing upon later stages of the proceeding. It affects merely the grand jurors' obligation not to give extrajudicial information between the times of their session and of the arrest. This reason also disappears, in regard to the accused's opportunity of tampering with the witnesses or suborning others in defence, as soon as the indictment is returned; for the indictment must bear the witnesses' names indorsed. Modern criminal procedure disregards the danger of subornation, and acknowledges that the accused is in fairness entitled to know before trial who are to be the witnesses against him (*ante*, §§ 1850-1854). (d) The fourth reason aims chiefly to prohibit the grand juror's extrajudicial disclosure of the details of the charges against persons found innocent. It can have little or no application to compulsory disclosure in court; first, because the bill is returned "*ignoramus*" or "not found," and thus the fact of the charge is necessarily published upon the records, and, secondly, because the only mode in which such a disclosure would practically be relevant would be an attempt to impeach a witness who testifies to the person's innocence by his former testimony before the grand jury to the person's guilt, and this implies that the person's doings have become so far a relevant matter of public investigation that it would be vain to secure any further technical privacy for the charges.

Thus the only reasons which remain as the possible foundation of any privilege in subsequent testimony are the first and the second. The effect of these may now be examined.

§ 2361. (a) **Privilege of Grand Jurors; Secrecy of Vote and Opinion.** The necessity for securing to the grand jurors an absolute freedom of deliberation and decision, immune from apprehensions of injury from the persons charged by them, demands a guarantee that by no legal process will the disclosure of their votes and expressions of opinion in the jury room be compelled.¹ This rests upon precisely the same footing as the privilege of petit jurors (*ante*, § 2346) or that of husband and wife (*ante*, § 2332). It forbids that any grand juror shall be compelled to disclose his own utterances or permitted to disclose the utterances of his fellows. On principle, this privilege, like all others (*ante*, § 2196), may be waived by the person entitled to it. In practice, the privilege has little occasion to be exercised, because the utterances protected by it can seldom be relevant upon any issue.

¹ 1884, *Ex parte Sontag*, 64 Cal. 525, 2 Pac. 402; 1870, *Elbin v. Wilson*, 33 Md. 135, 144 (witness not allowed to be impeached by questions as to his conduct as grand juror in endeavoring to have the appellee indicted for perjury); 1879, *Gordon v. Com.*, 92 Pa. 216, 220 (votes may not be disclosed).

§ 2362. (b) **Privilege of Witnesses before Grand Jury; General Principle.** The witnesses and complainants appearing before the grand jury must be guaranteed temporarily against compulsory disclosure of their testimony and complaints, because otherwise the State could not expect to secure ample quantity of evidence for the information of the grand jury. The secrecy is the State's inducement for obtaining testimony. The policy is analogous to that of the privilege for informers in general (*post*, § 2374). The privilege, therefore, is not the grand juror's; for he is merely an indifferent mouth-piece of the disclosure. Nor is it the State's; for the State's interest is merely the motive for constituting the privilege. The theory of the privilege is that the witness is guaranteed against compulsory disclosure; the privilege must therefore be that of the witness, and rests upon his consent.

But obviously the secrecy that is guaranteed is only *temporary* and provisional. Permanent secrecy would be more than is necessary to render the witness willing. Moreover, it would go too far by creating an opportunity for abuse; since a corrupt witness would be able to utilize it for perjured charges. This much is now universally conceded:

1858, *Bigelow, J.*, in *Com. v. Mead*, 12 Gray 167: "But when these purposes [as above quoted] are accomplished, the necessity and expediency of retaining the seal of secrecy are at an end. *Cessante ratione, cessat regula*. After the indictment is found and presented, and the accused is held to answer and the trial before the traverse jury is begun, all the facts relative to the crime charged and its prosecution are necessarily opened, and no harm can arise to the cause of public justice by no longer withholding facts material and relevant to the issue, merely because their disclosure may lead to the development of some part of the proceedings before the grand jury. On the contrary, great hardship and injustice might often be occasioned by depriving a party of important evidence, essential to his defence, by enforcing a rule of exclusion, having its origin and foundation in public policy, after the reasons on which this rule is based have ceased to exist. The case at bar furnishes a good illustration of the truth of this remark. No possible injury to the interests or rights of the government that we can see could happen by a disclosure of the testimony given by the witness before the grand jury. . . . On the other hand, it is clear that the rights of the accused might be greatly affected and his peril much increased, if he can be shut out from showing the fact that an important witness against him is unworthy of credit, or that his testimony before the jury of trials is to be taken with great caution and doubt, because on a previous occasion, when called to testify on oath, he had given a different account of the same transaction from that which he has stated in his evidence at the trial."

1893, *McSherry, J.*, in *Izer v. State*, 77 Md. 110, 26 Atl. 282: "If witnesses who testify falsely before the grand jury are free from all the penalties of perjury merely because of the juror's oath of secrecy, the object designed to be effected by that clause of his oath would be perverted, and a measure intended to promote the public welfare would be transformed into a means to defeat the ends of justice. The law does not permit the obligation of secrecy which has been imposed for one purpose to be availed of for a totally different one. The grand juror's oath of secrecy cannot, therefore, be interposed to obstruct the administration of justice."

But what are the limits of this temporary secrecy? The answer is, on principle, that it ceases when the grand jury has finished its duties and has either indicted or discharged the persons accused. (1) Supposing the grand

jury to *indict* J. S. on Doe's testimony, it is plain that secrecy is no longer of any avail, for Doe will be summoned as a witness at the trial and will be compellable to testify. If he tells the truth, and the truth is the same as he testified before the grand jury, the disclosure of the former testimony cannot possibly bring to him any harm (in the shape of corporal injury or personal ill-will) which his testimony on the open trial does not equally tend to produce. If, on the other hand, he now testifies falsely, or if he testifies truly but formerly falsely, he is in no way a person who ought to have any privilege. The privilege therefore has no longer any reason to exist. (2) Supposing, on the contrary, that the grand jury, after hearing Doe's testimony, nevertheless *discharge* J. S., there may now be a motive for Doe to desire secrecy, — as when on a subsequent trial it is desired to impeach Doe as a witness by showing his biased utterances against J. S. before the grand jury. But here the privilege ought also to cease, for another reason, namely, that the chance that such a disclosure will be called for is too small a contingency to have any effect *a priori* in rendering Doe unwilling to make complaint or give testimony before the grand jury. Doe naturally will have expected that J. S. would be indicted. Moreover, when Doe is summoned on a civil trial involving the same matters as the criminal charge, and it is desired to impeach him by his former testimony, all motive for secrecy ends, for the same reasons noted in par. (1), *supra*. Furthermore, in the other rare contingencies in which his testimony before the grand jury might become relevant (*post*, § 2363, par. 2), justice requires in any case that Doe should not be exempted from disclosure.

There remain, therefore, on principle, no cases at all in which, after the grand jury's functions are ended, the privilege of the witnesses not to have their testimony disclosed should be deemed to continue. This is, in effect, the law as generally accepted to-day. It is, however, not usually stated in such a broad form. The common phrase is that disclosure may be required "whenever it becomes necessary in the course of justice." Disregarding a few local exceptions, this is in practice no narrower a rule than the one above deducible from principle.

§ 2363. **Same: Instances of the Cessation of the Privilege.** The instances in which the privilege ceases to operate, by virtue of the foregoing reasons, may be grouped according to the purpose for which the testimony is offered to be used:

(a) *Using the testimony as a self-contradiction in impeachment of the witness.* It is now universally conceded that a witness may be impeached, in any subsequent trial civil or criminal, by self-contradictory testimony (*ante*, § 1017) given by him before the grand jury.¹ In the same way, a party to

¹ To the statutes cited *ante*, § 2360, add the following cases: *Eng.*: 1842, *R. v. Gibson*, Car. & M. 672 (cross-examination of a witness to his prior testimony before the grand jury, allowed); *Md.*: 1896, *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; *Mass.*: 1858, *Com. v. Mead*, 12 Gray 167 (quoted *supra*); 1870, *Way v. Butterworth*,

106 Mass. 75; 1899, *Com. v. Chance*, 174 id. 245, 54 N. E. 551; *Mich.*: 1895, *People v. O'Neill*, 107 Mich. 556, 65 N. W. 540 (applying the statute); *Mo.*: 1889, *State v. Thomas*, 99 Mo. 235, 255, 259, 12 S. W. 643 (statute applied); *N. H.*: 1873, *State v. Wood*, 53 N. H. 484, 487, 493; *N. Y.*: 1847, *People v. Hulbut*,

the cause, not taking the stand as a witness, may be impeached by his *admissions* (*ante*, § 1048) made in testifying before the grand jury.² The occasional statutory sanction for the former of these uses cannot be construed to prohibit the latter, which goes upon the same reasoning. Nor should any of the ensuing legitimate purposes of disclosure be considered to be obstructed by the statutory omission to mention them, — else the integrity of common-law principles would tend to be diminished in direct ratio to the ignorance or unskilfulness of the Legislature which attempted in any respect to make a declaratory statute.

(b) *Perjury*. A witness' testimony before a grand jury may always be used upon a prosecution for perjury therein.³

4 Denio 133 (statutory rule confirmed); *Or.*: 1887, *State v. Moran*, 15 Or. 262, 14 Pac. 419; 1895, *State v. Brown*, 28 id. 147, 41 Pac. 1042; *Ill.*: 1846, *Granger v. Warrington*, 8 Ill. 299, 310; 1886, *Bressler v. People*, 117 id. 422, 436, 8 N. E. 62 (after an accused is put on trial, there is no reason against publicity "if the ends of justice require it"); *Ind.*: 1838, *Burnham v. Hatfield*, 5 Blackf. 21 (plaintiff's admissions, when before the jury); 1853, *Perkins v. State*, 4 Ind. 222 (witness' corroborative statements before the jury); 1873, *Burdick v. Hunt*, 43 id. 381, 389 (witness' self-contradiction); 1877, *State v. Van Buskirk*, 59 id. 384, 388 (preceding cases approved); *Ia.*: 1901, *State v. McPherson*, 114 Ia. 492, 87 N. W. 421 (disclosure by the clerk of the grand jury, as to prior testimony of a witness, in impeachment, held admissible, on common-law principles); *Me.*: 1874, *State v. Benner*, 64 Me. 267, 282 (disposing of the prior contrary intimation in *State v. Knight*, 43 id. 1, 128); *Pa.*: 1879, *Gordon v. Com.*, 92 Pa. 216, 219; *Tex.*: 1901, *Wooley v. State*, — Tex. Cr. —, 64 S. W. 1054 (referring to prior cases); *Va.*: 1874, *Little v. Com.*, 25 Gratt. 921, 930, *semble*.

The early *Connecticut* doctrine was very strict; this was the more absurd because the local practice of permitting the accused's presence at the grand jury's sessions utterly nullified the ground of the privilege. On the present point, however, the privilege seems always to have been denied, and would certainly to-day be denied: 1844, *State v. Fasset*, 16 Conn. 457, 467 (grand juror not admitted to prove certain evidence given to them); 1888, *State v. Coffee*, 56 id. 410, 16 Atl. 151 (preceding opinion doubted as to the unqualified nature of its expressions).

The following early doubt in *New Jersey* would to-day be repudiated: 1800, *Imlay v. Rogers*, 2 N. J. L. 347 (two judges *pro*, and two judges *con*).

² 1895, *Jenkins v. State*, 35 Fla. 737, 18 So. 182 (accused's testimony as a witness before the jury; admitted, under a statute in part like the Missouri statute, though the accused had not taken the stand at the trial; the statutory specified cases for permitted use "do not exclude an inquiry in other cases sanctioned by the law"); 1897, *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 158 (disclosure of the testimony of the defend-

ant, who had not taken the stand, allowed; R. S. 1894, § 1731, not excluding any uses before recognized, but confirming and adding others); 1899, *Steele-Smith G. Co. v. Potthast*, 109 Ia. 413, 80 N. W. 517 (party's admissions); 1890, *New Hampshire F. I. Co. v. Healey*, 151 Mass. 537, 24 N. E. 913 (party's admissions); 1846, *State v. Broughton*, 7 Ired. 96 (accused's testimony before the grand jury as a witness, making criminalizing statements; quoted *ante*, § 2360); 1813, *U. S. v. Charles*, 2 Cr. C. C. 76, *semble* (an accused's confessions when a witness); 1887, *U. S. v. Kirkwood*, 5 Utah 123, 13 Pac. 234 (accused's confessions in testifying before the jury; the statute held not to contain any express prohibition of this); 1892, *People v. Reggel*, 8 id. 21, 28 Pac. 955 (similar).

In *Connecticut* the usual result is reached, but is attainable on peculiar grounds due to local practice: 1888, *State v. Coffee*, 56 Conn. 410, 16 Atl. 151 (the accused by local practice being permitted to attend the session of the jury, his confession to some of the jurors, made informally, was allowed to be proved by them, as not being "a part of the secrets of the cause," nor obtained by them as "a part of their duty"). The ruling in *Missouri* would presumably be contrary to the sound doctrine: 1855, *Tindle v. Nichols*, 20 Mo. 326 (cited *infra*, note 6). The present law in *Texas* seems to be sound: 1898, *Gutgesell v. State*, — Tex. Cr. —, 43 S. W. 1016 (the Code exception is exclusive of others; hence, an accused's testimony as a witness before the grand jury cannot be used against him as an admission, if he is not a witness on his trial; unsound); 1900, *Spangler v. State*, 41 id. 424, 55 S. W. 326 (preceding case approved); 1901, *Wisdom v. State*, — id. —, 61 S. W. 926 (admitting testimony to a confession, and repudiating any limitations "after the hearing before that body has been terminated"; explaining *Gutgesell v. State*, *supra*, and prior cases; *Henderson, J.*, diss.); compare the peculiar rule in this State for confessions (*ante*, §§ 852, 1039).

³ This is usually declared in the statutes (*ante*, § 2360). Add the following rulings: 1844, *R. v. Hughes*, 1 C. & K. 519, 528, *Tindal*, C. J. (perjury before the grand jury; another witness before them admitted to prove the defendants' testimony; "it is for the purposes of public justice"); 1867, *People v. Young*, 31 Cal. 563;

(c) The mere fact that a certain person was a witness⁴ or a complainant⁵ before the grand jury may always be used, for the simple reason that the names of witnesses and of complainants are necessarily given publicity in the usual procedure of finding or rejecting indictments.

(d) Where a plaintiff seeking redress for *defamation* or *malicious prosecution* desires in his proof the testimony of witnesses, other than the defendant, before the grand jury, the privilege should not apply.⁶ Where the suit is for defamation uttered by the defendant in the course of testimony before the grand jury, much less should the privilege apply;⁷ for otherwise the right of action would be a vain pretence of the law, the sole means of establishing it being denied. It may be, however, that the utterance is privileged from liability by the substantive law of torts; in that event it is the substantive law, and not the law of evidence, that forbids its proof.

(e) Where the witness is sought to be impeached at a subsequent trial upon other issues, by *expressions of bias* in his testimony before the grand jury, the privilege does not necessarily apply. But here, if anywhere after the grand jury's session is ended, the privilege may conceivably be held to continue.

(f) So far as the privilege exists and continues, it prohibits disclosures, not only by the grand jurors themselves, but also by the *State's officers* and others who may be present, lawfully or unlawfully, at the private sessions; for the witness has no control over these persons' presence and their secrecy is as essential as that of the grand jurors to his security.⁸

1893, *Izer v. State*, 77 Md. 110, 26 Atl. 282; 1838, *Crocker v. State*, Meigs 127.

⁴ 1886, *Ex parte Schmidt*, 71 Cal. 212, 12 Pac. 55 (like the next case); 1888, *People v. Northey*, 77 id. 618, 19 Pac. 865, 20 Pac. 129 ("The fact that a person was called, sworn, and examined as a witness before a grand jury does not come within the rule of secrecy; if it did, it is violated whenever an indictment is returned with the names of the witnesses indorsed on it or inserted at its foot"); 1853, *Com. v. Hill*, 11 Cush. 137, 140 (to prove that no variance between the indictment and proof existed, a grand juror was allowed to testify, in impeachment of one who testified to his prior testimony before the grand jury, that he was not a witness at all before that jury); 1903, *Re Archer*, — Mich. —, 96 N. W. 442 (grand jurors' report to the judge that a witness on appearing refused to exhibit his books, held not privileged, in proceedings for contempt).

⁵ 1823, *Freeman v. Arkell*, 1 C. & P. 135 (that a certain person was the prosecutor on a bill ignored by them); 1846, *Granger v. Warrington*, 8 Ill. 299, 310 (malicious prosecution; name of the complainant required to be disclosed; but the Court offer the unsound reason that no oath of secrecy was then locally required of grand jurors); 1834, *Huidekoper v. Cotton*, 3 Watts 56 (malicious prosecution, the bill having been returned "ignoramus"; "so far is our law from forbidding the grand jury from disclosing the name of the prosecutor that it is provided that . . . if they return that the prose-

cutor shall pay the costs, they shall name who is the prosecutor"). Such statutes exist in many jurisdictions, requiring a prosecutor to be named.

⁶ 1879, *Hunter v. Randall*, 69 Me. 183, 189 (malicious prosecution; plaintiff allowed to prove what witnesses testified before the grand jury on the then complaint against the plaintiff for perjury). *Contra*: 1855, *Tindle v. Nichols*, 20 Mo. 326 (under a statute permitting the jury to testify in contradiction of a witness or on his trial for perjury, and forbidding them "except when lawfully required," the disclosure is forbidden in all other but the specified cases; here, in an action for slander charging the plaintiff with perjury before the jury, on a plea of truth; this is clearly unsound, as well as unjust; compare par. (a) *supra*); 1858, *Beam v. Link*, 27 id. 261 (similar ruling, in an action for malicious prosecution by procuring the plaintiff to be indicted; but here the local substantive law would apparently have exempted the defendant from liability in any case).

⁷ 1849, *Sands v. Robinson*, 12 Sm. & M. 704, 711 (a grand juror allowed to testify to utterances by a witness before them, in an action against the witness for defamatory utterances, the previous disclosure of the topic not making it necessary to preserve secrecy, and the utterances not being absolutely privileged from suit). Compare the rulings upon an *informant's privilege* (*post*, § 2374).

⁸ 1844, *State v. Fasset*, 16 Conn. 457, 470 (disclosure by "others who were present and

2. Parol Evidence Rule.

§ 2364. **Grounds for Indictment; Illegal Evidence; Required Number of Votes; etc.** The finding of an indictment by the grand jury, like the verdict of a petit jury, is a legal act and a part of a judicial record; and the Parol Evidence rule therefore applies to all attempts to invalidate it. The principles upon which depends the application of that rule to verdicts have been already examined (*ante*, §§ 2348-2356); and it will be sufficient here to note briefly, under the same heads, the effect of those principles *mutatis mutandis*, upon the grand jury's legal act of finding an indictment.

(a) The *motives, reasons, and grounds* upon which the indictment was based cannot be availed of to invalidate it (*ante*, § 2349). This much is generally conceded.¹ But suppose that there is a limitation of the grand jury's sources of investigation in the shape of a rule that they may receive only such kinds of evidence as would be receivable on a trial before a petit jury. Such a rule is a plain obstruction of justice, reprehensible in policy. But if it exists, it logically obliges the Court to permit the indictment to be invalidated by the fact of the jury's reception of illegal evidence. In an ordinary trial, the record of proceedings, containing the exceptions, furnishes the means of establishing the fact, and the fact, when established, may be used to invalidate the verdict. But in the grand jury's proceedings, if the rule is to be enforced at all, as it is for petit juries, the fact must be allowed to be shown by the grand jurors or others present. If, then, any community is willing to accept so deleterious a rule of criminal procedure, its enforcement in the only feasible way must be permitted by showing the facts.² Upon the recognition of such a rule the various jurisdictions are divided.³

have not taken this oath," not permitted); 1895, *Jenkins v. State*, 35 Fla. 737, 18 So. 182 (State's attorney); 1896, *McLellan v. Richardson*, 13 Me. 82, 86 (county attorney); 1899, *People v. Thompson*, 122 Mich. 411, 81 N. W. 344 (prosecuting attorney's stipulation as to testimony, not admitted on plea of abatement to indictment); 1839, *Clark v. Field*, 12 Vt. 485 (State's attorney). *Contra*, but unsound: 1877, *State v. Van Buskirk*, 59 Ind. 384, 388 (prosecuting attorney held not subject to the grand jurors' rule, because he "is not bound by any such oath of secrecy"; yet here, where he was allowed to impeach a witness, a juror would equally have been allowed); 1874, *Little v. Com.*, 25 Gratt. 921, 931 (third person present).

¹ 1902, *Hall v. State*, 134 Ala. 90, 32 So. 750 (jurors' testimony not admissible to show that the grand jury were brought to find a true bill only after several contrary votings, followed by repeated urgings of the prosecuting attorney and the judge); 1895, *Owens v. Owens*, 81 Md. 518, 32 Atl. 247 (inquiry of the foreman of a grand jury why a bill was dismissed, not allowed); 1847, *People v. Hulbut*, 4 Denio 133 (illegal liquor-selling, on an indictment in five counts charging five offences; grand jurors not allowed to testify that only one offence was testified to before them, mainly on the theory

that the indictment "like other records, imports absolute verity," and cannot be disputed "unless it be done upon motion" to quash or to strike out counts).

In Pennsylvania an unwise rule as to the jury's methods of investigation has led naturally to a variation from the present principle: 1889, *Com. v. Green*, 126 Pa. 531, 17 Atl. 878 (grand juror's testimony admitted, on a motion for quashing the indictment, to show that the indictment was founded on testimony of witnesses and not on their own "knowledge and observation," a procedure which under the local law was forbidden and constituted "a breach of privilege on the part of the grand jury").

² 1881, *U. S. v. Farrington*, 5 Fed. 343, Wallace, J. (for quashing an indictment, the proceedings may be inquired into with reference to the sufficiency or legality of the evidence; "whenever it becomes essential to ascertain what has transpired before a grand jury, it may be shown, no matter by whom; and the only limitation is that it may not be shown how the individual jurors voted or what they said during their investigations").

³ See the following typical cases: 1871, *State v. Beebe*, 17 Minn. 241; 1871, *U. S. v. Brown*, 1 Sawyer 531; 1902, *State v. Comer*, 157 Ind. 611, 62 N. E. 452.

(b) Where the question is as to the *issues* covered by the indictment (as when a former conviction for the same offence is pleaded), it may be necessary to ascertain the precise charge made by the testimony before the grand jury, so as to define the charge covered by the indictment. This is permissible on the general principle (*ante*, § 2351).⁴

(c) Where the *misconduct* of the jurors, or the *irregularity* of their proceedings, constitutes by the law of criminal procedure a ground for invalidating the indictment, the fact may properly be proved by the testimony of a grand juror, on the general principle (*ante*, § 2352);⁵ though a Court acknowledging the rule against a petit juror's impeaching his own misconduct should equally apply it here.

(d) That *less than the required number assented* to the verdict of a petit jury cannot be shown (*ante*, § 2355). Does the same consequence follow for a grand jury's indictment? For the petit jurors, the reason is that their outward assent, express or implied, at the time of polling, is the sole effective conduct constituting assent. This act of assent is in reality individual as well as joint, whether there is an individual polling or not. But the grand jurors are not polled; nor do they individually subscribe the indictment; nor is the tenor of each indictment brought home to them individually by public reading, as is that of a petit jury's verdict. There is, to be sure, some opportunity of dissent, but hardly a practical one. There is no formal outward act of assent in the sense in which there clearly is for petit jurors. Virtually, then, the time of the act of assent is carried back to the time of voting in the jury room. It is therefore consistent with principle to allow the absence of such assent by the requisite number to be shown.⁶ Some Courts are found to maintain the opposite view, following the analogy of a petit jury's verdict.⁷ So long as the present procedure is followed, the former view seems inevitably sound. But the proper course would be to poll the grand jurors upon each indictment after the manner of a petit jury, and thus to satisfy the requirements of principle, for it is undeniably poor policy to hold out any inducement (as the present rule does) to ferret among the grand jurors and ascertain the tenor of their votes, and to make necessary the quashing of an indictment which ought never to have been received in the beginning.

⁴ 1859, *Rocco v. State*, 37 Miss. 357, 369 (on a plea of former conviction for the same offence of illegal liquor-selling, a grand juror's testimony to the parties and evidence before them on the indictment was received, applying a statute).

⁵ 1858, *Shattuck v. State*, 11 Ind. 473, 477 (propriety of the indictment with reference to irregularities of proceeding before the grand jury; grand juror's testimony held admissible); 1815, *U. S. v. Coolidge*, 2 Gall. 364 (testimony of court officers that a witness before the grand jury was not duly sworn, admitted).

⁶ The leading opinion, fully expounding the principle and policy, is found in *Low's Case*, 4 Me. 439 (1827). To this add the following: 1888, *State v. Coffee*, 56 Conn. 410, 16 Atl. 151 (suggested as "one possible exception"); 1878,

People v. Shattuck, 6 Abb. N. C. 33 (on a motion to quash, the number of votes may be shown).

⁷ 1702, *Colonel Bayard's Trial*, 14 How. St. Tr. 478, New York (here the counsel for the defendant makes a good argument); 1878, *Spigener v. State*, 62 Ala. 383, 386 (neither jurors' testimony, nor that of others, admitted to show that less than twelve jurors assented to the bill; good opinion by Stone, J.); 1902, *Hall v. State*, 134 id. 90, 32 So. 750 (like *Spigener v. State*, *supra*); 1867, *State v. Oxford*, 30 Tex. 428 (that an indictment was not found by the requisite twelve can be shown only by the records of the court, and not by the testimony of the jurors; "our Code but follows the principles of the common law").

TOPIC B (continued) : PRIVILEGED COMMUNICATIONS.

SUB-TOPIC V: STATE SECRETS AND OFFICIAL DOCUMENTS.

CHAPTER LXXXIII.

§ 2367. Several Principles discriminated.	§ 2372. Same: Ambassadors, Consuls, Judges.
§ 2368. (a) Tortious Non-Liability of the Executive.	§ 2373. (e) Irremovability of Official Records.
§ 2369. (b) Constitutional Exemption of the Executive from Judicial Process.	§ 2374. (f) Privilege for Communications by Informers to Official Prosecutors.
§ 2370. (c) Testimonial Privilege of the Executive not to be a Witness.	§ 2375. (g) Privilege for Secrets of State and Official Communications.
§ 2371. (d) Testimonial Privilege of the Executive and Subordinate Officers, not to attend Court.	§ 2376. Same: Who determines the Necessity for Secrecy.

§ 2367. **Several Principles discriminated.** The principle of privilege which protects from disclosure, through the testimony of governmental officers, the secrets of State and communications of informers to official prosecutors, is in practice superficially related to certain other principles, not resting upon testimonial privilege in general or upon this kind of privilege in particular. In order to discriminate the precise scope of these different principles, it is necessary to consider them together here. The necessity is the greater because some of them, being plainly valid, have in some courts been misused to give an unwarrantable scope to the present privileges for State secrets and informers' communications. By comparing their boundaries, the true and limited scope of the testimonial privileges can best be understood.

There are, then, seven distinct principles which in superficial features tend often to be confounded. (a) There is a doctrine of the *substantive law*, that the chief Executive and subordinate executive officers are in some respects *exempt from liability for torts* of violence and defamation. (b) There is a question of *constitutional law*, whether the chief Executive is corporally *exempt from the legal process of the Judiciary* for any purpose whatever. (c) There is a question of *testimonial privilege* at large, whether the Executive is exempted from the ordinary *duty to give testimony*; this is usually united with the preceding question, yet is distinct in theory. (d) There is a question of *testimonial privilege of attendance in court*, whether executive and other officers are exempted from the general duty to attend, though still liable testimonially to give evidence by deposition while remaining at their offices. (e) There is a doctrine, analogous to the foregoing privilege, that *official records are irremovable* and cannot be required to be taken, in the original, from their place of official custody to the court-room. (f) There is a genuine *communications-privilege*, permitting secrecy for communications by *informers to official prosecutors*. (g) There is a genuine *topical privilege* for facts constituting *secrets of State*, and this, by improper exten-

sion, has often been made to include a bastard *communications-privilege* for *communications between officials of the government*.

These various doctrines may now be examined in the above order.

§ 2368. (a) **Tortious Non-Liability of the Executive.** The chief Executive and subordinate executive officers have unquestionably some exemptions from liability for harm done in the course of their official acts. A sheriff, for example, is not liable for the death of a person hanged by him in pursuance to a lawful order of execution. In general, two classes of officials are distinguished in applying this principle. A subordinate or ministerial official, *i. e.* one who acts under the orders of a superior official, is absolutely exempted from liability if the harm done by him is done solely in the implicit obedience of an order lawful upon its face; conversely, he is not exempt, if he varies from the order, though in good faith. A superior official, *i. e.* one who is given by the law a discretionary authority and exercises his judgment independently and without looking higher for orders, is exempted from liability, because the nature of his responsibility requires that he should exercise his judgment free from apprehension of the harassment of subsequent litigation. Some Courts exempt such an official only when he has acted in good faith; but sound policy requires an absolute exemption, not in order to protect the malicious official, but in order that the upright official may be exempted from the burden of defending himself from a charge of malice. In the following passage this doctrine is exemplified:

1888, Chief Justice *Cooley*, Torts, 2d ed., * 376: "If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the State which the Legislature ought to allow, but neglects or refuses to allow. In such a case there may be a moral wrong, but there can be no legal wrong. The Legislature has full discretionary authority in all matters of legislation, and it is not consistent with this that the members should be called to account at the suit of individuals for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. . . . If we take next the case of executive officers, the rule will be found to be the same. The governor of the State is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws; but neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforcement of the laws. The Executive in these particulars exercises his discretion, and he is not responsible to the Courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department, and this would be inconsistent with the theory of republican institutions. Each department, within its province, is and must be independent. Taking next the case of the judicial department, the same rule still applies. For mere neglect in judicial duties no action can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence, and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to be assumed that that judgment has been honestly exercised and applied. . . . For all duties the time, manner, and extent of the per-

formance of which are left to the wisdom, integrity, and judgment of the officer himself, it is conceded that, as a general rule, the only liability of the officer is to the criminal law, in case he shall wrongfully and maliciously neglect to perform his duties, or shall perform them improperly. Duties of this nature are usually spoken of as duties in the exercise of discretionary and judicial powers, and it is deemed a conclusive answer to any private action for an injury resulting from neglect or unfaithful performance to say that where a matter is trusted to the discretion or judgment of an officer, the very nature of the authority is inconsistent with responsibility in damages for the manner of its exercise, since to hold the officer to such responsibility would be to confer a discretion and then make its exercise a wrong.”¹

The foregoing principle of substantive law comes, at two points, into apparent contact with the ensuing principles here to be considered. In the first place, a chief Executive who has ordered a *trespass* — for example, a Governor who has ordered the military to fire upon a mob — may appeal to the foregoing principle to exempt him from civil or criminal liability. At the same time and in the same litigation the question may arise whether he is constitutionally subject to judicial process compelling him to appear (*post*, § 2369), and whether he is privileged from testifying at all (*post*, § 2370), and, if not, whether he is privileged from attendance at court (*post*, § 2371). All of these questions are independent of each other; yet they have sometimes been confused. In the second place, an officer who has in an official report made a *libellous statement* may appeal to the principle of substantive law to privilege him from liability. If he is thus legally exempt and pleads his exemption, no question of testimonial privilege arises. Yet some Courts have preferred to attain the same end, not by recognizing a plea of substantive law, but by declaring a privilege of testimonial secrecy (*post*, § 2375), — thus defeating the action indirectly by suppressing the means of proof. Yet the testimonial and the tortious privileges should be strictly discriminated.

§ 2369. (b) **Constitutional Exemption of the Executive from Judicial Process.** Whether the apportionment of functions between Executive and Judiciary, in coördinate independent supremacy, signifies that the Executive can never be corporally subjected to the compulsory process of the Judiciary, is an interesting question, but solely one of constitutional law. The distinction between this question and the foregoing one (of exemption from tortious liability) is obscured when it is sought (for example) to sue the Governor of a State for a trespass done by the military under his order and at the same time to summon or to enjoin him by subpoena or to arrest him upon execution-process. But in a suit against him after expiration of his office, his supposed exemption from judicial process has clearly disappeared, and yet a proper plea claiming exoneration from tortious liability for executive acts would present that question nakedly and plainly, and would still defeat the action.

Whether, then, he has during office, as Executive, a constitutional immunity from compulsory process, after the analogy of the sovereign of a monarchy, is a large question independent of all others. Chief Justice

¹ Compare the following opinions: 1774, Mansfield; 1841, Hill v. Bigge, 3 Moore P. C. Mostyn v. Fabrigas, Cowp. 161, 175, L. C. J. 465, 4 St. Tr. N. S. 723, Lord Brougham.

Marshall, in Aaron Burr's trial,¹ raising the question in connection with the process of subpoena, noted that "a difference of opinion may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen," but did not attempt to force the issue. Since his time, the theory has received some attention, with differing judicial views, in determining the judicial power to enforce by mandamus the performance of ministerial duties by the Executive.² In the following passage the principle has been convincingly expounded, in its application to testimonial process:

1877, *Agnew, C. J., in Hartranft's Appeal*, 85 Pa. 433, 455: "The first point to be noticed is the argument that he is exempt from a subpoena because he is a coördinate branch of the State government. What is coördination or equality of rank, under the Constitution? It is not the absolute independence of each. If it were, the end would be disorder, conflict, and finally disorganization. It is not absolute superiority each over the others, for then they would not coexist in unity, as essential parts of the same common whole. . . . From the very nature of coördination in one and the same government, and the distribution to each branch of its appropriate functions, each is necessarily supreme in its own department, for neither can freely exercise its proper functions if it can be obstructed by the other. For example, *the Judiciary cannot control or interfere with the discretion of the Governor in the exercise of an executive function.* And for the same reason the legislative and executive branches cannot control the appropriate functions of the judicial. If the Legislative or Executive can oppose or obstruct the exercise of an appropriate judicial power the purpose of separation is defeated; a practical union takes place in them, and the surrender by the judiciary is effected. One of the appropriate and exclusive functions of the judiciary is the detection, trial, and punishment of offenders against the law. On the true principles of constitutional coördination, therefore, the Governor cannot obstruct this function, and must yield obedience to the judicial branch in this respect as the appropriate and superior repository of the power conferred by the people themselves. . . . The appropriate function of the Judiciary being the detection, trial, and punishment of offenders, and the inquiry for this purpose by witnesses being the constitutional and legal mode of procedure, it is equally clear that the Governor, just as any other citizen, being subordinate to the judicial power *in this respect*, must yield his obedience to the process necessary for the exercise of this judicial function. Good government and the welfare of the people demand this."

§ 2370. (c) **Testimonial Privilege of the Executive not to be a Witness.** The public (in the words of Lord Hardwicke) has a right to every man's evidence.¹ Is there any reason why this right should suffer an exception when the desired knowledge is in the possession of a person occupying at the moment the office of chief Executive of a State? There is no reason at all. His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice. The general principle (*ante*, § 2192) of testimonial duty to disclose knowledge needed in judicial investigations is of universal force. It does not suffer an exemption

¹ Quoted *post*, § 2371.

² The following authorities exhibit the arguments: 1878, *People v. Governor*, 29 Mich. 320; 1888, *Martin v. Ingham*, 38 Kan. 641, 17 Pac. 162; Merrill on *Mandamus*, ed. 1892, §§ 92-96.

Note that a foreign *ambassador*, as his sovereign's personal representative, and, by treaty sometimes, a *consul* also, is exempt from process: *post*, § 2372.

¹ *Ante*, § 2192.

which would be irrespective of the nature of the person's knowledge and would rest wholly on the nature of the person's occupation. This duty, and its equal application to the Executive and subordinate officers, has perhaps never been doubted. But it tends to become confused with three other distinct principles.

In the first place, the amenability of the Executive to *compulsory process* (just examined) is a different question. It may be held that the person is thus exempt, and yet that the duty exists. That the enforcement of it is constitutionally impossible is still consistent with its existence. Indeed, the specific or direct enforcement of it is never possible, for if a subpoenaed witness be willing to lie in jail perpetually for contempt, no judicial power can actually effect any testimonial utterance. Neither the corporal nor the constitutional impossibility of enforcing the performance of the duty prevents us from recognizing and declaring its existence. Such, in effect, was the attitude of Chief Justice Marshall and Chancellor Zabriskie in their dealings with this problem. Such is presumably the attitude of the Department of State in its definition of a consul's duty, under a treaty expressly exempting consuls from compulsory process but not exempting them from testimonial duties.²

In the second place, this testimonial duty to disclose one's knowledge may coexist with exemption from *attendance in court* as a witness,—the duty to testify (*ante*, § 2192) and the duty to attend for the purpose of testifying (*ante*, § 2204) being plainly separable. The official's exemption from attendance is later examined (*post*, § 2371).

In the third place, this general testimonial duty of disclosure is compatible with definite exceptions to it for certain *official topics*, upon which secrecy may be preserved. The scope of this exception, by way of testimonial privilege, is elsewhere examined (*post*, §§ 2174–2176).

Let it be understood, then, that there is no exemption, for officials as such, or for the Executive as such, from the universal testimonial duty to give evidence in judicial investigations. The exemptions that exist are defined by other principles.

§ 2371. (*d*) **Testimonial Privilege of the Executive and Subordinate Officers, not to attend Court.** That an exemption from attendance in court may be sometimes properly recognized has already been noticed in its general principle (*ante*, § 2204). This exemption is conceded sometimes on the ground of illness, sometimes on the ground of the excessive inconvenience of travelling a long distance (*ante*, §§ 2205–2207). Whenever it applies, the testimonial duty at large — *i. e.* to disclose one's evidential knowledge — nevertheless continues, and may be exacted and performed by the taking of a deposition, which is then admissible on the ground of necessity (*ante*, §§ 1401–1418), instead of oral testimony.

The question now is whether the requirements of official business, demanding continual presence at the seat of office, bring within this principle

² *Post*, § 2372.

the chief Executive or subordinate executive officers. That the principle does apply to exempt them, within certain limits, cannot be doubted. Such an exemption was at common law in England conceded to the monarch, though to no other person;¹ and the dignity of the position seems here to have been a sufficient reason (apart from the monarch's immunity from compulsory process). In the United States the exemption must be placed upon grounds of public convenience, — a more inclusive consideration. In Chief Justice Marshall's notable exposition of the principle, it will be observed that his concession of this mere exemption from attendance does not involve any concession of an exemption from the Executive's general testimonial duty to furnish evidence or of a judicial inability to enforce the performance of that duty:

1807, *Aaron Burr's Trial*, Robertson's Rep., I, 121, 127 ff., 136, 181, 255, on motion for a *subpœna duces tecum* to the President of the United States to attend and bring certain correspondence with General Wilkinson, material to aid the defence, the counsel for the prosecution did not deny that the President was "as amenable to that process as any other citizen," but claimed that "if his public functions disable him from obeying the process, that would be a satisfactory excuse *pro hac vice*," and that the papers here asked for were State secrets and irrelevant; in granting the motion, and holding the papers relevant and not State secrets, the general principle of the President's amenability to process *ad testificandum* was thus expounded by Marshall, C. J.: "The exceptions [to the accused's right to process] furnished by the law of evidence, with one reservation, so far as they are personal, are of those [persons] only whose testimony could not be received. The single reservation alluded to is the case of the King. Although he may, perhaps, give testimony, it is said to be incompatible with his dignity to appear under the process of the Court. Of the many points of difference which exist between the First Magistrate in England and the First Magistrate in the United States, in respect to the personal dignity conferred on them by the constitutions of their respective nations, the Court will only mention two. (1) It is a principle of the English Constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named in debate. By the Constitution of the United States, the President, as well as every other officer of the government, may be impeached, and may be removed from office on high crimes and misdemeanors. (2) By the Constitution of Great Britain the crown is hereditary, and the monarch can never be a subject. By that of the United States, the President is elected from the mass of the people, and, on the expiration of the time for which he is elected, returns to the mass of the people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries, in reference to the personal dignity of the executive chief, will be perceived by every one. In this respect, the First Magistrate of the Union may more properly be likened to the first magistrate of a

¹ 1613, Countess of Shrewsbury's Case, 12 Co. Rep. 94 (before a Council including the Chancellor, Chief Justices, and Chief Baron; the Countess being required to declare her knowledge concerning Lady Arabella Stuart's escape, declined, for one reason, on the ground of her "privilege of nobility, *sc.*, to answer only when she was called judicially before her peers"; the Council denied that nobility had "such privilege as is alledged," and the liability of a peer to be examined in Chancery, common-law Courts, and the Star-Chamber, was pointed out); 1854, Parke, B., in *Attorney-General v. Radloff*, 10 Exch. 84, 94 ("It is clear that the Sovereign cannot be a witness, because there is no means of

compelling her attendance"); 1861, Willes, J., in *Ex parte Fernandez*, 10 C. B. N. s. 3, 39 ("Every person in the kingdom, except the sovereign, is bound to give evidence). In L. C. J. Campbell's *Lives of the Chancellors*, III, 215, 4th ed., the learned author sets forth the authorities. Compare also the cases cited *ante*, § 1674 (certificate of the King).

In *Lady Daburgavenny's Case*, cited 6 Co. Rep. 53 a, it would seem that there had been a ruling that peers were not subject to examination upon oath, at least as *parties in wager of law*. Distinguish also the question whether a peer was obliged to take an *oath* or could merely affirm (*ante*, § 1825).

State, — at any rate, under the former Confederation ; and it is not known ever to have been doubted but that the chief magistrate of a State might be served with a *subpœna ad testificandum*. If in any court of the United States it has ever been decided that a subpœna cannot issue to the President, that decision is unknown to this Court. If upon any principle the President could be construed to stand exempt from the general provisions of the Constitution, it would be because his duties as chief magistrate demand his whole time for national objects. But it is apparent that this demand is not unremitting ; and, if it should exist at the time when his attendance on a court is required, it would be sworn on the return of the subpœna, and would rather constitute a reason for not obeying the process of the Court than a reason against its being issued. In point of fact, it cannot be doubted that the people of England have the same interest in the service of the executive government — that is, of the cabinet council — that the American people have in the service of the Executive of the United States, and that their duties are as arduous and as unremitting ; yet it has never been alleged that a subpœna might not be directed to them. It cannot be denied that to issue a subpœna to a person filling the exalted station of the Chief Magistrate is a duty which would be dispensed with more cheerfully than it would be performed ; but, if it be a duty, the Court can have no choice in the case. If then, as is admitted by the counsel for the United States, a subpœna may issue to the President, the accused is entitled to it of course ; and, whatever difference may exist with respect to the power to compel the same obedience to the process as if it had been directed to a private citizen, there exists no difference with respect to the right to obtain it. The guard furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpœnas is to be looked for in the conduct of a Court after those subpœnas have issued, — not in any circumstance which is to precede their being issued.” To this subpœna, President *Jefferson* responded, without attendance, by a letter to the prosecuting counsel, in which he offered to be examined at Washington by deposition, but explained his non-attendance at Court as follows : “ As to our personal attendance at Richmond, I am persuaded the Court is sensible that paramount duties to the nation at large control the obligation of compliance with its summons in this case ; as it would, should we receive a similar one to attend the trials of *Blennerhasset* and others [co-conspirators] in Mississippi Territory, those instituted at St. Louis and other places on the western waters, or at any place other than the seat of government. To comply with such calls would leave the nation without an executive branch, whose agency nevertheless is understood to be so constantly necessary that it is the sole branch which the Constitution requires to be always in function. It could not, then, intend that it should be withdrawn from its station by any coördinate authority.”

1871, *Zabriskie, C.*, in *Thompson v. R. Co.*, 22 N. J. Eq. 111, 113 : “ The subpœna was directed to the Governor by his individual name, and not as Governor. Every person, whatever his office or dignity, is bound to appear and testify in courts of law when required to do so by proper process, unless he has a lawful excuse. The official engagements and duties of the higher officers of the government may be, and in many cases are, a sufficient excuse. The dignity of the office, or the mere fact of official position, is not of itself an excuse, and whether the official engagements are sufficient must be determined from the circumstances of each case. . . . There is no reason why the Governor should not be called upon to testify as to the time when the engrossed bill was delivered to him. . . . But I will make no order on him for that purpose. . . . Such order ought not to be made against the Executive of the State, because it might bring the Executive in conflict with the Judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the Court, he will do it without an order ; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply, even if directed by an order ; and in his case, the Court would hardly entertain proceedings to compel him by adjudging him in contempt. . . . If the Governor, without sufficient or lawful reasons, refuses to appear and testify, he is, like all other citizens, liable to respond in damages to any party injured by his refusal.”

That this exemption from attendance exists for the chief Executive of a State cannot be doubted. Perhaps also it exists for members of Congress during sessions. Whether it exists for subordinate executive officials may be doubted.² By statute, in a few jurisdictions, specific officials have been exempted,—presumably those whose official duties are most likely to be seriously interfered with by frequent calls for attendance to give evidence.³

That the Court should determine whether a proper excuse exists in each case seems the sounder rule, for the reasons elsewhere noted (*post*, § 2376), though they do not apply as strongly to this exemption; and Chief Justice Marshall apparently reserves this power. But no decisive judicial opinion has here been expressed.⁴ For any officer other than the chief Executive, it seems hard to believe that a Court would abdicate its normal authority to determine all questions of privilege.

² In the following rulings, the distinctions of §§ 2368, 2369, 2370, and 2371, *ante*, are not always observed: 1871, *Thompson v. R. Co.*, 22 N. J. Eq. 111 (a Governor is liable to attend; but no process of compulsion will issue; quoted *supra*); 1815, *Gray v. Pentland*, 2 S. & R. 23, 28, 32 (whether a Governor is compellable on subpoena *d. t.* to attend and produce a paper in his official custody, not decided); 1877, *Hartman's Appeal*, 85 Pa. 433 (grand jury's subpoena to the Governor and other officers, to attend and testify as to a riot; on a written answer alleging that public duties elsewhere prevented their attendance, an attachment was refused, partly on the ground that the Governor could not be summoned, partly on the principle of *Thompson v. R. Co.*, *supra*; the opinion is confused; *Agnew, C. J.*, and *Sterrett, J.*, diss.); 1800, *U. S. v. Cooper*, *Whart. St. Tr.* 659, 660 (*Peters, J.*, acceded to a request to address a letter to the Speaker requesting him to have process served on a member of Congress; but *Chase, J.*, refused, and "ordered process without such letter," but declared that if compulsion became necessary he would continue the case till the session of Congress was over; ultimately the attendance appeared to have taken place by waiver; *Peters and Chase, JJ.*, "refused to permit a subpoena to issue directed to the President of the United States"; no reasons were given); 1803, *Marbury v. Madison*, 1 Cr. 137, 142, 144 (clerks of the department of State, and the Attorney-General, held liable to attend on a subpoena); 1806, *Smith's and Ogden's Trial*, *Lloyd's Rep.* 2, 7, 13, 89 (a subpoena having issued for James Madison and two other heads of Federal departments, who responded that the President had signified to them that their "official duties cannot at this juncture be dispensed with," the Court of two judges divided, without reasons given, as to issuing an attachment); 1807, *Burr's Trial*, *Robertson's Rep.* 1, 121 (quoted *supra*).

³ *Can.*: *B. C. St.* 1899, c. 62, § 22 (no land registrar need attend as a witness, but may be examined on commission); *Man. Rev. St.* 1902, c. 148, § 21 (a district registrar of land titles need not attend as witness without the town,

except after certain notice); *U. S.*: *Ida. St.* 1899, Feb. 10, § 6 (attendance "cannot be enforced" of a "State or county officer or judge" at a trial in other than the county of residence); *Ind. Rev. St.* 1897, § 432 (a State or county officer, judge, practising physician, or attorney-at-law, cannot be compelled to attend); *Ky. Stats.* 1899, § 235 (commissioners, officers, and servants, of State charitable institutions may testify at trials without the county by deposition, without attendance); *Tenn. Code* 1896, §§ 5624, 5628 (privileged not to attend Court are the following: an officer of U. S., an officer of this State or of a county, a clerk of another Court of record, a member of General Assembly in session or clerk or officer thereof, a practising physician or attorney, a jailer or prison-keeper of another county); *Va. Code* 1887, § 413 (no officer or employee of the treasurer, auditor, or second auditor is compellable to leave his office to testify as to the genuineness of coupon tendered in payment of State dues); *Wash. C. & Stats.* 1897, § 2658 (a superintendent of a State insane hospital is not required to attend as witness in a civil suit; nor in a criminal case, unless the judge of the court of trial shall require his attendance "upon being satisfied of the materiality of his testimony"); *Wis. Stats.* 1898, § 582 (a superintendent of a State insane hospital is not compellable to attend, except on certain specified conditions).

Add also the statutes exempting custodians of official records, *post*, § 2373. For attorneys at law, see *ante*, § 2206.

⁴ The possibilities of abuse that lie in conceding to the officer himself the determination of the necessity are suggested in the following passage from the opinion of *Agnew, C. J.*, in *Hartman's Appeal*, cited *supra*, n. 2 (*loc. cit.* p. 457): "The argument *ab inconvenienti* that it is necessary the Governor should always be at the seat of government, is preposterous, in view of frequent visits elsewhere, of business, courtesy, and pleasure. The absence of the Governor in the Rocky Mountains, on the way to California, at the time of these riots, is an apposite example."

§ 2372. **Same: Ambassadors, Consuls, Judges.** (1) An *ambassador*, being the personal representative of the foreign sovereign, is concededly immune from compulsory process; but this immunity rests also on a sound public policy, and is therefore by common custom of international law extended to *ministers* and (to some indefinite extent) to the persons of their official households. As a practical consequence, such officers are also exempt from attendance in court as witnesses.¹

(2) A *consul*, not being a diplomatic officer, does not by common custom of international law possess this immunity from compulsory process. But by treaty it has in many instances been expressly conceded.² Distinguish, however, first, this exemption from process or attendance and the duty to furnish evidence; for the two may properly coexist, and are recognized as co-existent for consuls abroad in the instructions of the Department of State;³

¹ 1663, *Earl of Clarendon's Trial*, 6 How. St. Tr. 291, 340 (the House discussing the sources of certain information, it was objected, "possibly a foreign ambassador, and no oath can be given him"); 1856, *Dubois' Case*, Wharton, *Digest of International Law*, I, 668, Lawrence's *Wheaton's International Law*, 393, Dana's *Wheaton*, § 226, note 129 (the Netherlands minister held exempt from summons; see Sen. Exec. Doc. 21, 34th Cong. 3d Sess.); 1881, *Guiteau's Trial*, I, 136 (Sr. Camacho, the Venezuelan minister, testified to what he saw of the murder; and the District Attorney announced that, although the minister was "entitled under the law governing diplomatic relations to be relieved from service by subpoena or sworn as a witness in any case," yet his Government had "instructed him to waive his rights").

For the admissibility, under the Hearsay rule, of an *ambassador's deposition*, see *ante*, §§ 1384, 1407.

² 1854, *Re Dillon*, 7 Sawyer 561 (the consul of France was summoned by subpoena *d. t.* in favor of a defendant in a criminal case; the treaty of 1853 with France, art. 2, provided for immunity of consuls from appearance in court as witnesses; held, that the constitutional provision entitling an accused to compulsory process did not override the treaty provision, the Constitution having given merely the same right to process which had before existed for the prosecution only, and therefore having given it subject to the established exemption for foreign ambassadors; and the subsequent addition of consuls to the exempt class, by treaty, was no new exemption but merely an enlargement of the class already exempt; official documents in a consular office were held privileged, here under express provision of the treaty of 1853 with France; the party summoning must show that the desired document is not an official one); 1854, *Dillon's Case*, Wharton's *Digest of International Law*, I, 665 (Mr. Marcy, Secretary of State, opposed the privilege in the preceding case, on the ground that the constitutional right was subject to such exemptions only as existed specifically at the Constitution's adoption, and the treaty exemptions of consuls were thus not

included); 1855, *Portuguese Consul's Case*, Wharton, *supra*, I, 775 (a Portuguese consul, assuming that the most-favored-nation clause gives him the French treaty-privileges, is exempted from process as a witness, except when required by an accused in a criminal case; per Marcy, Secretary); 1862, *Hanoverian Consul's Case*, Wharton, *supra*, I, 776 (a trading consul of Hanover held not exempt; per Seward, Secretary; no reason stated); 1867, *Janssen's Case*, Wharton, *supra*, I, 777, Sen. Ex. Doc. 1, spec. sess. 1867 (consul's exequatur may be revoked for failure to obey summons, when he is not privileged by treaty); 1891, *U. S. v. Trumbull*, 48 Fed. 94 (the Chilean vice-consul, under the existing treaty with Chili, which by the most-favored-nation clause secured the immunity for consuls under the treaty of 1853 with France, held exempt from compulsory process as witness on behalf of the prosecution; the constitutional guarantee invoked in Dillon's case not being applicable; here the testimony was asked against persons charged with violating the neutrality laws by aiding the insurrectionary party which by the time of the trial had become the lawful Government represented by the witness); 1894, *Mason's Case*, U. S. For. Rel. 1899, p. 304 (U. S. consul in Germany summoned; held, not privileged, unless by the most-favored-nation clause of Treaty 1871, art. V, the U. S. obtains the benefit of other treaties by Germany); 1899, *Guenther's Case*, ib. 302 (similar); 1899, *Clancy's Case*, ib. 566, 583 (similar; Nicaragua treaty of 1867, art. X, applied; but "information which came to him in his official capacity" is privileged); 1899, *Baiz v. Malo*, 27 N. Y. Miscell. 685 (under treaties with Colombia giving most-favored-nation privileges, the French treaty-provision with the United States applies and exempts consuls from attendance); 1900, *Bruni's Case*, U. S. For. Rel. 1900, p. 705 ("a consul engaged in business [in Guatemala] is amenable to summons, etc., only for causes apart from his official functions; he cannot be summoned to give evidence of any matter of his consular business, nor to produce to the Court any part of the consular archives").

³ See the cases *infra*, note 4.

secondly, a genuine privilege of secrecy (even where no exemption from attendance exists by treaty) for the official archives of the consulate⁴ and the official facts known to the consul;⁵ for the privilege for secrets of State (*post*, § 2375) may well be deemed to apply (in the absence of international courts of justice) to all matters of international concern.

(3) A *judge* of a superior court seems to have been regarded as exempt from attendance at common law.⁶ But the exemption cannot be put upon any broader ground, so as to negative either the general duty to furnish evidence (*ante*, § 2270) or the amenability to compulsory process (*ante*, § 2371). Whether, on grounds other than privilege, a judge should be prohibited (not merely exempted) from testifying in the very cause over which he is presiding, is a distinct question, elsewhere examined (*ante*, § 1909).

§ 2373. (e) **Irremovability of Official Records.** On the general principle of the public inconvenience and danger involved in removing official records from their usual place of custody (*ante*, § 2182), the Court may refuse to compel the production of the originals in evidence :

* 1894, *Mason's Case*, U. S. For. Rel. 1899, p. 304 (charges of under-valuation filed in U. S. consul's office in Germany; treaty provision of 1871, art. V, that consular archives shall be inviolable, applied); 1899, *Guenther's Case*, U. S. For. Rel. 1899, p. 302 (similar); 1899, *Clancy's Case*, ib. p. 566, 583 (similar; U. S. consul in Nicaragua; consular archives held inviolable, irrespective of treaties; but "personal books and papers of the counsel" are not privileged); 1900, *Bruni's Case*, U. S. For. Rel. 1900, p. 705 (quoted *supra*); 1903, *Kessler v. Best*, C. C., 121 Fed. 439 (documents being "part of the archives of the German consulate," privileged; no authority cited).

⁵ *Clancy's Case*, *Bruni's Case*, *supra*.

⁶ 1620, Declaration of Grievances, *Cobbett's Parl. Hist.* I, 1206 (the Lords having sent for several members of the Commons to testify in the investigation into abuses of royal patents, it was objected in the Commons that the members were virtually judges upon the grievances, and therefore not liable to be sworn; Sir E. Coke arguing that "the judges of the Common Pleas, or of any court, are never sworn as witnesses in any case, albeit they know of something concerning it and can testify in it; but if their knowledge be asked, they answer it without an oath; that no judge of the Star Chamber can be served with a subpoena *ad testificandum* in that court"; but finally the members volunteered their oaths out of courtesy); 1692, *Knowles' Trial*, 12 How. St. Tr. 1179 ff. (Holt, C. J., and Eyre, J., having quashed an indictment against a person claiming to be a peer, were summoned before the House of Lords to explain their reasons, the proceeding being by express vote not regarded as charging them, but only for information; they declined to make any explanation at that place, as being privileged); 1838, *R. v. Gazard*, 8 C. & P. 595 (perjury; the grand jury inquired whether they "ought to examine" the chairman

of the quarter sessions to prove the testimony, the chairman "having expressed a desire not to be examined as a witness"; *Patteson, J.*: "It is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court"; an *amicus curiæ* having referred to a contrary instance, *Patteson, J.*, replied: "I think it is wrong, and that it ought not to be done"; 1858, *R. v. Harvey*, 8 Cox Cr. 99, 103 (*Byles, J.*, said that he should refuse to appear if subpoenaed to produce his notes of testimony, but that the rule did not apply to inferior magistrates); 1880, *Anon.*, 24 Sol. J. 398 (master of the Supreme Court, summoned to prove testimony before him on a charge of perjury; objection waived); *Tex. C. Cr. P.* 1895, § 779 ("When it is proposed to offer the testimony of a judge in a cause pending before him, he is not required to testify if he declares that there is no fact within his knowledge important in the cause"). The admissibility of a *judge's notes*, under the Hearsay rule, is still another question: *ante*, § 1666.

It was at one time thought that an *arbitrator* had some such privilege: 1808, *Ellis v. Saltau*, 4 C. & P. 327, note (an arbitrator being called to prove that he had exceeded the limits of his submission, "*Mansfield, C. J.*, told the witness that he need not be examined unless he chose it, thinking that an arbitrator was not to be afterwards worried as a witness"). But this notion was entirely unfounded. It is now thoroughly understood that an arbitrator is not, by reason of that office, either disqualified or privileged (*ante*, § 1912); and that the only prohibitions applicable concern the facts which may be proved as to his award, these facts being determined by the principles of the parol-evidence rule as applied to awards (*ante*, § 2358).

1794, *Per Curiam*, in *Delaney v. Philadelphia*, 1 Yeates 403 (refusing a subpoena *d. t.* against the surveyor-general): "We ought not to issue a subpoena with such a clause in the present instance; otherwise the surveyor-general, or any other public officer, might be obliged to take any original public papers from his office to the farthest counties in the State, and the same papers might be demanded in different counties at the same time."¹

This rule of the common law has been supplemented in some jurisdictions by express statutes.²

Distinguish, however, (1) the *illegality* of removing such records; for this of itself is no ground for refusing to receive them (*ante*, § 2183); (2) the propriety of receiving an *original* always, in preference to a copy; for, apart from the prohibition of the present rule (which leaves much to the Court's discretion) the original of a document is always receivable (*ante*, § 1186);

¹ *Accord: England: 1788, R. v. King*, 2 T. R. 234 (application for an information against assessing-officers; the rule that, in granting an information against magistrates for misconduct, there should be a production of their proceedings before the Court was conceded; but, by exception, on the score of "public inconvenience," the order to bring the assessment books by *certiorari* was quashed; "every person is entitled to take copies, so that no injury can arise to the party from our refusing a *certiorari*;" but on the contrary very great public inconvenience would ensue from permitting it to issue"); 1788, *Atherfold v. Beard*, 2 T. R. 610 (action on a wager as to the collection of taxes; revenue officers treated as not bound to produce the public books, chiefly on the ground of inconvenience); *United States: 1887, Stevenson v. Moody*, 85 Ala. 33, 35, 4 So. 595 ("except in special cases," a public record's original cannot be required for production; here said of probate record-book); 1886, *Re Lester*, 77 Ga. 143 (a mayor, who was *ex officio* the presiding judge of a Court of record; held not subject to subpoena *d. t.* to bring his docket to be used as evidence); 1870, *Dunham v. Chicago*, 55 Ill. 357 ("books and documents, public records, in the custody of public officers"; the Court has power to order production, but will not do so where certified copies will answer as well; "public convenience and safety" being the reason); 1901 *Delaware Surety Co. v. Layton*, — N. J. Eq. — 50 Atl. 378 (Secretary of State enjoined from removing official documents out of the State); 1832, *Peney v. Gilliland*, Wright Oh. 38 (justice's docket; "strong circumstances must be shown to induce a Court to order the removal of the book"); 1794, *Delaney v. Philadelphia*, 1 Yeates 403 (subpoena *d. t.* to the surveyor-general to bring official papers, refused; quoted *supra*); 1840, *Devling v. Williamson*, 9 Watts 311, 317 ("To permit a person other than [the custodian] . . . to take them [out of the office] is a most dangerous and pernicious practice"; they should be taken out only by a custodian upon subpoena or special order); 1879, *Corbett v. Gibson*, 16 Blatchf. 334 (production of official documents in custody of a major-general, not

required, since copies could be obtained and used).

In a few cases the Court has exercised its power to require production: 1815, *Treasurer v. Moore*, 3 Brev. 550 ("A sheriff's books are public property, and whoever may be in possession of them is bound to produce them when called for by legal authority, even though as evidence against himself"); 1856, *Bashford v. Barstow*, Wis., Pamph. Rep. p. 289 (the Court required the Secretary of State to bring original election returns, bearing evidence of forgery, from another room in the same building).

² *Cal. C. C. P. 1872, § 1950* (no record of any sort of which a transcript is receivable may be removed from the office of custody, except on order of Court "in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending, or where the court is held in the same building with such office"); *Kan. Gen. St. 1897, c. 97, § 2* ("no public officer herein named," viz., a probate judge, county clerk, county treasurer, register of deeds, clerk of the district court, justice of the peace, police judge, or other public officer, or "other custodian of public records shall be compelled to attend any court, officer, or tribunal sitting more than one mile from his office" with the records in his custody); *N. Y. C. C. P. 1877, § 866*, Laws 1895, c. 946 (regulation of the use of records, by a qualified prohibition of removal); *Ok. Rev. St. 1898, § 5250* (the custodian of irremovable official documents is not compellable to attend, on certain conditions); *Okla. Stats. 1893, § 4278* (no public officer or other custodian of public records is to be compelled to attend with official records "more than one mile from his office"); *Pa. St. 1823, Pub. L. 233, § 1, P. & L. Dig.*, Evidence, 29 (documents in the offices of the secretaries of the Commonwealth and of the land-office, of the surveyor-general, auditor-general, and State treasurer, are producible on proper process); *Wash. C. & Stats. 1897, § 5996* ("no public officer having the possession or control of public records or papers which are required by law to be kept in any particular office or place shall be compelled to produce the same").

(3) the admissibility of *copies*, whenever the original is not removable; for this raises the question whether a specific kind of record is required to be produced in the original (*ante*, § 1218); the few instances of such required production — for example, on a plea of *nul tiel record* — are thereby made exceptions to the present rule.

§ 2374. (*f*) **Privilege for Communications by Informers to Official Prosecutors.** A genuine privilege for communications, on the fundamental principle of privilege (*ante*, § 2285), must be recognized for the communications made by informers to official prosecutors, because such communications ought to receive encouragement, and because that confidence which will lead to such communications can be created only by holding out immunity from a compulsory disclosure of the informant's identity:

1794, *Hardy's Trial*, 24 How. St. Tr. 8; the witness had reported the existence and doings of secret political societies: "I did not do it of myself, but by advice; a gentleman recommended me by all means to make a report. It was not to a magistrate"; Mr. *Erskine*: "Then to whom was it?" Objection was made. "I submit he must state the name of the person to whom he communicated it; then have I not a right to subpoena that person? I will then ask [this witness], When did you tell it him? At what place? Who were present? Then I ask that person, Is it true? . . . And if he were to say, I never saw his face [the witness] till I saw him in court, would not that shake the credit of the witness with any man of understanding? I apprehend it would." Mr. *Attorney-General* [opposing]: "What is the principle upon which the Court says, You shall never ask where he got that information? . . . A court of justice does not sit to catch the little whispers or the huzzas of popularity; it proceeds upon great principles of general justice. It says that individuals must suffer inconveniences rather than great public mischief should be incurred; and it says that if men's names are to be mentioned who interpose in situations of this kind, the consequence must be that great crimes will be passed over without any information being offered about them, or without persons taking that part which is always a disagreeable part to take but which at the same time it is necessary should be taken for the interest of the public. . . . Nobody will deny but that it is a hard case; but it has become a settled rule, because private mischief gives way to public convenience"; *Eyre*, L. C. J.: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule which has universally obtained on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made should not unnecessarily be disclosed. . . . [As to (1) the person reported to,] I cannot satisfy myself that there is any substantial distinction between the case of this man's going to a justice of the peace or going to a magistrate superior to a justice of the peace, or to some other person who communicated with a justice of the peace. . . . [As to (2) the person above advising a report,] I am of opinion the principle extends to that question, because the disclosing who the friend was that advised him to go to a magistrate is a thing which puts that friend in a situation into which he ought not to be put, and into which it is inconvenient to general justice that he should be put. . . . My apprehension is that, among those questions which are not permitted to be asked, are all those questions which tend to the discovery of the channels by whom the disclosure was made to the officers of justice; that it is upon the general principle of the convenience of public justice not to be disclosed; that all persons in that situation are protected from the discovery; and that, if it is objected to, it is no more competent for the defendant to ask who the person was that advised him to make a disclosure than it is to whom he made the disclosure in consequence of that advice, [or] than it is to ask any other question respecting the channel of communication or all that was done under it"; *Buller*, J.: "My lord chief

justice and my lord chief baron both say the principle is that the discovery is necessary for the purpose of obtaining public justice; and if you call for the name of informer in such cases, no man will make a discovery, and public justice will be defeated. Upon that ground, therefore, it is that the informer for the purpose of a public prosecution shall not be disclosed."

1888, *Parnell Commission's Proceedings*, 20th day, Times' Rep. pt. 6, p. 38; the Times had charged the Irish Land League with complicity in crime and agrarian outrage; part of its case was that, in spite of the League's avowedly peaceable purpose, there were inner circles of conspirators who used the League to advance criminal purposes; one of the police inspectors had testified that there was such an inner circle of criminals; on cross-examination he was asked by Mr. Reid: "You now say that you obtained this information from an informer?" A. "Yes." Q. "Give me the name of the informer." A. "I will not." Q. "I must press you." A. "I repeat to my Lords that I cannot do any such thing." A. L. Smith, J.: "I always understood that a police-constable is not bound to state the name of a person from whom he received information"; Mr. Reid: "We are wanting to get to the bottom of this matter. Here is a police-constable who states that the Land League has an inner circle, according to his information. I am entitled to find out who gave him the information, otherwise we are at the mercy of an anonymous informer whom we are not allowed to ascertain, whose name even we are not allowed to find out. We may be able to prove him to be the greatest liar in the three kingdoms. I submit that I am entitled to have the name." Sir H. James (opposing): "My lords, we have to ask you to consider the entire question. I gather we may assume that Inspector Davis has some good reason for refusing to give this information. This man's life might not be safe." President Hannen: "When this sort of question arose before, I suggested that the question might be asked why the witness refused to give an answer. . . . It will be for us to say whether the excuse he gives will be a sufficient reason in our opinion, and whether we should or should not exercise the power we have of calling upon the witness to answer the question."

1872, *Gray, C. J., in Worthington v. Scribner*, 109 Mass. 487, 488: "It is the duty of every citizen to communicate to his government any information which he has of the commission of an offence against the laws. To encourage him in performing this duty without fear of consequences, the law holds such information to be among secrets of State, and leaves the question how far and under what circumstances the names of the informers and the channel of communication shall be suffered to be known to the absolute discretion of the Government, to be exercised according to its views of what the interests of the public require. Courts of justice therefore will not compel or allow the discovery of such information, either by the subordinate officer to whom it is given, by the informer himself, or by any other person, without the permission of the Government."

This privilege is well established,¹ and its soundness cannot be questioned. But it is subject to certain limitations, inherent in its logic and its policy:

¹ *England*: 1790, *R. v. Akers*, 6 Esp. 126, note (information for obstructing a customs officer; the defendant not allowed to inquire the name of the person informing of the smuggling); 1794, *Hardy's Trial*, 24 How. St. Tr. 8 (quoted *supra*); 1817, *R. v. Watson*, 2 Stark. 116, 135, 32 How. St. Tr. 102 (a shorthand reporter of seditious speeches, not allowed to be asked as to delivering his notes to the Under-Secretary of State; L. C. J. Ellenborough "said that a communication to a member of the Government was a communication to Government"); 1845, *R. v. O'Connell*, 1 Cox Cr. 403, 5 State Tr. N. s. 1, 208 (a witness for the Crown was not allowed to ask "at whose suggestion"

he came over to Ireland, even on cross-examination); 1845 (?), *R. v. Candy*, cited 15 M. & W. 176 (the witness was allowed to be asked whether he was the informer; Rolfe, B.: "That was tried before me; the principle was rather followed than violated by asking that question of B., because it was perfectly clear and admitted that he was the informer, and it went to exclude the notion of anybody else being an informer"); 1846, *Attorney-General v. Briant*, 15 M. & W. 169 (information for penalties; the question, "Did you give the information?" was not allowed; "in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person; . . . the

(1) The privilege applies only to the *identity* of the informant, not to the contents of his statement as such, for, by hypothesis, the contents of the communication are to be used and published in the course of prosecution. Much less does the privilege apply to prevent merely the proof of contents which have already been *de facto* disclosed, — as in an action against the informant for libel. To deny production in such a case is in effect to declare that the libel is privileged from liability. If that is indeed the judicial belief and the law, it should be frankly declared; if not, the action should not be defeated by an evasion which pretends to keep secret that which is not secret.²

(2) If the identity of the informer is *known and admitted*, then there is

principle of the rule applies to the case where a witness is asked if he himself is the informer"); 1848, *R. v. O'Brien*, 7 State Tr. N. S. 1, 123 (an informer was told by some one, not an official, to attend a treasonable meeting, but refused to name him on account of supposed danger of assassination; not compelled); 1888, Parnell Commission's Proceedings, 20th day, Times' Rep. pt. 6, p. 28 (quoted *supra*; another instance occurs on the 35th day, pt. 9, p. 241); 1890, *Marks v. Beyfus*, L. R. 25 Q. B. D. 494, 498 (malicious prosecution; on testimony by the director of public prosecutions that the original proceeding had been instituted by himself, he was held privileged from naming his informants or producing their written statements; following *Attorney-General v. Briant*, *supra*); *Canada*: 1884, *Bradley v. McIntosh*, 5 Ont. 227, 232 (libel; an anonymous letter sent by the defendant to the Attorney-General concerning the plaintiff was refused production by the head of the department; production not compelled); 1893, *Humphrey v. Archibald*, 20 Ont. App. 267 (police-officer sued for malicious prosecution, and refusing to disclose his informants, held privileged; "it is not the privilege of the witness, but is adopted on the grounds of public policy on account of its importance to the public"); *United States*: 1899, *Smith v. Smith*, 2 Penne. (Del.) 365, 45 Atl. 848 (communications by a citizen to a letter carrier as to addresses and other matters relating to mail delivery, not protected); 1839, *State v. Soper*, 16 Me. 293 (larceny of logs; questions as to the employees giving information to the owner, leading to a search by him, excluded on the facts; the informants being in fear of mob violence in case of disclosure); 1872, *Worthington v. Scribner*, 109 Mass. 487 (action for falsely informing the U. S. Treasury that the plaintiff was a fraudulent impostor; interrogatories to the defendant as to his giving such information, held privileged from answer; quoted *supra*); 1900, *Shinglemeyer v. Wright*, 124 Mich. 230, 82 N. W. 887 (slander; defendant's communications of his suspicions to detective officers, not admitted to show malice, because privileged; this seems unsound); 1839, *Howard v. Thompson*, 21 Wend. 319, 335 (libel, for a letter by a postmaster to the Secretary of the Treasury charging with fraud the plaintiff a customs inspector; intimated *obiter* that the letter was

privileged; *Gray v. Pentland*, *infra*, approved); 1815, *Gray v. Pentland*, 2 S. & R. 23, 28, 32 (libel, for a deposition made by defendant before a justice, charging the defendant, clerk of a court, with unfitness, and forwarded to the Governor; on a subpoena *d. t.* to the Governor and Secretary, they refused to attend, and evidence of the document's contents was offered; held inadmissible, since to allow such proof "would be a check on representations to the competent authority"; this is unsound, because both the name and the contents were already disclosed); 1837, *Yoter v. Sanno*, 6 Watts 164, 166 (preceding ruling approved); 1807, *Burr's Trial*, Robertson's Rep., II, 508, 520, 525 (a motion was made that "a communication confidentially made to the President, respecting the conduct of certain persons holding places of trust and confidence, but who have not hitherto been prosecuted or even suspected, should be produced"; Chief Justice Marshall in this instance ordered production of the letter, because it did not appear that the President objected to production; but the Chief Justice, while recognizing a privilege, did not indicate the limits of it, nor whether it here rested on the present ground or on that of State secrecy; the arguments of counsel *pro* and *con* are useful); 1827, *U. S. v. Moses*, 4 Wash. C. C. 726 ("the officer who apprehended the prisoner is not bound to disclose the name of the person from whom he received the information which led to the detection and apprehension"); 1884, *Vogel v. Gruaz*, 110 U. S. 311, 316, 4 Sup. 12 (*Worthington v. Scribner*, *supra*, followed, in holding a communication privileged when made to a State's attorney with reference to securing an indictment); 1902, *King v. U. S.*, 50 C. C. A. 647, 112 Fed. 988 (answers as to an accomplice-witness' immunity from prosecution under a promise from the government attorney, held not privileged as involving State secrets); 1816, *Morris v. Creel*, 2 Va. Cas. 49 (subpoena *d. t.* upon the clerk of the Executive Council, for "a certain memorial to the Executive," submitted "for public purposes, to enable the Council to determine upon the conduct of executive officers"; attachment refused, because the clerk ought not to produce without the Council's order).

² For this reason *Gray v. Pentland*, *supra*, seems erroneous.

reason for pretended concealment, and the privilege of secrecy would be merely an artificial obstacle to proof.³

(3) The privilege applies to communications to such officers only as have a *responsibility or duty* to prevent public wrongs, and not to officials in general.⁴

(4) The privilege applies only to communications concerning *third persons' misdoings*. For example, a person's own statement of his own *taxable property*⁵ or his own *unfinished inventions*,⁶ to the proper official, may be protected by some express statute (based, to be sure, on an analogous principle), but not as an informer's disclosure under this rule.

(5) Even where the privilege is strictly applicable, the *trial Court may compel disclosure*, if it appears necessary in order to avoid the risk of false testimony or to secure useful testimony; the reasons for this qualification have been thus set forth:

1863, *R. v. Richardson*, 3 F. & F. 693; murder by poison; a policeman, having testified to finding poison on a search of defendant's premises in consequence of information received, refused under police regulations to give the names of his informants; *Cockburn*, C. J., "ordered him immediately to answer the question, observing that in this case it was most material to the ends of justice that it should be stated"; and it then appeared that the informants were "two girls who were not called as witnesses for the prosecution"; the Chief Justice afterwards commenting strongly on the failure to produce them; the *Reporters* add: "Though in this particular case it was not so, yet it might be in similar cases that the information was given by or derived from the really guilty party with a view to divert suspicion from himself and fix it on an innocent person; or again, it might be (and in this case it was so) that the information was derived from the accused herself and was accompanied by a statement showing her innocence. . . . The effect of applying the supposed rule in such cases, it is manifest, would be to enable prosecutors or policemen to produce such portions of evidence as they might please, and to withhold the witnesses the whole of whose evidence might demonstrate the innocence of the accused. It is extraordinary that it should ever have been supposed that (in ordinary cases at all events) there ever was such a rule; and the latest writer on the subject, Mr. Best, entirely ignores it except in political cases. And it may deserve consideration whether ever in such cases it applies where the question is asked, not merely with a view to elicit the name for purposes of observation or credit, etc., but when (as in the present instance) the party who gave the information must have been in a position to disclose something further as to the facts of the case."

³ *R. v. Candy*, *supra*, illustrates this.

⁴ Note that a communication not protected by this privilege may be protected by the privileges for communications to an *attorney* (*ante*, § 2296) or to a *grand jury* (*ante*, § 2363), and *vice versa*.

⁵ 1900, *Re Joseph Hargreaves, Limited*, 1 Ch. 347 (financial misdoings of a corporation; the corporation balance-sheets, filed with the income-tax commissioner, were refused production by that officer, on the ground of public policy and also of the prohibition of disclosure in his oath required by the income-tax statute; held privileged from discovery on the facts; Wright, J.: "It seems to me it must be a matter of public concern that persons should have confidence in the secrecy of that procedure [of the Inland

Revenue Board]"); 1902, *Bowman v. Montcalm Circuit Judge*, — Mich. —, 89 N. W. 334 (in a proceeding to lower an assessment, the taxpayer may not compel the disclosure of the sworn assessment-lists of other persons; the statute providing that "no such statement shall be used for any other purpose" than enforcing the act).

⁶ U. S. Rev. St. 1878, § 4902 (caveat of an incomplete invention "shall be filed in the confidential archives of the office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof"); 1891, *Edison El. L. Co. v. U. S. El. L. Co.*, 45 Fed. 55, 59 (statute held not applicable to an ordinary application pending. Compare the rulings upon *trade secrets* (*ante*, § 2212).

1890, *Lord Esher, M. R.*, in *Marks v. Beyfus*, L. R. 25 Q. B. D. 494, 498: "I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to show the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail."⁷

§ 2375. (g) **Privilege for Secrets of State and Official Communications.** What, then, yet remains, in the shape of official privilege? Eliminating the foregoing principles, is there still a genuine testimonial privilege which is to protect public officers from the disclosure of certain kinds of facts or communications received through their official duties? Some such privilege undoubtedly exists. But the scope of that privilege has not yet been defined with certainty.

So far as the tenor of the precedents has gone, they may be grouped into several classes. First, several rulings (all of them in England), in actions against an official for *defamation contained in an official report*, privilege the defendant from producing the defamatory writing, *i. e.* practically accord to him an exoneration from liability by refusing the means of proof.¹ Next,

⁷ 1893, *Burton, J.*, in *Humphrey v. Archibald*, 20 Ont. App. 267, 269 (similar to *Marks v. Beyfus, supra*).

¹ 1816, *Wyatt v. Gore*, Holt 299, 302 (libel against the lieutenant-governor of Upper Canada, by the surveyor-general thereof; the defendant's consultation with the attorney-general, held privileged; *Gibbs, C. J.*: "No office of this kind could be executed with safety, if conversations between the governor of a distant province and his attorney-general, who is the only person upon whom such governor can lean for advice, were suffered to be disclosed"); 1820, *Home v. Bentinck*, 2 B. & B. 130, 134 (leading case; libel by a lieutenant-colonel, who was engaged in a mining company, against one of a court of inquiry appointed by the commander-in-chief to inquire into the plaintiff's conduct in the mining adventure and reporting his misconduct; the military secretary of the commander was held privileged, for the defendant, not to produce the minutes of the court of inquiry containing the alleged libel, nor was a copy obtained from the commander's office received; on the ground that the report was made under lawful orders, was confidential, and contained the names of witnesses and tenor of their evidence, and thus was privileged as an informer's report); 1822, *Earl v. Vass*, 1 Shaw 229, 236 (libel, for a letter by H. to the customs commissioners and the Treasury Office, in relation to the fitness of the plaintiff, nominee to a customs comptrollership; the commissioners were held privileged not to produce the correspondence; the application was *ex parte*, the opinion by L. C. Eldon, citing *Home v. Bentinck*; the Scotch Court had ordered production by a vote of 3 to 2); 1832, *Blake v. Pilfold*, 1 Mo. & Rob. 198 (libel of a post-office employee; defendant's letter of complaint to the secretary of the postmaster-general, offered as the libellous statement, held not privileged, because not writ-

ten by a public officer); 1860, *Beatson v. Skene*, 5 H. & N. 838, 853 (leading case; libel on an army-officer; letters to the Secretary of War and minutes of a court of inquiry, the Secretary of War having been subpoenaed to produce but having attended and objected on the ground of "prejudice to the public service," held privileged on that ground); 1863, *Gugy v. Maguire*, 18 Low. Can. 33, 49 (libel, for a communication to the Government by the defendant, a police superintendent; on a subpoena *d. t.* to the provincial secretary for the document, in order to prove the plaintiff's case, and on objection on the ground of "injury to the public service," production was held not compellable, because "the disclosure is to divulge *inter arcana imperii*, which no judge can dare to undertake"; *Mondelet, J.*, diss.; an absurdity was given to the ruling by the fact that the secretary had already sent a copy of the document to the plaintiff); 1864, *M'Elveney v. Connellan*, 17 Ir. C. L. 55, 69 (libel, for a report by defendant as inspector-general of prisons to the Lord Lieutenant of Ireland; motion to produce the report and the minutes of testimony taken before defendant, not granted, the Lord Lieutenant having stated that "in his opinion it would be injurious to the public service to produce the report"; the principle covering "official communications, or communications made to an official person in the discharge of a public duty, whenever it is plain that the duty in compliance with which they have been made requires an unreserved communication in relation to the matter of it"); 1869, *Stace v. Griffith*, L. R. 2 P. C. 420, 425, 428 (libel for a letter of complaint to the colonial secretary of St. Helena; Lord Chelmsford said *obiter* that in *Anderson v. Hamilton, infra*, n. 2, "the rule is correctly laid down"); 1873, *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, 267 (leading case; libel, for testimony against the plaintiff by the

several similar precedents (all but one in England), in actions against officials for *other kinds of wrong* done to the plaintiff by *official acts*, have protected the defendant from disclosure of his acts or his written admissions,—thus again indirectly effecting his exoneration in substantive law by refusing the means of proof.² Again, several precedents (representing England, the United States Federal Court, and two State Courts) have declared a *privilege of secrecy in general* for *official documents* in an officer's possession, particularly (so far as any definition has been attempted) for communications between officials; and in these precedents no question whatever of international politics or military defence was involved.³ Besides these, an occasional precedent has applied

defendant, his general, at a military court of inquiry; held, that the proceedings and testimony were privileged; the opinion confusing the two questions of defamation-privilege in the substantive law and evidence-privilege; 1888, *Hennessey v. Wright*, L. R. 21 Q. B. D. 509 (libel by the governor of Mauritius; dispatches, etc., between the governor or royal commissioner and the Secretary of State for Colonies or between the first two, directed by the Secretary of State not to be produced "on the ground of the interest of the State and of the public service," held privileged, approving *Beatson v. Skene*, *supra*; the personal appearance or affidavit of the Secretary to claim privilege not being here necessary). *Contra* (but practically repudiated by the foregoing cases): 1804, *Robinson v. May*, 2 J. P. Smith 3 (libel; defendant's letter of information to the Admiralty Commissioners, produced); 1859, *Dickson v. Wilton*, 1 F. & F. 419 (libel, for a letter by defendant as colonel reporting to the field-marshal about the plaintiff, and inclosing the report of a court of inquiry and other documents; "a clerk from the War Office was called to produce the letter, but submitted on behalf of the Secretary of War whether the proceedings ought to be produced"; *Campbell, L. C. J.*: "You must produce the letter," and both letter and documents were produced; that the Secretary did not attend to object personally is not mentioned as the ground of the ruling, and the distinction of this ruling on that ground in subsequent decisions does not affect the meaning of this ruling when made).

² 1816, *Anderson v. Hamilton*, 2 B. & B. 156, note (action for imprisonment against the Governor of Heligoland; correspondence between the Governor and the Secretary of State for Colonies, with the plaintiff's letter to the Secretary giving rise to the correspondence, held privileged, first, because "it might be pregnant with a thousand facts of the utmost consequence respecting the state of the government, the connection of parties, the state of politics, and the suspicion of foreign powers with whom we may be in alliance"; secondly, because no extract material alone to the case could be received, "for the plaintiff must be entitled to the whole or none"—a ruling absurd in two respects, first, because it was not shown or even claimed that international secrets were in fact mentioned in the letters, and secondly, in that even the innocuous and separable parts were held inadmis-

sible); 1817, *Cooke v. Maxwell*, 2 Stark. 183 (action for arrest of person and destruction of property in Africa; plea, that the plaintiff was illegally trading in slaves and defendant had acted as governor under the law; to prove the defendant's responsibility, the plaintiff called the military officer who had acted, and asked whether the defendant had given him the orders; upon objection that public policy prevented disclosure, Bayley, J., apparently agreed, but allowed oral testimony to the fact of the order; "the law will not work injustice"; this was indeed beating the devil around a stump); 1875, *The Bellerophon*, 44 L. J. Adm. 5 (action for injury by collision with a Government vessel; its commander's report to the Admiralty Office, held privileged, following *Beatson v. Skene*, *supra*). The following ruling is practically of this sort: 1877, *Hartnuff's Appeal*, 85 Pa. 433 (grand jury's subpoena to the Governor, Secretary, Adjutant-General, General, and Major, to testify as to a riot; on application for attachment, the respondents answered that their knowledge was obtained by official communications and its disclosure would be "detrimental to the public service"; the testimony was held privileged, approving *Beatson v. Skene*; the opinion inextricably confuses the present subject with the privilege against attendance; *Agnew, C. J.*, and *Sterrett, J.*, diss., quoted *ante*, § 2369).

³ *England*: 1723, *Bishop Atterbury's Trial*, 16 How. St. Tr. 495 (the Crown having obtained treasonable letters, imputed to the defendant, by intercepting the mails under a statute, it was resolved to be "inconsistent with the public safety," to allow any inquiry as to the special warrants issued for the purpose or the methods used in obeying them; many Lords dissenting; it was also resolved that a clerk of the Secretary's office, asked as to the skill of a fellow-clerk in unsealing letters and re-sealing with counterfeit seals, should not be examined "touching any transaction any way relating to the government, which came to his knowledge by reason of his being employed in the secretary's office"); *ib.* pp. 494, 543, 587, 629, 672 (the key by which Crown detectives deciphered alleged cipher letters was not allowed to be disclosed, as "tending to the discovery of their art," and thus destroying their usefulness); 1839, *R. v. Russell*, 7 Dowl. Pr. 693 (papers "of a public nature and in the possession of Lord John Russell in his

the privilege to refusing disclosure of matters involving "secrets of State" in *military or international affairs*.⁴ Furthermore, the supposed rule of these

public character as Secretary of State," held not producible); 1841, *Smith v. East India Co.*, 1 Phill. 50, 11 L. J. Ch. 71, L. C. Lyndhurst (bill for freight; correspondence on the subject between defendant's directors and the royal commissioners, held privileged on account of the company's governmental duties; without such a privilege "the effect would be to restrain the freedom of the communications and to render them more cautious, guarded, and reserved"); 1856, *Wade v. East India Co.*, 25 L. J. Ch. 345, 8 DeG. M. & G. 182, 187, 190 (bill for delivery of notes of Governor-General of India; discovery refused of political communications between defendant and its Indian governments; privilege held to cover "State papers, dispatches, minutes, or documents of any such description which relate to the carrying on of the government and are connected with the transaction of public affairs"; placed on the usual ground of the possibility of their affecting "the question of peace or war"; decided by LL. J. Turner and Knight-Bruce, overruling the contrary decision of Romilly, M. R., who had said that "official documents in many cases are privileged, but in some cases they are not"); *New Jersey*: 1871, *Thompson v. R. Co.*, 22 N. J. Eq. 111 (subpoena *d. t.* upon the Governor for the engrossed copy of a private statute; held that he might withhold "any paper or document in his possession, or any part of it, if in his opinion his official duty requires him to do so"; here the Governor did place the document at the Chancellor's disposal); *United States*: 1800, *U. S. v. Cooper*, Whart. St. Tr. 659, 662 (libel on the President; production of unspecified official documents, not compelled); 1872, *U. S. v. Six Lots of Ground*, 1 Woods 234, 236 (correspondence between the attorney-general and a district attorney as to dismissing a writ of error, held confidential); 1895, *Re Huttman*, 70 Fed. 699 (Federal deputy collector of internal revenue not compellable to testify in a State court to statements made by an applicant for a liquor-dealer's tax-stamp, the statements being made for record in the office; on the ground that a State court in a prosecution under a State law has no jurisdiction to compel a Federal officer's disobedience to a Federal regulation, equivalent to law, forbidding such disclosure; on this point compare the principle of jurisdiction, *ante*, § 6); 1896, *Re Hirsch*, 74 id. 928 (unlawful liquor-selling by C.; the payment of a liquor-tax being admissible to show an intent to sell liquor, the deputy-collector of Federal internal revenue was ordered to produce a document in his custody in which C. applied for a license and declared his intention of selling liquor; held, that no privilege existed, in the absence of statute, requiring the secrecy of such declarations); 1897, *Re Weeks*, 82 id. 729 (habeas corpus for a U. S. collector imprisoned for contempt in refusing to produce evidence for the Court of Vermont as to the payment of a liquor-tax by a defendant in that court; on being asked whether X. had paid him for obtaining a tax-

stamp, he replied that he could not remember but had the means of ascertaining, "whereupon he was asked to ascertain and state the fact, which he refused to do because his means of knowledge of it had come to him solely in his official capacity," and because his superior's instructions forbade disclosure; held, that although by law the official records were open to public inspection, the official could not be compelled to give evidence; "the Federal government . . . cannot be required to provide evidence for the State Courts"); 1899, *Re Comingle*, 96 id. 552 (a Treasury regulation forbade revenue-collectors from producing records or furnishing copies; held, in a State action for taxes against a distiller, that his reports to the Federal collector were privileged not to be disclosed by the latter, on the grounds partly that the State could not control a Federal official, partly that the document was an official "quasi-confidential" document designed solely to aid in the collection of Federal revenue); 1900, *Boske v. Comingle*, 177 U. S. 459, 20 Sup. 701 (the preceding ruling affirmed on appeal); 1903, *Re Lamberton*, Ark. Dist., 124 id. 446 (deputy collector of internal revenue, held privileged from testifying whether he had seen a Federal license to sell liquor public posted in a certain house; applying the principle of *Boske v. Comingle*); *Vermont*: 1839, *Redfield, J.*, in *Clark v. Field*, 12 Vt. 485 ("I apprehend that the true doctrine, in regard to requiring a witness to disclose State secrets, is that the Court will exercise its discretion in each particular case"); 1902, *Nye v. Daniels*, 81 id. 75, 53 Atl. 150 (a postmaster held privileged not to disclose whether the plaintiff sent a registered letter, on the theory that a postal regulation prohibiting such a disclosure had the force of law; the fallacy of the Court appears in the proviso of the U. S. Rev. St. § 161, authorizing such regulations provided they be "not inconsistent with law").

For rulings under statutes concerning *assessment-lists* and *unfinished inventions*, see *ante*, § 2374.

⁴ 1817, *R. v. Watson*, 2 Stark. 116, 148 (sedition; a clerk of the War department, after testifying that a plan found in defendant's possession was a plan of the interior of the Tower of London, was asked on cross-examination whether another plan, printed and purchasable, was a correct plan of the Tower, but "the Court held that it might be attended with public mischief to allow an officer of the Tower to be examined as to the accuracy of such a plan"); 1807, *Aaron Burr's Trial* (cited *post*, § 2376; here the correspondence desired might have involved international relations with Spain and France); 1875, *Totten v. U. S.*, 92 U. S. 105 (no action can be maintained on a contract with the Government for secret service as a spy during war; "the secrecy which such contracts impose precludes any action for its enforcement").

foregoing precedents has been embodied in broad form in several statutes, by legislators who perhaps did not perceive the possible scope of their phrasing.⁵ To these classes must be added the rulings refusing to compel disclosure of the *votes or speeches of a member of the House of Commons* or of Congress,⁶ or to compel disclosure of the *proceedings of the House of Commons*; ⁷ the former being in effect (like the rulings in libel actions) virtually an indirect enforcement of the member's non-liability for his utterances, and the latter resting merely on a traditional fiction of secrecy once much cherished by the British House. Finally, there are a few rulings (none of them important, except perhaps *Marbury v. Madison*) in which the existence of a *privilege* in the large scope predicated by the modern English rulings is *negated*.⁸

⁵ *Ont. Rev. St. 1897, c. 73, § 27* ("Where documents in the official possession, custody, or power of a member of the Executive Council or the head of a department of the public service of this province," and the officer having the documents is called as a witness, "he shall be entitled, acting herein by the direction and on behalf of such member of the Executive Council or head of the department, to object to produce the documents on the ground that they are privileged"; the objection to have the same effect as if the superior officer had made it); *P. E. I. St. 1889, § 29* (like *Ont. R. S. 1897, c. 73, § 27*); *Cal. C. C. P. 1872, § 1881, par. 5* ("A public officer cannot be examined as to communications made to him in official confidence, when the public interests would suffer by the disclosure"); *Colo. Annot. St. 1891, § 4824* ("A public officer shall not be examined as to communications made to him in official confidence, when the public interests, in the judgment of the Court, would suffer by the disclosure"); *Ga. Code 1895, §§ 3947, 5288* ("official persons" cannot be called on "to disclose any State matters of which the policy of the State and the interest of the community require concealment"); *Ida. Rev. St. 1887, § 5953* (like *Cal. C. C. P. § 1881*); *Ia. Code 1897, § 4609* (like *Cal. C. C. P. § 1881*); *Minn. Gen. St. 1894, § 5662* (like *Cal. C. C. P. § 1881*); *Mont. C. C. P. 1895, § 3163* (5) (like *Cal. C. C. P. § 1881*); *Nebr. Comp. St. 1899, § 5909* (like *Cal. C. C. P. § 1881*); *Nev. Gen. St. 1885, § 3407* (like *Cal. C. C. P. § 1881*); *N. D. Rev. C. 1895, § 5703* (like *Cal. C. C. P. § 1881*); *S. D. Stats. 1899, § 6544* (like *Cal. C. C. P. § 1881*); *Utah Rev. St. 1898, § 3414* (like *Cal. C. C. P. § 1881*); *Wash. C. & Stats. 1897, § 5994* (substantially like *Cal. C. C. P. § 1881*).

⁶ 1804, *Plunkett v. Cobbett*, 5 Esp. 136 (libel on plaintiff's conduct in parliament in Ireland; a witness called to prove the plaintiff's expressions in parliament, held privileged from disclosing the tenor of the speeches, though not from stating the fact of speaking there); 1852, *Chubb v. Salomons*, 3 C. & K. 75 (Pollock, C. B., after consulting the other judges of the Exchequer, refused to compel a member of the House of Commons to relate whether the defendant voted in the House, without the permission of the House that he might testify; an

officer of the House was then examined, the House having given permission); 1822, *Law v. Scott*, 5 H. & J. 438, 458 (slander; testimony to a vote in the Senate rejecting the plaintiff's nomination; question apparently not decided).

⁷ 1818, *Commons Journal*, vol. 73, p. 389, May 26, quoted in 3 C. & K. 77 (in consequence of the case of *R. v. Mercer*, 2 Stark. 366, in which the shorthand reporter of the House had been examined without its leave, "Resolved, that all witnesses examined before this House or any committee thereof are entitled to the protection of this House in respect of anything that may be said by them in their evidence"); 1839, *Stockdale v. Hansard*, 9 A. & E. 1, 212, per Patteson, J. (Commons proceedings are in theory secret until the House permits publication); 1868, *Wason v. Walter*, L. R. 4 Q. B. 73, 95, *semble*, per Cockburn, C. J. (similar). Compare the following: *Can. Rev. St. 1886, c. 11, §§ 5-8*.

⁸ *Eng. : 1775, Maharajah Nundocomar's Trial*, 20 How. St. Tr. 1057 (records of the Governor and Council of the East India Company, required to be produced, though the "safety of the State" was urged in opposing production); 1813, *Lee v. Birrell*, 3 Camp. 337 (defendant for penalty; to prove the defendant a collector of the property tax, the commissioners' clerk was summoned to produce the records; on objection that he had taken an official oath of secrecy, L. C. J. Ellenborough, said that the giving of evidence in court was an implied exception to the oath, and compelled production); *U. S. : 1843, Capt. McKenzie's Case*, 2 Pars. Eq. Cas. 227, Pa. Com. Pl. (letters rogatory in an action for libel; testimony by officers of a court-martial to the votes given for and against the plaintiff therein charged, held not privileged; the Court, however unwilling "to establish a precedent which might in any way weaken the naval arm of the government, saw in all this no legal bar to the adduction of evidence to which a citizen is entitled under the laws"); 1803, *Marbury v. Madison*, 1 Cr. 137, 143 (mandamus to the Secretary of State to deliver commissions to justices of the peace; the commissions were alleged to have been duly made out and sealed, but unlawfully withheld; clerks of the department of State being summoned to prove the fact, they claimed a privilege not to disclose the

It may be said, then, that the extent to which this privilege has gone (beyond "secrets of State" in the military or international sense) is by no means clearly defined; and, furthermore that it has not become a matter of precedent or even of debate in more than a few jurisdictions. Its scope and bearing are therefore open to careful examination in the light of logic and policy. What are the reasons which have been advanced for this privilege, and how do they bear testing? They are sufficiently represented in the following passages:

1640, *Earl of Strafford's Trial*, 3 How. St. Tr. 1427, 1441; Parliament was now striking at Charles I by prosecuting his chief political adviser; Sir Henry Vane having testified, as a member of the King's Council, that the defendant Strafford "did say at the Council Board" that he would help his Majesty Charles I with force to reduce the kingdom, if Parliament remained obstinate, Lord *Clarendon* remarks: "The ruin that this last act [of producing this testimony] brought to the King was irreparable; for . . . it was matter of horror to the counsellors to find that they might be arraigned for every rash, every inconsiderate, every imperious expression or word they had used there; and so made them more engaged to servile applications. It banished forever all future freedom from that board and those persons from whom his Majesty was to expect advice in his greatest streights; all men satisfying themselves 'that they were no more obliged to deliver their opinions there freely, when they might be impeached in another place for so doing'; and the evincing this so useful doctrine was without doubt more the design of those grand managers [of the prosecution] than any hope they had of receiving further information thereby."

1820, *Dallas, C. J., Home v. Bentinck*, 2 B. & B. 130, 162: "What is the ground upon which these cases [of informers] stand, except it be the ground of danger to the public good, which would result from disclosing the sources of such informations? For no person would become an informer if his name might be disclosed in a court of justice and if he might be subjected to the resentment of the party against whom he had informed. Does not this reasoning apply closely to the case now before us — [a report by a court of inquiry to a commander-in-chief] — on the broad rule of public policy and convenience, that these matters, secret in their natures and involving delicate inquiry and the names of persons, stand protected? Now what is this proceeding but consulting with those who are bound to give the advice which is required as to the exercise of a public duty? And whether the case be that of the attorney-general of a province advising a governor, or an officer present at a court of inquiry directed to be held by the commander-in-chief, it is equally a case of advice and information given for the regulation of a public officer."

1860, *Pollock, C. B., in Beatson v. Skene*, 5 H. & N. 838, 853: "We are of opinion that it cannot be laid down that all public documents, including treaties with foreign powers and all the correspondence that may precede or accompany them, and all communications to the heads of departments, are to be produced and made public whenever a suitor in a court of justice thinks that his case requires such production. It is manifest, we think, that there must be a limit to the duty or the power of compelling the production of papers which are connected with acts of State. As an instance, we would put the case of a British minister at a foreign Court writing in that capacity a letter to the Secretary of State for Foreign Affairs in this country, containing matter injurious to the

transactions of the office, and the Attorney-General being summoned for the same purpose made the same claim; held that they must answer, the facts not being confidential; the Court said, "they had no doubt he ought to answer; there was nothing confidential required to be dis-

closed. If there had been, he was not required to answer it. . . . But the fact whether such commissions had been in the office or not could not be a confidential fact; it is a fact which all the world have a right to know"; good argument by Mr. Lee).

reputation of a foreigner or a British subject; can it be contended that the person referred to would have a right to compel the production of the letter in order to take the opinion of a jury whether the injurious matter was written maliciously or not? We are of opinion that, if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice."

1888, *Field, J.*, in *Hennessy v. Wright*, L. R. 21 Q. B. D. 509, 512: "There are two aspects of this question. First, the publication of a State document may involve danger to the nation. If the confidential communications made by servants of the Crown to each other, by superiors to inferiors or by inferiors to superiors, in the discharge of their duty to the Crown, were liable to be made public in a court of justice at the instance of any suitor who thought proper to say '*fiat justitia ruat cælum*,' an order for discovery might involve the country in a war. Secondly, the publication of a State paper may be injurious to servants of the Crown as individuals; there would be an end of all freedom in their official communications if they knew that any suitor, that as in this case any one of their own body whom circumstances had made a suitor, could legally insist that any official communication, of no matter how secret a character, should be produced openly in a court of justice."

Of these reasonings three things are to be said:

(1) The brunt of the argument is that *an official should be secured from liability* based on his official communications made in the course of duty. Nobody can dispute this general principle. But it signifies nothing for the law of evidence. It signifies an exoneration from tortious or criminal liability. Whether and how far such exoneration should be conceded is a question of substantive law, and is now solved by that law liberally in favor of officials. But wherever that law has declined to concede an exoneration, and has predicated liability, all this reason for protection ceases, by hypothesis. It is a mockery to reserve, against righteous claims, a privilege of testimonial secrecy. This much seems plain. All the argument based upon hardship to officials may therefore at once be conceded; but for the purpose of testimonial privilege all such cases are irrelevant, being duly safeguarded by other means.

(2) The remainder of the argument consists in invoking secrecy for *acts of pending international negotiations or military precautions against foreign enemies*. This, too, may be conceded. There ought to be a protection for "secrets of State," in this narrow sense. But, this done, what remains? In only three or four of the precedents has there been even a pretence that the matters actually preserved from disclosure concerned international facts of negotiation or defence. If they do not, then this reason is insufficient; for it is vain to claim secrecy on the ground that something else might have been asked for, which is in fact not asked for.

(3) The question is then reduced to this, Whether there are any matters of fact, in the possession of officials, concerning *solely the internal affairs* of public business, civil or military, which ought to be privileged from disclosure when material to be ascertained upon an issue in a court of justice? Most emphatically, there are not. In any community under a system of representative government and removable officials, there can be no facts

which require to be kept secret with that solidity which defies even the inquiries of a court of justice. "To cover with the veil of secrecy," said Patrick Henry,⁹ "the common routine of business, is an abomination in the eyes of every intelligent man and every friend to his country." Such a secrecy cannot even be legitimately desired. It cannot be desired for any but the purposes of partisan politics or personal self-interest. The responsibility of officials to explain and to justify their acts is the chief safeguard against oppression and corruption. Whether it is the relations of the Treasury to the Stock Exchange, or the dealings of the Interior Department with government lands, or the orders of the War Department in colonial dependencies (and in all of these departments, in the last generation, instances susceptible of such a claim of privilege have occurred), the facts must constitutionally be demandable, sooner or later, on the floor of Congress. To concede to them a sacrosanct secrecy in a court of justice is to attribute to them a character which for other purposes is never maintained, — a character which appears to have been advanced only when it happens to have served the interests of some individual to obstruct investigation into facts which might fix him with a just liability.

It is urged, to be sure (as in *Beatson v. Skene*), that the "public interest must be considered paramount to the individual interest of a suitor in a court of justice." As if the public interest were not involved in the administration of justice! As if the denial of justice to a single suitor were not as much a public injury as is the disclosure of any official record! When justice is at stake, the appeal to the necessities of the public interest on the other side is of no superior weight. "Necessity," as Joshua Evans said,¹⁰ "is always a suspicious argument, and never wanting to the worst of causes." What is the necessity for secrecy in such matters? To justify a privilege, it must be, on settled principles (*ante*, §§ 2192, 2285), a secrecy indispensable to induce freedom of official communication or efficacy in the transaction of official business, and it must further be a secrecy which has remained and would have remained inviolable but for this compulsory disclosure. In how many transactions of official business is there ordinarily such a secrecy? After guaranteeing to official communications and acts an immunity from liability to civil or criminal consequences, and after further eliminating those acts and communications which are in no sense secret from their inception, what remains of real and intrinsic secrecy of transaction? If there arises at any time a genuine instance of such otherwise inviolate secrecy, let the necessity of maintaining it be determined upon its merits. But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy, has commonly been only a canting appeal to a fiction. It seems to lend itself naturally to mere sham and evasion. The leading case of *Beatson v. Skene* is a sufficient example, *ex quo disce omnes*. The plaintiff, Skene, was a general of cavalry; at the close of the Crimean war he was superseded in command, and resigned; an investigation into the state of the corps was made by General Shirley,

⁹ Elliot's Debates, III, 170.

¹⁰ Arguing in *Home v. Bentinck*.

whose secretary and commissioner the defendant Beatson was; the defendant reported to his superior that the plaintiff had stirred up mutiny in the corps, and afterwards so testified as a witness before a military court of inquiry held to investigate General Shirley's alleged libel on the plaintiff; for this testimony the plaintiff's suit for libel was brought, and he sought production, in his proof, of the court's minutes of the defendant's testimony, and of the plaintiff's own letters to the Secretary of War. Now a plea of privilege in the substantive law might immediately have disposed of the matter. Since it did not, the case placed the defendant in the position of having uttered an unjustifiable libel on the plaintiff. To refuse the production of the desired documents was therefore virtually to deprive the plaintiff of his means of proving a just claim. And yet to protect the defendant, as the Court did, by placing this refusal on the ground of the secrecy of State affairs was to lay hold of the merest fiction,—first, because the topic involved was only one of the plaintiff's personal conduct in his own cavalry corps; next, because the whole subject and its details had long and notoriously been the theme of military and public gossip, and was in its inception known to scores of persons; and, again, because the very Court which appealed to this inviolable secrecy for withholding the notes of the testimony permitted a person who had been present at the military court to prove publicly the same oral testimony of the defendant which was recorded in the suppressed minutes! With such pharisaic shams and resounding incongruities is the rule replete in almost every instance.¹¹ Rested upon such fictions, and applied in such a spirit, it tends to become merely a technical advantage on the side of that party who happens to be interested as an official and to be in possession of important proof. Let John Doe sue a neighbor for encroaching on his boundary line, and he may compel the neighbor to produce the documents which vindicate Doe's just claim. But let him sue a colonial officer of the Philippine Islands for exploiting his land or imprisoning his person,—let him sue a postmaster for destroying his business by refusing the use of the mails, or a revenue collector for the illegal impounding of goods,—let him be the complainant against any government official for any oppressive conduct, and the same discovery of the facts is refused by law, provided only that the wrongdoer is sufficiently strong in interest with his superiors to induce them to invoke the privilege of official secrecy. The time has not yet come, with us, when such deliberate combination for the oppression of citizens by officials is rife. But the possibilities of such abuse are plainly latent in this supposed privilege. There is needed only the willingness to exercise them. The liquor-tax cases show how simple the expedient would be, *mutatis mutandis*, in a thousand cases, and how effective as an obstruction to justice and a refuge for cowardly oppressors. Rules of law much more innocent in appearance have been made to serve evil purposes upon a large scale. "No nation" (in the words of a great American

¹¹ *E. g.*, *Gugy v. Maguire*, *Hartranft's Appeal*, and other cases *ante*, especially those of the Federal liquor-tax receipts.

jurist¹²), “ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses which were imperceptible only because the means of publicity had not been secured.” The menace which this supposed privilege implies to individual liberty and private right will justify us in repudiating it before it is too solidly entrenched in precedent. More than once have plain warnings been given us of the potency of its abuse for partisan and selfish ends:

1807, Mr. *Botts*, arguing, in *Aaron Burr's Trial*, Robertson's Rep. II, 517: “I can never express, in terms sufficiently strong, the detestation and abhorrence which every American should feel towards a system of State secrecy. It never can conduce to public utility, though it may furnish pretexts to men in power to shelter themselves and their friends and agents from the just animadversion of the law, — to direct their malignant plots to the destruction of other men while they are themselves secure from punishment. In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of the United States have a right to know every public act, every thing that is done in a public way by their public functionaries. They ought to know the particulars of public transactions in all their bearings and relations, so as to be able to distinguish whether and how far they are conducted with fidelity and ability; and with the exception of what relates to negotiations with foreign nations, or what is called the diplomatic department, there ought to be nothing suppressed or concealed. . . . I will again predict that, if a secret inquisitorial tribunal be established by your decision now, . . . if you determine that we be deprived of the benefit of important written or oral evidence by the introduction of this State secrecy, you lay, without intending it, the foundation for a system of oppression. If these things be established, to go down to posterity as precedents, the inevitable consequences will be that, whenever any man in the United States becomes an object of the vengeance or jealousy of those in power, he may easily be ruined. A wicked executive power will have nothing to do to effect his destruction but to foment divisions in this country, to encourage and excite accusations by its officers, to deny the use of all public documents that may tend to the justification of the accused, or to render the attainment of exculpatory evidence dependent on the arbitrary whim of its prosecuting officers, and he will be condemned to sink without the smallest effectual resistance.”

1863, *Mondelet, J.*, in *Gugy v. Maguire*, 13 Low. Can. 33, 38 (upon a Provincial Secretary's refusal to produce the report of a superintendent of police); “It has been pretended, as in the case of *Home v. Bentinck*, that it is necessary for the interest of the public that secrecy should be had in such and similar matters. . . . I cannot, I ought not, for a moment, as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine, — a doctrine which prostrates to the ground that liberty, that protection to life, honour, property, and to civil and religious liberty, which this country has so much right to boast of, too valuable to be thus thrown away and scattered to the four winds of Heaven! A doctrine which reduces the judge on the Bench to an automaton, who, like the statue of Don Juan, will bend at the bidding of any reckless politician, whatever shade of politics or party spirit it may be his misfortune to be tainted with, or of any unprincipled member of society, whoever he is or may be, who is desirous of, or has interest in being screened, or of screening others, from the responsibility his misdeeds have subjected them to. If that doctrine be law, or rather, were law, it would be appalling. It would be such that no one would feel himself secure. I cannot, I must not assent to it. It is not law. It is unconstitutional. It is tyrannical. It is monstrous. And it must more glaringly appear so, when we come to reflect that an

¹² Edward Livingston, Works, I, 15.

attempt is made to give it currency, and to fasten it on the judges of the land, under constitutional responsible government. Such a pretension reminds me of what was so often done in France, under the old régime, by means of the maxim then looked upon as sacred by the government. The following will, much better than I could myself, illustrate this branch of the subject : ‘ Vainement les Parlemens et les autres Cours souveraines élevaient une voix courageuse contre cet intolérable abus ; la Cour ne répondait qu’en lançant de nouvelles lettres de cachet, ou par cette maxime, “ qu’il ne faut pas soumettre à l’inspection des tribunaux le secret de l’administration et l’exécution des ordres du roi ” ; d’où l’on concluait qu’il n’existait aucun recours contre les ordres donnés par ses ministres.’ . . . I never can, and I trust never shall acknowledge as a true one, the paradoxical proposition, that under the protection of the freest and best constitution in the world, and the most solemn imperial statute guaranteeing our rights, an action may be instituted against any one who has caused damage to his fellow subject, but that it will be in the power of a secretary, or of any member of the government, to deprive the injured of the evidence which he may adduce to entitle him legally to a verdict or a judgment. . . . [It is] a dangerous, monstrous pretension.”

1877, *Agnew, C. J.*, in *Hartranft's Appeal*, 85 Pa. 433, 458 : “ There were fearful crimes committed on the 21st and 22d of July. These are the undoubted subjects of judicial inquiry in the mode prescribed by law, — to wit, through a grand jury. In that unknown and vast multitude of citizens and soldiers, who were guilty ? Who were innocent ? By the 22d section of the Declaration of Rights, it is declared that the ‘ military shall in *all cases*, and *at all times*, be in *strict subordination* to the civil power.’ The military took many lives — the multitude some. Did the military act under the authority of the civil power ? This is one of the first points of inquiry by a grand jury, for it involves the question, whether their acts were murder, manslaughter, excusable or justifiable homicide. Thus the evidence of civil authority becomes essential to the inquiry. Did the Governor, as commander-in-chief, command their presence, and aid in quelling the violence of the mob ? Or was his authority assumed by unauthorized persons ? These are questions which the Governor alone, as a witness, might be able to answer satisfactorily, by competent testimony in a common-law proceeding. They are not State secrets, but acts of authority in their very nature public, and cannot be concealed from the inquiry of the law. The rights of life and public safety are too sacred to be subordinated to any right to conceal the authority by which they are destroyed or jeopardized. If the executive authority was duly given, he neither can nor ought to withhold the knowledge which acquits of crime the military acting under his own orders. Indeed, from the character of our excellent Governor, he would not for a moment refuse to come to their rescue, if he believed his duty demanded it. On the other hand, if his authority was unlawfully assumed, or was simulated, or was exercised at the bidding of persons without right — an inference which his absence in California very naturally raises — and the military have been involved in an unlawful act, his duty and the rights of the people demand his testimony, that the parties who have thus misled them may be reached. This is no State secret as to them, but its concealment is a crime against society, which no one who knows the Governor would attribute to him, if aware of his duty. . . . In every respect of personal and official duty, the State has a right to the disclosure. A contrary doctrine strikes at the essential and fundamental principles of a free government as set forth in the Declaration of Rights.”

§ 2376. **Same: Who determines the Necessity for Secrecy.** So far as the privilege has any legitimate scope, it raises the question how the existence of the facts which make it applicable is to be determined. If it extends only (as its just limits prescribe) to matters involving international negotiations or military precautions against a foreign enemy, the presence of such matters in the documents or communications sought to be disclosed must by some

authority be predetermined, before the privilege can be deemed applicable. If it extends to the larger scope indicated by the English rulings, still the existence of a necessity for secrecy must be in each instance declared. Who shall make this determination? Obviously, and by analogy with other privileges, the Court (*ante*, §§ 2193, 2271, 2322, *post*, § 2550). But the judge, urges the learned incumbent of that office, in *Beatson v. Skene*,¹ "would be unable to determine it without ascertaining what the document was," — surely an unavoidable process; "which inquiry," however, it is added, "cannot take place in private," — a singular assumption. It would rather seem that the simple and natural process of determination was precisely such a private perusal by the judge. Is it to be said that even this much of disclosure cannot be trusted? Shall every subordinate in the department have access to the secret, and not the presiding officer of justice? Cannot the constitutionally coördinate body of government share the confidence? It is ludicrous to observe a chief magistrate, as in *Beatson v. Skene*, solemnly protesting his incompetence to share the knowledge of a fact which had never been secret at all and had for months been spread abroad by the hundred tongues of scandal. By the doctrine of judicial notice, to be sure, he could not judicially know anything that was not already notorious; by a sarcastic perversion of that doctrine, the perusal of the documents in *Beatson v. Skene* might have been urged upon the Court.

The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to designing officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the judge:

1807, *Aaron Burr's Trial*, Robertson's Rep. I, 121, 127, 186, 255; II, 536, treason; a subpœna *duces tecum* was issued by Chief Justice Marshall to President Jefferson, to attend and bring certain correspondence with General Wilkinson said to be material to the defence; as to the argument that reasons of State might forbid the disclosure, *Marshall, C. J.*, said: "There is certainly nothing before the Court which shows that the letter in question contains any matter the disclosure of which would endanger the public safety; . . . if it does contain any matter which it would be imprudent to disclose, which it is not the wish of the Executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will of course be suppressed. . . . Everything of this kind, however, will have its due consideration on the return of the subpœna. . . . I admit, in such a case, much reliance must be placed on the declaration of the President; . . . perhaps the Court ought to consider the reasons which would induce the President to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defence. The President may himself state the particular reasons which may have induced him to withhold a paper, and the Court would unquestionably allow their full force to those reasons."² President

¹ *Ante*, § 2375, note 1.

² He also held (II, 513, 536) that the Presi-

dent's delegation of discretion to the prosecuting counsel was not lawful.

Jefferson, while forwarding the desired letter, added the following: "With respect to papers, there is certainly a public and private side to our offices. To the former belong grants of land, patents for inventions, certain commissions, proclamations, and other papers patent in their nature. To the other belong mere executive proceedings. All nations have found it necessary that for the advantageous conduct of their affairs some of these proceedings at least should remain known to their executive functionary only. He, of course, from the nature of the case, must be the sole judge of which of them the public interest will permit publication."

1863, *Mondelet, J.*, in *Guy v. Maguire*, 13 Low. Can. 33, 38 (upon a provincial secretary's refusal to produce the report of a superintendent of police): "[Conceding that the privilege may exist,] are you to compare the discretion, the unbiassed mind, the position of the judge who is alike independent of the Crown and of the People, who is free from party spirit, who knows or should know no one, to the biassed mind — naturally, necessarily, biassed mind — of a politician, not independent as the judge is, but dependent upon a party, who knows or must know, the contending parties, and may have the most cogent reasons for supporting one party, in preference to another; who has to bear, and does bear the external pressure which the judge is or should be inaccessible to; whose interest it may be, under the flimsy pretence, under the transparent veil of pretended public interest, to screen some petty minion in office? The comparison cannot hold for a moment. In the case of the judge, you have sacred guarantees; in that of a politician, you have none. External pressure will curb down the politician, whilst you will behold the judge more erect than ever, calmly and firmly resisting and baffling its baneful influence. Clearly then, manifestly, should it be left to the judge on the Bench, in his discretion, to determine the question, instead of allowing a secretary, or any member of the government, to silence him, to interfere with the administration of justice, and to become the judge? . . . This very case, this very flimsy, unfounded pretence, this unjustifiable refusal of the honorable secretary to prove the letter, which, through the instrumentality of the assistant provincial secretary, one of the acknowledged channels of communication with the department of the secretary, and actually, in most cases of importance, the medium of such communication, has been made public, shews up, in its true light, the danger, were it even legal or constitutional (which it is not), of the exorbitant pretension now set up. The honorable Judge, who presided at the trial, had it in his power, and at a mere glance at it, with his well known clear mind and sound judgment, had he thought proper to do so, might have seen through the transparency of the objection raised by the honorable secretary and the respondent. Such a letter, if proved, injurious to the public service! In what respect? How could the fact that the respondent had libelled the appellant, supposing he has, be injurious to the public service? . . . It is manifestly laying down the rule, that a secretary, or other public functionary, member of the government, will be at liberty to say that white is black, and that he must be believed." ³

³ What the English ruling to-day would be is uncertain: 1860, *Beatson v. Skene*, 5 H. & N. 838, 853 (the executive officer's claim of injury to public interests determines the recognition of the privilege; unless perhaps where he merely sends a subordinate to make objection without such explanation; *Martin, B.*, diss.); 1888,

Hennessy v. Wright, L. R. 21 Q. B. D. 509, 515, 521 (disapproving *Beatson v. Skene*, on this point); 1884, *Bradley v. McIntosh*, 5 Ont. 227, 232, 236 (the officer determines). Compare some remarks by the judges in *Re Joseph Hargreaves, Limited*, 1900, 1 Ch. 347.

TOPIC B (*continued*): PRIVILEGED COMMUNICATIONS.

CHAPTER LXXXIV.

SUB-TOPIC VI: COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.

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| <p>§ 2380. History and Policy; Statutes.
 § 2381. (a) Confidentiality of Communications; (1) Implied Confidence; Burden of Proof; Third Persons' Testimony.
 § 2382. Same: (2) Professional Character of the Consultation.
 § 2383. (b) Communications Necessary for Prescription.
 § 2384. (c) Information, Active and Passive.
 § 2385. (d) Criminal Cases; Malpractice.
 § 2386. (e) Whose is the Privilege; Claim of Privilege; Inference from Claim.</p> | <p>§ 2387. (f) Termination of the Privilege; Death.
 § 2388. Same: Waiver, in general; Express and Implied Waiver.
 § 2389. Same: Waiver by Bringing Suit; by Testifying; by Former Waiver.
 § 2390. Same: Waiver by Calling the Physician; by using "Proofs of Death."
 § 2391. Same: Waiver by Deceased Patient's Representative.</p> |
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SUB-TOPIC VII: COMMUNICATIONS BETWEEN PRIEST AND PENITENT.

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| <p>§ 2394. History: No Privilege at Common Law.</p> | <p>§ 2395. Statutes recognizing the Privilege.
 § 2396. Policy of the Privilege.</p> |
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Sub-topic VI: COMMUNICATIONS BETWEEN PHYSICIAN AND PATIENT.

§ 2380. **History and Policy; Statutes.** It was early understood, in the precedents of English law, as soon as the secrecy of private confidence in general was finally settled to be no justification for a legal privilege (*ante*, §§ 2286, 2290), that confidences given to a physician stand upon no better legal footing than others:

1776, *Duchess of Kingston's Trial*, 20 How. St. Tr. 573; bigamy; Mr. Hawkins, a physician, who had attended the accused and her alleged husband, was asked: "Do you know from the parties of any marriage between them?" Ans.: "I do not know how far anything that has come before me in a confidential trust in my profession should be disclosed, consistent with my professional honor." L. C. J. *Mansfield*: "If all your lordships will acquiesce, Mr. Hawkins will understand that it is your judgment and opinion that a surgeon has no privilege, where it is a material question in a civil or criminal cause to know whether parties were married or whether a child was born, to say that his introduction to the parties was in the course of his profession and in that way he came to the knowledge of it. . . . If a surgeon was voluntarily to reveal these secrets, to be sure, he would be guilty of a breach of honor and of great indiscretion; but to give that information in a court of justice, which by the law of the land he is bound to do, will never be imputed to him as any indiscretion whatever."

This has ever since been accepted by English judges¹ (in spite of an occasional and proper dispensation by courtesy²); and would probably have

¹ 1792, *Wilson v. Rastall*, 4 T. R. 753, 760, per Buller, J. ("It is much to be lamented that the law of privilege is not extended" to medical persons; this judge's views on the subject were anachronistic, as noted *ante*, § 2285); 1822, *Garrow, B.*, in *Falmouth v. Moss*, 11 Price 455, 470; 1823, *R. v. Powell*, 1 C. & P. 97, *Parke, B.* (a surgeon attending an accused indicted for the murder of her bastard child, held not entitled to refuse testimony to

her confession); 1838, *Greenlaw v. King*, 1 Beav. 137, 145, per Lord Langdale, M. R.; 1851, in *Russell v. Jackson*, 9 Hare 387, 391, per Wigram, V. C.; 1876, *Jessel, M. R.*, in *Anderson v. Bank*, L. R. 2 Ch. D. 644, 650, *obiter*; 1881, the same judge in *Wheeler v. Le Marchant*, 17 id. 675, 681, *obiter*.

² 1825, *Gardner Peerage Case*, *Le Marchant's Rep.* 65, 88, 133 (names of women whose periods of gestation were testified to).

been acknowledged as a common-law principle in every American court.³ But in New York in 1828⁴ came a statutory innovation, establishing a privilege; and the legislation of other States, accepting in this respect (as in so many others) the model constructed by the distinguished leaders of legal reform in that epoch-making movement in New York, embodied the privilege in other statutes —, Missouri following next in 1835; until at the present day in one half of our jurisdictions the privilege is a settled part of the law.⁵

³ 1793, *Sherman v. Sherman*, 1 Root 486 (divorce for adultery; a doctor's testimony compelled, though "all he could testify came to his knowledge in confidence").

⁴ *N. Y. Rev. St.* 1828, II, 406 (Part III, c. VII, art. 9, § 73); in the second edition, in 1836, in an Appendix to the Revisers' Reports, vol. III, p. 737, is found their reasoning in justification, quoted *post*. In 1849 the Commissioners on Practice and Pleadings embodied the rule in the new Code of Civil Procedure (§ 1710, part 4).

⁵ *Alaska C. C. P.* 1900, § 1038 (like Or. Annot. C. 1892, § 712, par. 4, omitting "regular," and substituting for "without the consent," "against the objection"); *Ariz. St.* 1899, March 16, No. 65 ("A physician or surgeon practising under the laws of the Territory of Arizona cannot without the consent of his patient be examined in civil or criminal cases as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient"); *Rev. St.* 1901, § 2535, par. 6 ("A physician or surgeon cannot be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient; provided that if a person offer himself as a witness and voluntarily testify with reference to such communications, that is to be deemed a consent to the examination of such physician or attorney"; see also *P. C.* § 1111, par. 4); *Ark. Stats.* 1894, § 2919 ("No person authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired from his patient while attending him in a professional character, and which information was necessary to enable him to prescribe as a physician or do any act for him as a surgeon"); *Cal. C. C. P.* 1872, § 1881, par. 4 ("A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient"; amended by the Commission of 1901 by adding: "but this subdivision does not apply in an action between a physician or surgeon and his patient in which the treatment of the patient by the physician or surgeon is in issue; and provided that in an action brought under sections 376 and 377 [for death by wrongful act] a physician or surgeon is competent to testify as to the cause of the death of the deceased"; for the validity of this amendment, see *ante*, § 488);

§ 1882 (implied waiver; quoted *ante*, § 2292); *Colo. Annot. Stats.* 1891, § 4824 ("A physician or surgeon duly authorized to practice his profession under the laws of this State shall not, without the consent of his patient, be examined as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient"); § 4825 (waiver by consent; like Or. Annot. C. 1892, § 713); *D. C. Code* 1901, § 1073, U. S. St. 1896, c. 245, May 25 ("In the Courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representatives to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity; provided, that this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of or inflicting injuries upon a human being, and the disclosure shall be required in the interest of public justice"); *Hawaii Civil Laws* 1897, § 1418 ("No physician or surgeon shall, without the consent of his patient, divulge in any civil suit, action, or proceeding (unless the sanity of the patient be the matter in dispute) any information which he may have acquired in attending the patient, and which was necessary to enable him to prescribe or act for the patient"); *Ida. Rev. St.* 1887, § 5958 (like unnamed *Cal. C. C. P.* § 1881); *Ind. Rev. St.* 1897, § 507 ("Physicians, as to matter communicated to them, as such, by their patients, in the course of their professional business, or advice given in such cases," shall not be competent); *Ia. Code* 1897, § 4608 (quoted *ante*, § 2292); *Kan. Gen. St.* 1901, § 4771, par. 6 (like *Okl. Stats.* § 335); *Mich. Comp. L.* 1897, § 10181 ("No person duly authorized to practice physic or surgery shall be allowed to disclose any information which he may have acquired in attending any patient in his professional character, which information was necessary in order to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon"); *Minn. Gen. St.* 1894, § 5662 ("A regular physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient"); *Mo. Rev. St.* 1889, § 8925 ("The following persons shall be incompetent to testify: . . . fifth, a physician or surgeon, concerning any information which he may have acquired from any patient

What is to be said in favor of such an innovation upon the common law? The privilege has been supported, in the home of its origin, in the following passages:

1836, *Commissioners on Revision of the Statutes of New York*, III, 737: "The ground on which communications to counsel are privileged, is the supposed necessity of a full knowledge of the facts, to advise correctly, and to prepare for the proper defence or prosecution of a suit. But surely the necessity of consulting a medical adviser, when

while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician, or do any act for him as a surgeon"; *Mont. C. C. P.* 1895, § 3163 (4) (like unamended Cal. C. C. P. § 1881); *Nev. Gen. St.* 1885, § 3406 (like unamended Cal. C. C. P. § 1881, omitting "in a civil action," and adding: "provided, however, in any suit or prosecution against a physician or surgeon for malpractice, if the patient or party suing or prosecuting shall give such consent, and any such witness shall give testimony, then such physician or surgeon, defendant, may call any other physicians or surgeons as witnesses on behalf of defendant, without the consent of such patient or party suing or prosecuting"); *N. Y. C. C. P.* 1877, § 834 ("a person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity"); § 836 (including amendments added by St. 1897-1899; the preceding section not to apply if "expressly waived upon the trial or examination" by the patient; moreover, except for "confidential communications and such facts as would tend to disgrace the memory of the patient," express waiver by the personal representative of the deceased suffices, or, in testamentary controversies, by the executor, surviving husband, widow, heir, or next of kin; quoted in full, *ante*, § 2292); *N. C. Stat.* 1885, c. 159 ("No person duly authorized to practice physic or surgery shall be required to disclose any information which he may have acquired in attending a patient in a professional character and which information was necessary to enable him to prescribe for such patient as a physician or to enable him to do any act for him as a surgeon; provided that the presiding judge of a superior court may compel such disclosure if in his opinion the same is necessary to a proper administration of justice"); *N. D. Rev. C.* 1895, § 5703 (like Cal. C. C. P. § 1881, unamended, omitting "in a civil action" and "licensed"); § 5704 ("If a person offers himself as a witness," it is a consent to the physician's examination "on the same subject"); *Oh. Annot. Rev. St.* 1898, § 5241 ("The following persons shall not testify in certain respects: . . . a physician, concerning a communication made to him by his patient in that relation, or his advice to his patient; but the attorney or physician may testify by express consent of the client or patient; and if the client or patient voluntarily testify, the attorney or physician may be compelled to testify on the same subject"); 1903, Metropolitan

Life Ins. Co. v. Howle, 68 Oh. 614, 68 N. E. 4 (statute applied); *Okla. Stats.* 1893, § 335 ("The following persons shall be incompetent to testify: . . . Sixth, a physician or surgeon concerning any communication made to him by his patient with reference to any physical or supposed physical disease, or any knowledge obtained by a personal examination of any such patient; provided, that if a person offer himself as a witness, that is to be deemed a consent to the examination; (*sic?*) also, if [also of?] an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section"); *Or. Annot. C.* 1892, § 712, par. 4 (like Cal. C. C. P. § 1881, unamended); § 713 ("If a party to the suit, action, or proceeding offer himself as a witness, that is to be deemed a consent to the examination also of a wife, husband, attorney, clergyman, physician, or surgeon, on the same subject, within the meaning of subdivisions 1, 2, 3, and 4 of the last section"); *Pa. St.* 1895, June 18, Pub. L. 195, § 1 ("No person authorized to practice physics or surgery shall be allowed, in any civil case, to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity, which shall tend to blacken the character of the patient, without his consent"); *S. D. Stats.* 1899, § 6544 (like Cal. C. C. P. § 1881, unamended, omitting "licensed"); § 6545 (like N. D. Rev. C. § 5704); *U. S.* : 1884, Connecticut L. Ins. Co. v. Union Trust Co., 112 U. S. 250, 254, 5 Sup. 119 (the privilege given by the New York statute is to be applied in trials in the Federal Courts in New York); *Utah Rev. St.* 1898, § 3414 (like Cal. C. C. P. § 1881, unamended, omitting "licensed"); *Wash. C. & Stats.* 1897, § 5994 (like Cal. C. C. P. § 1881, unamended, substituting "regular" for "licensed"); § 6940 ("[Witnesses are competent in criminal as in civil cases;] but no regular physicians or surgeons, clergymen or priest[s], shall be protected from testifying as to confessions, or information received from any defendant, by virtue of their profession and character"); *W. Va. St.* 1897, c. 44 (quoted *ante*, § 488); *Wis. Stats.* 1898, § 4075 ("No person duly authorized to practice physic or surgery shall be compelled to disclose any information which he may have acquired in attending any patient in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon"); *Wyo. Rev. St.* 1887, § 2589 (like Oh. Rev. St. 1898, § 5241).

life itself may be in jeopardy, is still stronger. And unless such consultations are privileged, men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offence. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter, aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of truth, too strong for human resistance."

1871, *Miller, J.*, in *Edington v. Ins. Co.*, 67 N. Y. 185, 194: "It is a just and useful enactment introduced to give protection to those who were in charge of physicians from the secrets disclosed to enable them properly to prescribe for diseases of the patient. To open the door to the disclosure of secrets revealed on the sickbed, or when consulting a physician, would destroy confidence between the physician and the patient, and, it is easy to see, might tend very much to prevent the advantages and benefits which flow from this confidential relationship."⁶

To test these arguments, let us refer to the fundamental canons which must be satisfied by every privilege for communications (*ante*, § 2285). The questions must be asked: Does the communication originate in a confidence? Is the inviolability of that confidence vital to the due attainment of the purposes of the relation of physician and patient? Is the relation one that should be fostered? Is the expected injury to the relation, through disclosure, greater than the expected benefit to justice? A negative answer to any one of these questions would leave the privilege without support. In truth, all of them, except the third, may justly be answered in the negative:

(1) In only a few instances, out of the thousands daily occurring, is the fact communicated to a physician confidential in any real sense. Barring the facts of venereal disease and criminal abortion, there is hardly a fact in the categories of pathology in which the patient himself attempts to preserve any real secrecy. Most of one's ailments are immediately disclosed; the few that are not openly ascertainable are at least explained to intimates. No statistical reckoning is needed; these facts are well enough known.

(2) Even where the disclosure is actually confidential, it would none the less be made though no privilege existed. People would not be deterred from seeking medical help because of the possibility of disclosure in court. If they would, how did they fare in the generations before the privilege came? Is it noted in medical chronicles that, after the privilege was established in New York, the floodgates of patronage were let open upon the medical profession, and long-concealed ailments were then for the first time brought forth to receive the blessings of cure? And how is it to-day in those jurisdictions where no privilege exists,—does the medical profession in one half of the Union enjoy, in a marked way, an afflux of confidence contrasting with the scanty revelations vouchsafed in that other half where no privilege protects? If no difference appears, then this reason for the privilege falls away; for it is undoubted that the rule of privilege is intended

⁶ Mr. Wm. A. Purrington, in *Hamilton and ed.*, I, 625-632, expounds the supposed reasons *Godkin's System of Legal Medicine* (1900), 2d for the privilege.

(*ante*, § 2285), not to subserve the party's wish for secrecy as an end in itself, but merely to provide secrecy as a means of preserving the relation in question, whenever without the guarantee of secrecy the party would probably abstain from fulfilling the requirements of the relation.

(3) That the relation of physician and patient should be fostered, no one will deny. But (4) that the injury to that relation is greater than the injury to justice — the final canon to be satisfied — must most emphatically be denied. The injury is decidedly in the contrary direction. Indeed, the facts of litigation to-day are such that the answer can hardly be seriously doubted. Of the kinds of ailments that are commonly claimed as the subject of the privilege, there is seldom an instance where it is not ludicrous to suggest that the party cared at the time to preserve the knowledge of it from any person but the physician. From asthma to broken ribs, from ague to tetanus, the facts of the disease are not only disclosable without shame, but are in fact often publicly known and knowable by every one — except the appointed investigators of truth. The extreme of farcicality is often reached in litigation over personal injuries, — in the common case, a person injured by a street-car amid a throng of sympathizing onlookers. Here the element of absurdity will sometimes be double; in the first place, there is nothing in the world, by the nature of the injury, for the physician to disclose, which any person would ordinarily care to keep private from his neighbors; and, in the second place, the fact which would be most strenuously secreted and effectively protected, when the defendant called the plaintiff's physician and sought its disclosure, would be the fact that the plaintiff was not injured at all! Upon such a foundation of vain imaginations is the privilege reared. The injury to justice by the repression of the facts of corporal injury and disease is a hundred fold greater than any injury which might be done by disclosure. And furthermore, the few topics — such as venereal disease and abortion — upon which secrecy might be seriously desired by the patient come into litigation ordinarily in such issues (as when they constitute cause for a bill of divorce or a charge of crime) that for these very facts common sense and common justice demand that the desire for secrecy shall not be listened to.

There is but one form in which the argument for the privilege can be put with any semblance of plausibility, and in that form it doubtless commonly presents itself to the view of medical men jealous for their profession. This argument is that, since the secrets of the legal profession are allowed to be inviolable, the secrets of the medical profession have at least an equal title to consideration. This, to be sure, is no more than analogy; and nothing is more fallible than an argument from analogy. But, leaving aside the consideration that the privilege for communications to attorneys stands itself on none too firm a foundation (*ante*, § 2291), and leaving aside the primary tests (just examined) by which every privilege must be judged, and answering the argument as it is put, — the answer is that the services of an attorney are sought primarily for aid in litigation, actual or expected, while those of the

physician are sought for physical cure; that hence the rendering of that aid would result directly and surely in the disclosure of the client's admissions, if the attorney's privilege did not exist, while the physician's curative aid can always be rendered irrespective of making disclosure; and, finally, that thus the absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent, while the physician, being called upon only rarely to make disclosures, is not consciously affected in his relation with the patient. The function of the two professions being entirely distinct, the moral effect upon them of the absence of the privilege is different.

Certain it is that the practical employment of the privilege has come to mean little but the suppression of useful truth,—truth which ought to have been disclosed and would never have been suppressed for the sake of any inherent repugnancy in the medical facts involved. Nine-tenths of the litigation in which the privilege is invoked consist of actions on policies of life insurance, where the deceased's misrepresentations of his health are involved; actions for corporal injuries, where the extent of the plaintiff's injury is at issue; and testamentary actions, where the testator's mental capacity is disputed. In all of these the medical testimony is absolutely needed for the purpose of learning the truth. In none of them is there any reason for the party to conceal the facts, except to perpetrate a wrong upon the opponent. In the first two of these, the advancement of fraudulent claims is notoriously common; nor do the culpable methods of some insurance or railway companies, whatever they may have been or still are, justify the infliction of retaliatory punishment, indirectly and indiscriminately, by means of an unsound rule for the suppression of truth.⁷ In none of these cases need there be any fear that the absence of the privilege will subjectively hinder people from consulting physicians freely; the actually injured person would still seek medical aid, the honest insured would still submit to medical examination, and the testator would still summon physicians to his cure. There is nothing to be said in favor of the privilege, and a great deal to be said against it.⁸ The adoption of it in any other jurisdictions is earnestly to be deprecated.

§ 2381. (a) **Confidentiality of Communications; (1) Implied Confidence; Burden of Proof; Third Persons' Testimony.** In the foregoing privileges for communications, the fundamental assumption has been that the communications, in order to deserve protection, must be confidential in their origin. This principle obtains equally for the present privilege.

When the confidential nature of the communication has been expressly stated at the time of making it, the application of the privilege is plain. But is *confidentiality to be implied from the mere relation* of physician and patient? Or is it to be implied only according to the circumstances of each

⁷ See the comment of Earl, J., in *Renihan v. Dennin*, 103 N. Y. 573, 580, 9 N. E. 320.

⁸ Mr. Albert Bach, in the *Medico-Legal Journal*, X, 33, 40 (1892), "The Medico-Legal Aspect of Privileged Communications," has stated forcibly the objections to the privilege.

case, including the nature of the ailment and the occasion of consultation? The latter solution seems the natural one. Some Courts, however, have declared that the mere relation of physician and patient implies a confidentiality for all communications;¹ and this assumption is tacitly made in other Courts. Nevertheless, there is a general and sound doctrine, occasionally enforced, that the claimant of the privilege has the *burden of establishing* in each instance all the facts necessary to create the privilege;² and it would seem to be a consequence of this that the circumstances indicating confidentiality must also be established.

As with the other privileges, however, the privilege forbids compulsory disclosure by that person only to whom the confidence was extended. It therefore does not exempt a *third person*, overhearing the communication, from testifying to it;³ except so far as the third person is an agent of the physician.⁴

§ 2382. **Same: (2) Professional Character of the Consultation.** The confidence which is protected is that only which is given to a professional physician during a consultation with a view to a curative treatment; for it is that relation only which the law desires to facilitate.

Hence, the person consulted must be a *professional physician*, in the usual sense of the word. This does not include a veterinary surgeon;¹ nor a pharmacist;² nor a dentist,³ although the modern recognition of dental science as strictly a branch of medical science might here have justified the opposite conclusion. A practitioner of any branch or school of medical science, recognized as such by the reputable medical profession, is included; some of the statutes define the privileged class as "licensed" practitioners. A surgeon is in any case within the definition. How far the class should be extended, in these days of pretentious and successful quackery, may become difficult to determine.

The consultation with such a person must be had in his *professional character at the time*. A consultation, therefore, for some purpose other than that of ultimate curative or alleviative treatment is not privileged;⁴ nor is a

¹ 1881, *Masonic M. B. Ass'n v. Beck*, 77 Ind. 203, 210; 1902, *Munz v. R. Co.*, — Utah —, 70 Pac. 852 (physician sent by a railroad company to the injured person; privilege held applicable; Rolapp, J., diss.).

² 1902, *Wheeler v. State*, 158 Ind. 687, 63 N. E. 975; 1879, *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 571 (the proponent of the evidence is not required to negative the privilege; "the party objecting must in some way make it appear, if it does not otherwise appear, that the information is within the statutory exclusion"); 1887, *People v. Schuyler*, 106 id. 298, 304, 12 N. E. 783 (preceding case approved); 1902, *Griffiths v. R. Co.*, 171 id. 106, 63 N. E. 808; 1902, *Green v. R. Co.*, ib. 201, 63 N. E. 958.

³ 1894, *Springer v. Byram*, 137 Ind. 15, 36 N. E. 361 (undertaker's employees, allowed to testify to a conversation with the physician in the ambulance).

⁴ 1884, *Raymond v. R. Co.*, 65 Ia. 152, 21

N. W. 495 (a physician attending with his partner, not allowed to disclose the patient's statement made to his partner); 1886, *Renihan v. Dennin*, 103 N. Y. 573, 578, 9 N. E. 320 (a physician called in for consultation by the regular physician is within the privilege).

¹ 1898, *Hendershot v. Tel. Co.*, 106 Ia. 529, 76 N. W. 828 (treating a horse).

² 1877, *Brown v. R. Co.*, 66 Mo. 597 (a drug-clerk, asked what medicines he had sold the plaintiff).

³ 1875, *People v. De France*, 104 Mich. 563, 62 N. W. 709.

⁴ 1895, *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523 (admitted, where the physician called upon the patient for a money matter); 1889, *Hoyt v. Hoyt*, 112 N. Y. 493, 515, 20 N. E. 402 (physician's testimony as to interviews had with a testator to ascertain his opinion of his daughter's mental condition, held not privileged); 1879, *Edington v. Aetna Life Ins. Co.*, 77 N. Y. 564, 570 (that "the witness attended

communication made at some time when the professional relation is not pending.⁵ An autopsy after decease is of course not privileged.⁶

A communication made to a physician invited to the inspection or consultation *at the opponent's instance* is not privileged, because it is not usually made for the purpose of curative treatment, and because a confidence cannot be implied in the absence of an invitation on the part of the communicating person.⁷

§ 2383. *(b) Communications Necessary for Prescription.* The privilege is intended (and by most statutes is declared) to protect only those communications which are necessary for obtaining the benefits of the professional relation,—in other words, for enabling the physician to prescribe remedies.¹ No doubt the patient's belief of what was necessary should be the test. The burden of showing necessity should in any case be upon the claimant of the privilege.²

the assured for some disease " does not raise a presumption "that he discovered that disease or learned its nature while attending him professionally"; 1880, *Grattan v. Ins. Co.*, 80 id. 281, 296 (professional character, found on the facts); 1899, *Bruendl's Will*, 102 Wis. 45, 147, 78 N. W. 169 (examination of patient with reference to her mental competency as being fit for release from guardianship, held not within the statute).

⁵ 1901, *Herries v. Waterloo*, 114 Ia. 374, 86 N. W. 306 (opinion based on information acquired when not employed as physician, not privileged); 1903, *Patterson v. Cole*, 67 Kan. 441, 73 Pac. 54; 1897, *People v. Koerner*, 154 N. Y. 355, 48 N. E. 730 (communications during trial, but after the relation of physician had ended, excluded).

⁶ 1897, *Harrison v. R. Co.*, 116 Cal. 156, 47 Pac. 1019.

⁷ 1892, *Freel v. R. Co.*, 97 Cal. 40, 45, 31 Pac. 730, *semble* (a physician sent by the opponent to examine, held not privileged); 1894, *Nesbit v. People*, 19 Colo. 441, 461, 36 Pac. 221 (examination by a physician agreed on between the defendant and the prosecution, held not privileged); 1902, *State v. Height*, 117 Ia. 650, 91 N. W. 935 (information obtained by a physician examining the defendant, while in jail, for the prosecution, held not within the privilege); 1888, *People v. Glover*, 71 Mich. 307, 38 N. W. 874 (rape; a physician's examination of the defendant in jail, at the district attorney's instance, held not privileged); 1890, *People v. Kemmler*, 119 N. Y. 580, 585, 24 N. E. 9 (a physician's opinion of an accused's mental condition, obtained by watching him in jail at the instance of the district attorney, held not privileged); 1893, *People v. Sliney*, 137 id. 570, 33 N. E. 150 (a physician sent by the district attorney to examine the defendant for insanity; the defendant's admissions not privileged); 1896, *People v. Hoch*, 150 id. 291, 44 N. E. 977 (an examination of the defendant for insanity, made by the witness as an expert for the prosecution, held not privileged).

¹ 1877, *Collins v. Mack*, 31 Ark. 693 (by a woman after a childbirth, that the father had

never promised to marry her, held not privileged); 1897, *Redfield's Estate*, 116 Cal. 644, 48 Pac. 794 (mental condition learned while treating for consumption; may be "necessary," etc.); 1901, *Black's Estate*, 132 id. 392, 64 Pac. 695 (testamentary capacity; preceding case approved); 1890, *Pennsylvania Co. v. Marion*, 123 Ind. 415, 23 N. E. 973 (incidental facts, not necessary to be disclosed for the purpose of the treatment, held privileged); 1884, *Raymond v. R. Co.*, 65 Ia. 152, 21 N. W. 495 (injured person's statement that he "stepped off the car while it was in motion and thus fell," held privileged; this seems unsound); 1895, *Kansas C. F. S. & M. R. Co. v. Murray*, 55 Kan. 336, 40 Pac. 646 (injured person's statements as to the facts leading up to the injury, held not privileged); 1890, *Briesenmeister v. Supreme Lodge*, 81 Mich. 525, 531, 45 N. W. 977 ("all disclosures by the patient . . . respecting his ailments" are privileged, whether they are necessary for prescribing or not; said *obiter*); 1891, *Cooley v. Foltz*, 85 id. 47, 48 N. W. 176 (patient's statements about the litigation, held not privileged); 1897, *People v. Cole*, 113 Mich. 83, 71 N. W. 455 (by the complainant in a bastardy action, to the attending physician, as to the father of the child); 1874, *Harriman v. Stowe*, 57 Mo. 93, 95, *semble* (plaintiff's statement to the physician that she had fallen through a trap-door left insecure, held admissible); 1839, *Hewitt v. Praine*, 21 Wend. 79 (seduction; defendant's admission, when asking for drugs for an abortion, that the woman was the plaintiff's daughter, held not privileged); 1898, *Nelson v. Oneida*, 156 N. Y. 219, 50 N. E. 802 (a disease discovered while treating for another disease, held privileged); 1902, *Green v. R. Co.*, 171 id. 201, 63 N. E. 958 ("information of how the accident happened," held not necessary for surgical treatment; three judges diss.); 1897, *Kenyon v. Mondovi*, 98 Wis. 53, 73 N. W. 314 (statute applied).

² 1878, *Campau v. North*, 39 Mich. 606, 609; 1894, *Lincoln v. Detroit*, 101 id. 245, 249, 59 N. W. 617 (claimant of the privilege must show the necessity); 1876, *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 135, 194 (evidence of

§ 2384. (c) **Information, Active and Passive.** Communications are the subject of the protection. But communication may be made by exhibition, or by submission to inspection, as well as by oral or written narration or utterance. The invitation to the physician to prescribe assumes that he will first obtain the data for the prescription; and since the usual method of obtaining these involves the physician's own observation as well as the patient's narration, the invitation to prescribe is an implied communication of all the data which the physician may by any method seek to obtain as necessary for the prescription.¹ It is therefore well settled that the data furnished passively, through submission to inspection, are equally within the privilege, — and this whether the patient was himself aware or not of the existence of the specific data discovered. It might be doubtful whether the data of insanity are thus privileged, where the physician is called for another purpose, because here the foregoing principle — that the data must be necessary for prescription — would seem not to be satisfied; but so far as the present principle is concerned, they fall within it.²

the "necessity," is not required, "as it must be assumed from the relationship existing that the information would not have been imparted except for the purpose of aiding the physician in prescribing"; 1879, *Edington v. Aetna Life Ins. Co.*, 77 id. 564, 570 (the Court must be able "upon the evidence to say that such information was necessary"; the mere relation does not suffice; preceding ruling not noticed); 1887, *People v. Schuyler*, 106 id. 298, 300, 12 N. E. 783 (foregoing ruling approved); 1889, *Feeney v. R. Co.*, 116 id. 375, 380, 22 N. E. 402 (first *Edington* case approved; second one ignored).

The Court ought ultimately to determine (*ante*, § 2322) whether a necessity existed: *Contra*: 1903, *State v. Kennedy*, 177 Mo. 98, 75 S. W. 979 (in general, the physician must be the judge of the necessity; except as to matters "apparent to the ordinary observer").

¹ Compare the same question in other privileges (*ante*, §§ 2306, 2337).

² *Cal.*: 1901, *Nelson's Estate*, 132 Cal. 182, 64 Pac. 294 (capacity to make a will; attending physician's testimony inadmissible); *Ind.*: 1881, *Masonic M. B. Ass'n v. Beck*, 77 Ind. 203, 210 (like *Heuston v. Simpson*, *infra*); 1883, *Excelsior M. A. Ass'n v. Riddle*, 91 id. 84, 88 (same, under a revised phrasing of the statute); 1884, *Penn M. L. Ins. Co. v. Wiler*, 100 id. 92, 100 (same); 1887, *Williams v. Johnson*, 112 id. 273, 13 N. E. 872 (same); 1888, *Heuston v. Simpson*, 115 id. 62, 17 N. E. 261 (the statute applies "whether the knowledge is communicated by the words of the patient or is gained by observation"); 1889, *Morris v. Morris*, 119 id. 343, 21 N. E. 918 (same; applied to insanity); 1893, *Gurley v. Park*, 135 id. 440, 442, 35 N. E. 279 (sanity, in a will case, privileged); 1902, *Aspy v. Botkins*, 160 id. 170, 66 N. E. 462 (vacuum-ray photograph taken by the physician in the course of treatment, excluded); *Ia.*: 1895, *Prader v. Accident Ass'n*, 95 Ia. 159, 63 N. W. 601 (privilege covers all information

obtained by observation); *Mich.*: 1870, *Briggs v. Briggs*, 20 Mich. 34, 41 (privilege includes "whatever was disclosed to any of his senses and which in any way was brought to his knowledge for that purpose"); 1879, *Fraser v. Jennison*, 42 id. 206, 225, 3 N. W. 882 (same; applied to a testator's mental condition); 1901, *Rose v. Supreme Court*, 126 id. 577, 85 N. W. 1073 (opinion based on the patient's appearance alone, excluded); *Mo.*: 1882, *Gartside v. Ins. Co.*, 76 Mo. 446 ("information acquired by a physician from inspection, examination, or observation of the person of the patient," is equally privileged; leading opinion by Norton, J., with a good argument by Mr. Jacob Klein); *N. Y.*: 1871, *Sloan v. R. Co.*, 45 N. Y. 125, 128 (existence of a disease, held within the privilege); 1876, *Edington v. Mutual Life Ins. Co.*, 67 id. 185, 194 (the statute includes "such knowledge as may be acquired from the patient himself, from the statement of others who may surround him at the time, or from observation of his appearances and symptoms"); 1879, *Edington v. Aetna Life Ins. Co.*, 77 id. 564, 571 (the exclusion affects only "such information as a physician may acquire of secret ailments by an examination of the person"; but not of the fact that the patient "has a fever or a fractured leg or skull or is a raving maniac"; the remaining judges apparently did not concur in the details of the opinion); 1880, *Grattan v. Ins. Co.*, 80 id. 281, 297 ("though the patient had been dumb, it would make no difference; the communication to his sense of sight is within the statute, as much so as if it had been oral and reached his ear"; the first *Edington* case cited, and the second ignored on this point); 1883, *Grattan v. Ins. Co.*, 92 id. 274, 287 (preceding case approved); 1886, *Renihan v. Dennin*, 103 id. 573, 579, 9 N. E. 320 (*Grattan* case approved); *Wis.*: 1900, *Shafer v. Eau Claire*, 105 Wis. 244, 81 N. W. 409 ("all that he discovered by examination of her person," held privileged).

But it is the tenor only of the communication that is privileged. The mere *fact of making a communication*, as well as the *date* of a consultation and the *number of consultations*, are therefore not privileged from disclosure, so long as the subject communicated is not stated.³

§ 2385. (*d*) **Criminal Cases, Malpractice.** The privilege, in general, applies as well in criminal as in civil cases; unless the statute expressly limits it to the latter.¹ But in two classes of instances the privilege, though apparently applicable, exhibits its inherent impropriety so plainly that Courts have sometimes sought, by main force, to set limits and prevent its evil effects, namely, in cases where the physician is himself a *partaker in the criminal transaction*, and in cases where the physician has acted *on behalf of the victim* of a crime. Courts have chosen various methods, more or less reasonable, of escaping from the dilemma.² All that can be said is that an ill-advised initial principle is sure to tempt judges, sooner or later, to do violence to it.

³ *Ia.*: 1900, *Nelson v. Ins. Co.*, 110 *Ia.* 600, 81 *N. W.* 807 (that he was consulted and that he prescribed; not privileged); *Mich.*: 1887, *Brown v. Ins. Co.*, 65 *Mich.* 306, 316, 32 *N. W.* 610 (the fact of the physician's treatment for typhoid fever, held not privileged, under the particular circumstances); 1890, *Briesenmeister v. Supreme Lodge*, 81 *id.* 525, 532, 45 *N. W.* 977 ("the fact that he attended the insured professionally, and the dates and number of his visits," held not privileged); 1891, *Cooley v. Foltz*, 85 *id.* 47, 48 *N. W.* 176 (similar to the preceding case); 1893, *Dittrich v. Detroit*, 98 *id.* 248, 57 *N. W.* 125 (same); 1897, *Lammiman v. R. Co.*, 112 *id.* 602, 71 *N. W.* 153 (for what disease he had treated the party, excluded); 1899, *Jones v. P. B. L. Assur. Co.*, 120 *id.* 211, 79 *N. W.* 204 (that the person had consulted a physician for a certain illness, excluded); *Minn.*: 1903, *Price v. Standard L. & A. Ins. Co.*, — *Minn.* —, 95 *N. W.* 1118 (the fact of treatment and number of visits, admissible; "this doctrine, looking at the question in a logical way, comes very near trespassing on the statute"); *Nebr.*: 1902, *Sovereign Camp v. Grandon*, 64 *Nebr.* 39, 89 *N. W.* 448 (the fact that a physician was called is not within the privilege); *N. Y.*: 1892, *Patten v. Ins. Ass'n*, 133 *N. Y.* 450, 452, 31 *N. E.* 342 (whether P. was a patient of the doctor and was attended as such and was sick, and how many times and when he attended P., held not privileged); *Wis.*: 1899, *McGowan v. Supreme Court*, 104 *Wis.* 186, 80 *N. W.* 603 (that he treated the person for a disease, excluded).

This distinction is often of some practical significance; for example, in life insurance cases, the insured's allegation of complete health during a certain period may be disproved by the fact that a physician was often consulted; and in personal injury cases, the fact that a certain physician was consulted may give rise in effect to an unfavorable inference because he was not called for the plaintiff, although no inference could technically have been drawn from the plaintiff's claim of privilege if the defendant

had sought to call and examine the physician (*post*, § 2386).

¹ 1894, *People v. Lane*, 101 *Cal.* 513, 516, 36 *Pac.* 16; 1895, *People v. West*, 106 *id.* 89, 39 *Pac.* 207.

² *Ind.*: 1897, *Hank v. State*, 148 *Ind.* 238, 46 *N. E.* 127, 47 *N. E.* 465 (a disclosure by a physician attending a miscarriage, allowed in a prosecution for the abortion, the privilege not being intended "to shield one who is charged with perpetrating an unlawful act upon the patient"); 1903, *Seifert v. State*, 160 *id.* 464, 67 *N. E.* 100 ("a request to a physician to commit a crime is not privileged"; applied to a woman consulting for an abortion); *Ia.*: 1882, *Guptill v. Verback*, 58 *Ia.* 99, 12 *N. W.* 125 (the act of producing a miscarriage in order to save the mother's life being not criminal, a physician's advice as to the best means of "getting rid of a child" was held presumably "made for a lawful purpose"; this ruling, as regards the presumption, is unsound); 1896, *State v. Smith*, 99 *id.* 26, 68 *N. W.* 423 (causing a miscarriage; privilege applied); 1901, *State v. Grimmell*, 116 *id.* 596, 88 *N. W.* 342 (murder by abortion; the privilege does not apply to the testimony of a physician, called by the prosecution, who attended the deceased just before her death; whether a formal waiver is necessary, and by whom, not stated; compare § 2382, *ante*); *N. Y.*: 1880, *Pierson v. People*, 79 *N. Y.* 424, 432 (murder by poisoning; a physician's information acquired while attending the deceased for the poison, admitted for the prosecution, as not within the spirit of the privilege; but no "general rule applicable to all cases" was ventured); 1886, *People v. Murphy*, 101 *id.* 126, 4 *N. E.* 326 (abortion; testimony of the physician attending after the operation, not admitted); 1893, *People v. Harris*, 136 *id.* 423, 437, 448, 33 *N. E.* 65 (defendant, a physician, told a physician attending the deceased that he had twice performed operations for abortion on her; not privileged, the statutory privilege not being intended to "shield a person charged with the murder of his patient").

The same temptation exists to save an innocent physician who, when charged with malpractice, might otherwise be stifled by the privilege;³ but the doctrine of waiver (*post*, § 2389) usually assists him here.

§ 2386. (*e*) **Whose is the Privilege; Claim of Privilege; Inference from Claim.** The privilege is plainly that of the *patient*, not of the physician; and the latter therefore cannot claim it if the patient abandons it.¹ Although in the first instance it is commonly the physician who as witness declines to answer, still the claim of privilege must formally be made, in analogy to the other privileges (*ante*, § 2196) by the patient, if he is before the Court; if he is not, then technically he should be given an opportunity to claim before the examination is proceeded with. The privilege, furthermore, is that of the patient as such, not of the party; hence, the claim should be made by the patient himself, in accordance with the analogy of other privileges (*ante*, §§ 2270, 2321),—though this rule is seldom observed in practice. The privilege, furthermore, may be claimed by the *representative* of a deceased patient, as his personal successor;² but not by a mere assignee of a contract-interest.³

When the privilege is claimed by a patient who is a party, *no inference* as to the facts suppressed can be drawn,⁴—following here the analogy of the other privileges (*ante*, §§ 2272, 2322).

§ 2387. (*f*) **Termination of the Privilege; Death.** The object of the privilege is to secure subjectively the patient's freedom from apprehension of disclosure; it is therefore to be preserved even after the death of the patient,¹—following the analogies of the other similar privileges (*ante*, §§ 2323, 2341).

§ 2388. **Same: Waiver, in general; Express and Implied Waiver.** The privilege may be waived,¹ like all other privileges. It is astonishing to find that this question could ever have been regarded as debatable. Nothing but a confusion of fundamental ideas could ever create any doubt.²

³ 1900, *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. 258 (action for loss of a wife's services by the defendant's malpractice; the defendant allowed on the facts, as of necessity, to testify for himself). *Contra*: 1903, *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462 (action for malpractice; the plaintiff held privileged to withhold the testimony of other physicians attending her after the defendant; the ground of the ruling does not appear; but it is at any rate a mockery of justice).

¹ 1901, *Burgess v. Sims Drug Co.*, 114 Ia. 275, 86 N. W. 307; 1835, *Johnson v. Johnson*, 14 Wend. 636, 641; 1897, *Boyle v. Relief Assoc.*, 95 Wis. 312, 70 N. W. 351 (showing that "shall not be compelled" is equivalent to "shall not be allowed"; *Newman, J.*, diss.). Compare the theories of attorneys' privilege (*ante*, § 2290).

² *Post*, § 2391.

³ *Contra*: 1876, *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, 194 (assignee of an insurance policy may assert the privilege of the insured).

⁴ 1901, *Brackney v. Fogle*, 156 Ind. 535, 60 N. E. 303; 1890, *McConnell v. Osage*, 80 Ia. 293, 45 N. W. 550 (refusing to allow the question on cross-examination whether the patient

was willing to let the physician speak); 1899, *Lane v. R. Co.*, 21 Wash. 119, 57 Pac. 367.

Perhaps it is sound to distinguish between failing to call the witness and claiming the privilege when the opponent calls him: 1891, *Cooley v. Foltz*, 85 Mich. 47, 48 N. W. 176 (plaintiff's failure to produce her physicians, held "a legitimate fact for the jury").

¹ 1876, *Edington v. Ins. Co.*, 67 N. Y. 185, 194; 1880, *Grattan v. Ins. Co.*, 80 id. 281, 298; 1885, *Westover v. Ins. Co.*, 99 id. 56, 1 N. E. 104; 1900, *Davis v. Supreme Lodge*, 165 id. 159, 53 N. E. 891 (physician's certificate of death, recorded with the board of health, excluded on the ground of privilege); 1903, *Beglin v. Ins. Co.*, 173 id. 374, 66 N. E. 102 (*Davis v. Supreme Lodge* followed).

² 1879, *Grand Rapids & I. R. Co. v. Martin*, 41 Mich. 667, 671, 3 N. W. 173; 1879, *Scripps v. Foster*, 4 ib. 742, 748, 3 N. W. 216; 1884, *Groll v. Tower*, 85 Mo. 249, 255 (repudiating the apparently contrary assumption in *Harriman v. Stowe*, 57 id. 93); 1886, *Carrington v. St. Louis*, 89 id. 212, 1 S. W. 240; 1886, *Blair v. R. Co.*, ib. 337, 1 S. W. 367.

³ Compare the theory of Privilege (*ante*, §§ 2192, 2196, 2197).

That the waiver must be in *express* language is not necessary, upon any principle. But this is sometimes by statute required.³ Distinguished, however, this statutory waiver, which is valid only within certain limits, and the ordinary principle that a rule of evidence will not be enforced if the opposing counsel fails to make objection when the witness is examined (*ante*, § 18); thus, whether or not the statutory waiver was permitted to be made by the attorney for the witness or party before or during trial,⁴ still the counsel's failure to object to the compulsion of the witness' answer would render futile any exception to the answer.⁵

That a waiver may be irrevocably made by *contract* before litigation begun has generally been conceded by the Courts.⁶ It should certainly be sanctioned, unless made under conditions of duress or fraud which would have rendered the contract in other respects voidable.

Coming now to waivers *implied from conduct*, it is to be noticed that these depend, as already observed for other privileges (*ante*, §§ 2327, 2340), on two considerations — the interpretation of the actual conduct, and the fairness of the situation created by that conduct. A waiver is to be predicated, not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct (though not evincing that intention) places the claimant in such a position, with reference to the evidence, that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield (in Lord Mansfield's phrase concerning an infant's exemption from liability). The question then arises, What sorts of conduct, by inference or by fairness, should be treated as a waiver of the privilege to keep secret the communications to a physician?

§ 2389. **Same: Waiver by Bringing Suit; by Testifying; by Former Waiver.** (1) In the first place, the *bringing of an action* in which an essential part of the issue is the existence of physical ailment should be a waiver of the privilege for all communications concerning that ailment. The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. If the privilege means anything at all in its

³ *E. g.*, in New York, by the amendment of 1891.

⁴ *E. g.*: 1889, *Alberti v. R. Co.*, 118 N. Y. 77, 23 N. E. 35.

⁵ This distinction was ignored in the following case: 1889, *Hoyt v. Hoyt*, 112 N. Y. 493, 515, 20 N. E. 402.

⁶ 1902, *Keller v. Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612 (waiver in a policy held valid, and effective also against "all who come within its terms," — here, a beneficiary); 1876, *Edington v. Mutual Life Ins. Co.*, 67 N. Y. 185, 194 (undecided); 1896, *Foley v. Royal Arcanum*, 151 id. 196, 45 N. E. 456 (an express waiver, in an insurance-application, as to the testimony of any

attending physician, sanctioned, on the theory that a waiver of the statutory right is not against public policy); 1900, *Holden v. Ins. Co.*, 165 id. 13, 58 N. E. 771 (stipulation of waiver by the insured in his application, held not sufficient under the statutory amendment of 1891); 1901, *Fuller v. Knights of Pythias*, 129 N. C. 318, 40 S. E. 65 (waiver in an insurance application, held binding on the beneficiary); 1888, *Adreveno v. Mutual R. F. L. Ass'n*, 34 Fed. 870, Thayer, J. (waiver of the privilege by the insured in a policy is valid, and binds also one claiming under him after death). Compare such a waiver for another privilege (*ante*, § 2275).

origin, it means this as a sequel. By any other conclusion the law practically permits the plaintiff to make a claim somewhat as follows: "One month ago I was by the defendant's negligence severely injured in the spine and am consequently unable to walk; I tender witnesses A, B, and C, who will openly prove the severe nature of my injury. But, stay! Witness D, a physician, is now, I perceive, called by the opponent to prove that my injury is not so severe as I claim; I object to his testimony because it is extremely repugnant to me that my neighbors should learn of my injury, and I can keep it forever secret if the Court will forbid his testimony." If the utter absurdity of this statement (which is virtually that of every such claimant) could be heightened by anything, it would be by the circumstance (frequently observable) that the dreaded disclosure, which the privilege prevents, is the fact that the plaintiff has suffered no injury at all. In actions for *personal injury*, the permission to claim the privilege is a burlesque upon logic and justice. In actions upon *insurance policies*, where fraudulent misrepresentations as to health are in issue, the insured's initial conduct in volunteering a supposedly full avowal of his state of health has put him in the position of abandoning any desire to be secretive towards the insurer on that subject, and of giving the insurer in fairness the right to ascertain the truth; and a waiver should be predicated by the nature of the action. Yet here the injury to justice by denying a waiver is not so considerable; for in fairness (that is, to honest applicants, who have nothing to fear) the insurer ought immediately to make his extrinsic investigations among prior attendant physicians (which commonly he does not do), instead of waiting till more premiums have been paid and the insured has left the world;¹ so that here the moral inequities are more nearly balanced, and no particular harm is done by the privilege—except to the logic of the law. In *testamentary* causes, there is ordinarily no conduct amounting to waiver,—although it is otherwise unsound (*ante*, §§ 2381, 2384) to treat the data of sanity and insanity as having been consciously confided, in any sense of the word, to the physician. So far as judicial rulings go, only actions *against a physician for malpractice* have been deemed to involve a waiver.²

(2) The *party's own voluntary testimony*, on trial, to his physical condition in issue, should be a waiver of the privilege for the testimony of a physician who has been consulted about the same physical condition in issue; the reasons here being merely somewhat stronger than those above noted.³ Courts have rarely conceded this;⁴ though statutes have often en-

¹ This is recognized by the insurers in the now frequent issuance of policies which are made incontestable after a short period; *i. e.* the insurer virtually has to make his inquiries within that period or not at all. But so far as these policies are contestable (*e. g.* for "wilful misrepresentations"), the statement still applies.

² 1894, *Beckwell v. Hosier*, 10 Ind. App. 5, 37 N. E. 580 (patient's action for malpractice, held a waiver, permitting the defendant to testify); 1900, *Cramer v. Hurt*, 154 Mo. 112, 55 S. W. 258 (an action by a wife for personal in-

jury by malpractice by a physician is a waiver of privilege as to professional confidence; but not an action by a husband for loss of services of the injured wife). Compare the cases cited *ante*, § 2385.

³ 1891, *Lane v. Boicourt*, 128 Ind. 420, 27 N. E. 1111 (malpractice on the plaintiff's wife; the plaintiff's use of the testimony of himself, his wife, and her mother, held a waiver).

⁴ *Contra*: 1887, *Williams v. Johnson*, 112 Ind. 273, 13 N. E. 872 (the plaintiff's testimony that she had called Dr. H. and he had "pre-

acted it.⁵ Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded court-room the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege.

(3) A waiver at a *former trial* has been held not to affect the privilege at a later trial.⁶ This is clearly unsound; for the original disclosure takes away once for all the benefit aimed at by privilege; to enforce it thereafter is to seek to preserve a privacy which exists in legal fiction only.⁷

§ 2390. **Same: Waiver by Calling the Physician.** (1) To request a physician to *attest one's will* is by implication to request him to bear testimony, if called on, to all facts affecting the validity of the will, and is therefore a waiver.¹ (2) To call a physician to the stand, and *examine him as a witness* to one's physical condition as formerly communicated to him, is a waiver of the privilege in regard to his knowledge of the physical condition asked about;² no reasoning could pretend to maintain the contrary. (3) To call a physician as a witness to one's physical condition is a waiver of the privilege as to the knowledge acquired by *other physicians* of the same condition. This is generally not conceded in the judicial rulings;³ but it cannot be escaped, if regard is had to the foundation of the privilege. What further

scribed for her back and side," held not to permit the opponent to call Dr. H. to testify that he had found no injury; this was a gross error; it practically permitted the plaintiff to invoke the physician's credit falsely, with a guarantee against the exposure of her lie); 1890, *McConnell v. Osage*, 80 Ia. 293, 45 N. W. 550 (plaintiff's direct testimony to her previous condition of health and sickness, naming her physician, held not a waiver permitting the calling of the physician to contradict her); 1901, *Burgess v. Sims Drug Co.*, 114 id. 275, 86 N. W. 307 (testifying on cross-examination to the subject of the desired testimony of the physician is not a waiver, because not voluntary); 1902, *Green v. Nebagmain*, 113 Wis. 508, 89 N. W. 520 (a party's own testimony to the same injury, held not a waiver).

⁵ *Ante*, § 2380.

⁶ 1901, *Burgess v. Sims Drug Co.*, 114 Ia. 275, 86 N. W. 307 (testifying to the same subject, or calling the same physician, at a former trial, held not a waiver); 1883, *Grattan v. Ins. Co.*, 92 N. Y. 274, 288 (questioning the physician on a former trial, held not a waiver).

⁷ 1887, *McKinney v. R. Co.*, 104 N. Y. 352, 355, 10 N. E. 544 (*contra* to the preceding ruling; "after its publication no further injury can be inflicted upon the rights and interests which the statute was intended to protect; . . . the consent, having been once given and acted upon, cannot be recalled").

¹ 1895, *Mullin's Estate*, 110 Cal. 252, 42 Pac. 646.

² 1893, *Wheelock v. Godfrey*, 100 Cal. 587, 35 Pac. 317 (calling the physician, held on the facts a waiver); 1897, *Lissak v. Crocker Est.*

Co., 119 id. 442, 51 Pac. 688 (calling the physician to testify to an examination, held a waiver); 1902, *Sovereign Camp v. Grandon*, 64 Nebr. 39, 89 N. W. 448 (cross-examination of the physician to the injury; held a waiver). Statutes (*ante*, § 2380) often declare this in terms.

³ 1884, *Penn. Mutual L. Ins. Co. v. Wiler*, 100 Ind. 92, 102 (calling physician A is not a waiver of the privilege as to the same subject for physicians B and C); 1897, *Baxter v. Cedar Rapids*, 103 Ia. 599, 72 N. W. 790 (several physicians having examined the plaintiff, the calling of one does not waive the privilege as to the others); 1885, *Dotton v. Albion*, 57 Mich. 575, 577, 24 N. W. 786 (the calling of one physician to prove the plaintiff's good health before the injury, held not to permit the calling of other physicians to negative her good health before the injury); 1891, *Mellor v. R. Co.*, 105 Mo. 455, 16 S. W. 849 (plaintiff's calling of C, who attended him for the injury, held not to permit the calling of S., who had preceded C. in attending for the same injury); 1888, *Hope v. R. Co.*, 110 N. Y. 643, 17 N. E. 873, 40 Hun 438 (calling one of three physicians who had visited the plaintiff at separate times for the same injury; held not a waiver as to the other two; *Earl and Finch, JJ., diss.*); 1895, *Morris v. R. Co.*, 148 id. 88, 42 N. E. 410 (where two physicians were called in attendance for a joint examination, the plaintiff, by putting one on the stand, also waived the privilege as to the other; in effect overruling *Record v. Saratoga Springs*, 120 id. 646, 24 N. E. 1102); 1902, *Metropolitan St. R. Co. v. Jacobi*, 50 C. C. A. 619, 112 Fed. 924 (following *Hope v. R. Co.*).

reason is there for secrecy, if the patient has thrown it aside by permitting one physician to testify? The unfairness of allowing a party to play fast and loose with medical testimony in this shifty manner is obvious to the untechnical intelligence. (4) The sending of a physician's certificate, as part of the "*proofs of death*," by the beneficiary of a contract of life insurance or the representative of the insured, is a voluntary disclosure of the physician's knowledge though made in pursuance of contract, and is therefore a waiver.⁴

§ 2391. **Same: Waiver by Deceased Patient's Representative.** The *personal representative* of the deceased may waive the privilege. One who is entrusted with the management of the deceased's property may surely be trusted to protect the memory and reputation of the deceased, in so far as it is liable to injury by the disclosure of his physical condition when alive. It is incongruous to hold that the person who manages the litigation of the deceased's property-interests has no power to waive rules of evidence for the purpose of advancing those interests. The power of an *heir* may also be conceded, if we remember that the heir, first, is at least equally interested in preserving the ancestor's reputation, and, secondly, has an equal moral claim to protect the deceased's property-rights from unwarranted diminution. The futility, under the circumstances, of predicated any privilege is the more apparent when (as in the usual case) the issue turns upon the fact of insanity, which is so bruited publicly in the litigation that the pretence of preserving secrecy is a vain one. Except in two or three jurisdictions,¹ it is usually agreed that the deceased's representative (and probably also the heir) may waive the privilege.²

⁴ 1900, *Nelson v. Ins. Co.*, 110 Ia. 600, 81 N. W. 807 (physician's affidavit, sent with proofs of death, received as an admission of the beneficiary); 1891, *Buffalo L. T. & S. D. Co. v. Knights T. & M. M. A. Ass'n*, 126 N. Y. 450, 454, 27 N. E. 942 (physician's certificate of cause of death, sent with proofs of death, receivable as the party's admission).

Distinguish the following ruling: 1900, *Davis v. Supreme Lodge*, 165 N. Y. 159, 58 N. E. 891 (physician's certificate of death, required by law, excluded; N. Y. City Charter, Laws 1897, c. 378, § 1172, making admissible the records of the board of health, does not repeal the Code section; Gray and Landon, JJ., diss.); 1903, *Beglin v. Ins. Co.*, 173 id. 374, 66 N. E. 102 (preceding case followed).

For the question how far these "proofs" may be used as *admissions* or otherwise, see *ante*, § 1073.

¹ *Cal.*: 1893, *Flint's Estate*, 100 Cal. 391, 395, 34 Pac. 863 (no waiver, following the N. Y. construction; here, not for an heir as against a devisee); 1897, *Harrison v. R. Co.*, 116 id. 156, 47 Pac. 1019 (following the New York rulings); *Ia.*: 1900, *Shuman v. Supreme Lodge*, 110 Ia. 480, 81 N. W. 717 (contest between beneficiaries of insurance; the privilege held to apply; compare the Iowa cases *infra*); *N. Y.*: 1885, *Westover v. Ins. Co.*, 99 N. Y. 56, 1 N. E. 104;

1888, *Loder v. Whelpley*, 111 id. 239, 246, 18 N. E. 874.

² *Ind.*: 1881, *Masonic M. B. Ass'n v. Beck*, 77 Ind. 203, 210 (said *obiter*; waiver by deceased's representative, allowable); 1884, *Penn. M. L. Ins. Co. v. Wiler*, 100 id. 92, 101 (same; beneficiary of an insurance policy, held to have the right of waiver); 1889, *Morris v. Morris*, 119 id. 343, 21 N. E. 918 (administrator allowed to waive); *Ia.*: 1894, *Denning v. Butcher*, 91 Ia. 425, 436, 59 N. W. 69 (waiver by an executor allowable; here, by calling as a witness); 1897, *Winters v. Winters*, 102 id. 53, 71 N. W. 184 (a physician may testify to the deceased's mental condition; whether on the ground that either heir or alleged devisee has the right to waive the privilege as representative, or that the statute does not apply where the proceedings are not adverse to the estate, as in a will contest, is expressly not decided, both grounds being approved); *Mich.*: 1879, *Fraser v. Jennison*, 42 Mich. 206, 225, 3 N. W. 882 (testamentary contest; waiver by an executor allowed); *Mo.*: 1884, *Groll v. Tower*, 85 Mo. 249, 255 (personal injury; waiver by a representative, allowed); 1889, *Thompson v. Ish*, 99 id. 160, 12 S. W. 510 (testamentary contest; a residuary legatee allowed to waive; "all claiming under the deceased" may waive).

Sub-topic VII: COMMUNICATIONS BETWEEN PRIEST AND PENITENT.

§ 2394. **History; No Privilege at Common Law.** It is perhaps open to argument whether a privilege for confessions to priests was recognized in common-law courts during the period before the Restoration. The only available data appear to be an indecisive incident in the Jesuit trials under James I,¹ and a statute of much earlier date and of ambiguous purport,² together with the general probabilities to be drawn from the recognition of Roman ecclesiastical practices prior to Henry VIII.³ But since the Restoration, and for more than two centuries of English practice, the almost unanimous expression of judicial opinion (including at least two decisive rulings) has denied the existence of a privilege.⁴ A single judge, to be sure, distinctly declared for the privilege;⁵ and several took occasion to avow that in their

¹ 1606, Garnet's Trial, 2 How. St. Tr. 218, 255 (Garnet was Superior of the Jesuits, and on his trial refused certain answers because "he was bound to keep the secrets of confession"; "whereupon the earl of Nottingham asked him, if one confessed this day to him that to-morrow morning he meant to kill the king with a dagger, if he must conceal it? Whereunto Garnet answered that he must conceal it"; but the questioners did not attempt to compel a disclosure of the confessional's secrets).

² St. 9 Edw. II, c. 10 (Articuli Cleri); quoted and commented on in 2 Co. Inst. 629.

³ Mr. Badeley's pamphlet, written about 1860 (a copy of which has not been accessible), rested the privilege on the supposed demonstration that it was recognized directly in the canon law, and implicitly in the English authorities of the 1600s; but his data seem to have been adequately explained away by Mr. Hopwood, in his learned article on Confessions in Criminal Causes (1865; Juridical Society's Papers, III, 129, 137). The arguments of Mr. Badeley are in part reproduced in a note to *R. v. Hay*, 2 F. & F. 4.

⁴ 1693, *Anon.*, Skinner 404 (L. C. J. Holt declared communications with an attorney or scrivener were with the protection of a counsellor; "for he is counsel to a man, with whom he will advise, if he be intrusted and educated in such way of practice; otherwise, of a gentleman, parson, etc."); 1791, *R. v. Sparkes*, cited in Peake N. P. 77 (the confession of a papist to a protestant clergyman was admitted by Buller, J.); 1792, Buller, J., in *Wilson v. Rastall*, 4 T. R. 753, 759 ("I take the distinction to be now well settled that the privilege extends to those three enumerated cases [of counsel, solicitor, and attorney] at all times, but that it is confined to these cases only"); 1802, *Butler v. Moore, Ire.*, McNally, Evidence, 253 (title to property under a will; on the question whether the testator by having conformed to the Roman church had become incapable of devising his estates, a Roman clergyman was asked by the heir "what religion did Lord Dunboyne profess at the time of his death?"; Smith, M. R., declined to recognize the privilege claimed by the witness on the ground of "confidential communications made

to him in the exercise of his clerical functions"); 1823, *R. v. Radford*, cited by Mr. Moody, arguing in *R. v. Gilham*, Moo. Cr. C. 197 (confession to a clergyman, excluded; but probably not because of the privilege, but on the principles of confessions); 1828, *R. v. Gilham*, *ubi supra* (confession to a mayor, made after exhortations by a clergyman, admitted); 1828, *Broad v. Pitt*, 3 C. & P. 518, Best, C. J. ("The privilege does not apply to clergymen, since the decision the other day in the case of *Gilham*. I for one will never compel a clergyman to disclose communications made to him by a prisoner; but if he chooses to disclose them, I shall receive them"); 1838, *Greenlaw v. King*, 1 Beav. 137, 145, *obiter*, per Lord Langdale, M. R. (privilege denied); 1851, *Wigram, V. C.*, in *Russell v. Jackson*, 9 Hare 387, 391, *obiter* (privilege denied); 1860, *R. v. Hay*, 2 F. & F. 4 (a Catholic priest objected to reveal from whom he received the watch charged as stolen, claiming that he "received it in connection with the confessional"; Hill, J.: "You are not asked at present to disclose anything stated to you in the confessional"; and committed the witness for contempt, on his continued refusal to answer); 1865, *Nash's Life of Lord Westbury*, II, 104 (Lord Westbury, in the controversy over the "Road Murder," declared that no such privilege existed); 1876, *Jessel, M. R.*, in *Anderson v. Bank, L. R. 2 Ch. D. 644*, 651, *obiter* (privilege denied); 1881, the same judge in *Wheeler v. LeMarchant*, 17 id. 675, 681, *obiter* (same); 1893, *Normanshaw v. Normanshaw*, 69 L. T. Rep. 468, *Jeune, P. J.* (divorce for adultery; an answer compelled as to the respondent's admissions to the vicar; "each case of confidential communication should be dealt with on its own merits, but . . . it was not to be supposed for a single moment that a clergyman had any right to withhold information from a court of law").

⁵ 1846, *Alderson, B.*, in *Attorney-General v. Briant*, 15 L. J. Exch. 265, 271 (on *R. v. Gilham* being cited: "That case was not well argued; there was a statute upon the subject, which was not referred to; I think the words are: 'Let confessors beware that they do not

discretion they would not compel disclosure in practice.⁶ But the privilege cannot be said to have been recognized by the common law, either in England or in the United States.⁷

§ 2395. **Statutes recognizing the Privilege.** In two jurisdictions of Canada and in more than one half of the jurisdictions of the United States the privilege has been sanctioned by statute.¹ In the application of these statutes, it

disclose that which they receive from prisoners, excepting in treason'; the exception proves the rule"; this statute's meaning is explained by Mr. Hopwood, in the article cited *supra*; 1853, *R. v. Griffin*, 6 Cox Cr. 219, Alderson, B. (the chaplain of a workhouse, who had visited the accused "as her spiritual adviser to administer the consolations of religion" was held privileged, on the ground that by analogy to the attorney's privilege, which secures "proper legal assistance," so the accused should have "proper spiritual assistance"; yet the judge added: "I do not lay this down as an absolute rule; but I think that such evidence ought not to be given").

⁶ 1828, *Best, C. J.*, in *Broad v. Pitt*, quoted *supra*, n. 1; 1874, *R. v. Castro* (Tichborne Case), Charge of C. J., I, 648 (a priest refused to disclose subject-matter of a confession, and was not compelled to speak).

⁷ It was early denied in Massachusetts: 1818, *Com. v. Drake*, 15 Mass. 161 (lewdness; defendant's penitential confessions to fellow-members of his church, admitted); but was recognized in an inferior court in New York: 1820 *circa*, *People v. Phillips*, 1 West. L. J. 109, Anthon's Law Student, 217.

¹ *Newf. Consol. St.* 1892, c. 57, § 5 ("A clergyman or priest shall not be compellable to give evidence as to any confession made to him in his professional character"); *Que. : C. C. P.* (ed. 1886) § 275 ("[A witness] cannot be compelled to declare what has been revealed to him confidentially in his professional character as religious or legal adviser"); *Alaska C. C. P.* 1900, § 1037 (substantially like Or. Annot. C. 1892, § 712, par. 3); *Ariz. Rev. St.* 1901, § 2535, par. 5; *P. C.* § 1111, par. 3 (like Cal. C. C. P. § 1881, unamended); *Ark. Stats.* 1894, § 2918 ("No minister of the gospel or priest of any denomination shall be compelled to testify in relation to any confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination"); *Cal. C. C. P.* 1872, § 1881, par. 3 ("A clergyman or priest cannot, without the consent of the person making the confession, be examined as to any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs"; amended by the Commission of 1901 by adding: "nor as to any information obtained by him from a person about to make such confession and received in the course of preparation for such confession"; for the validity of this amendment, see *ante*, § 488; § 1882 (implied waiver; quoted *ante*, § 2292); *Colo. Annot. Stats.* 1891, § 4824 (like Cal. C. C. P. § 1881, unamended); § 4825 (waiver by consent; quoted

ante, § 2380); *Hawaii Civil Laws* 1897, § 1418 ("No clergyman of any church or religious denomination shall, without the consent of the person making the confession, divulge in any action, suit, or proceeding, whether civil or criminal, any confession made to him in his professional character according to the uses of the church or religious denomination to which he belongs"); *Ida. Rev. St.* 1887, § 5958 (like Cal. C. C. P. § 1881, unamended); *Ind. Rev. St.* 1897, § 507 ("Clergymen, as to confessions or admissions made to them in course of discipline enjoined by their respective churches," shall not be competent); *Ia. Code* 1897, § 4608 (quoted *ante*, § 2292); *Kan. Gen. St.* 1901, § 4771, par. 5 (like Okl. Stats. § 335); *Ky. C. C. P.* 1895, § 606(5) ("Nor shall a clergyman or priest testify to any confession made to him, in his professional character, in the course of discipline enjoined by the church to which he belongs, without the consent of the person confessing"); *Mich. Comp. L.* 1897, § 10180 ("No minister of the gospel or priest of any denomination whatsoever shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination"); *Minn. Gen. St.* 1894, § 5662 (like Cal. C. C. P. § 1881, unamended); *Mo. Rev. St.* 1889, § 8925 ("The following persons shall be incompetent to testify: . . . fourth, a minister of the gospel or priest of any denomination, concerning a confession made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination"); *Mont. C. C. P.* 1895, § 3163(3) (like Cal. C. C. P. § 1881, unamended); *Nebr. Comp. St.* 1899, § 5902 (" . . . The following persons shall be incompetent to testify: . . . fifth, a clergyman or priest, concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession"); § 5907 (quoted *ante*, § 2292); *Nev. Gen. St.* 1885, § 3405 (like Cal. C. C. P. § 1881, unamended); *N. Y. C. C. P.* 1877, § 833 ("a clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character in the course of discipline enjoined by the rules or practice of the religious body to which he belongs"); *N. D. Rev. C.* 1895, § 5703 (like Cal. C. C. P. § 1881, unamended); § 5704 ("If a person offers himself as a witness," it is a consent to the priest's examination "on the same subject"); *Oh. Annot. Rev. St.* 1898, § 5241 ("The following persons shall not testify in certain respects: . . . 2. A clergyman or priest, concerning a confession made to him in

has been held, following the dictates of principle, that the privilege applies only to communications made in the understood pursuance of that church discipline which gives rise to the confessional relation,² and, therefore, in particular to confessions of sin only, not to communications of other tenor;³ that it includes only the communications, and not information otherwise acquired;⁴ and that it exempts the penitent also, as well as the priest, from disclosure.⁵

§ 2396. **Policy of the Privilege.** Even by Bentham, the greatest opponent of privileges, this privilege has, in the following argument, been conceded, to justify recognition:

1827, Mr. *Jeremy Bentham*, *Rationale of Judicial Evidence*, b. IX, pt. II, c. VI (Bowring's ed. vol. VII, pp. 367 ff.): "To form any comparative estimate of the bad and good effects flowing from this institution, belongs not, even in a point of view purely temporal, to the design of this work. The basis of the inquiry is, that this institution is an essential feature of the catholic religion, and that the catholic religion is not to be suppressed by force. . . . I set out with the supposition, that, in the country in question, the catholic religion was meant to be tolerated. But with any idea of toleration, a coercion of this nature is altogether inconsistent and incompatible. In the character of penitents, the people would be pressed with the whole weight of the penal branch of the law; inhibited from the exercise of this essential and indispensable article of their religion; prohibited, on pain of death, from the confession of all such misdeeds as, if judicially disclosed, would have the effect of drawing down upon them that punishment; and so, in the case of inferior misdeeds, combated by inferior punishments. Such would be the consequences to penitents; to confessors, the consequences would be at least equally oppressive. To them, it would be a downright persecution, if any hardship, inflicted on a man on a religious account, be susceptible of that, now happily odious, name. To all individuals of that profession, it would be an order to violate what by them is numbered amongst the most sacred of religious duties. In this case, as in the case of all conflicts of this kind, some would stand firm under the persecution, others would sink under it. To the former, supposing arrangements on this head efficient and consistent, it would have the effect of imprisonment — a most severe imprisonment for life. . . . The

his professional character, in the course of discipline enjoined by the church to which he belongs"; *Okla. Stats.* 1893, § 335 ("The following persons shall be incompetent to testify: . . . Fifth, a clergyman or priest concerning any confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs, without the consent of the person making the confession . . . provided that, if a person offer himself as a witness, that is to be deemed a consent to the examination; also, if [of?] an attorney, clergyman or priest, physician or surgeon on the same subject, within the meaning of the last three subdivisions of this section"); *S. D. Stats.* 1899, § 6544 (substantially like *Cal. C. C. P.* § 1881, unamended); § 6545 (like *N. D. Rev. C.* § 5704); *Utah Rev. St.* 1898, § 3414 (like *Cal. C. C. P.* § 1881, unamended); *Vt. St.* 1896, No. 30 ("No priest or minister of the gospel shall be permitted to testify in any court in this State to statements made to him by any person under the sanction of a religious confessional"); *Wash. C. & Stats.* 1897, § 5994 (like *Cal. C. C. P.* § 1881, unamended); § 6940 (quoted *ante*, § 2380); *Wis. Stats.* 1898, § 4074 (like *N. Y. C. C. P.* § 833, adding "without consent thereto

by the party confessing"); *Wyo. Rev. St.* 1887, § 2589 (like *Oh. Rev. St.* 1898, § 5241).

² 1895, *State v. Brown*, 95 Ia. 381, 64 N. W. 277 (the defendant met the minister on the train, and communicated his story without any purpose of obtaining advice or assistance; held not privileged); 1835, *People v. Gates*, 13 Wend. 311, 323 (admissions "not in the course of discipline," held not privileged).

³ 1877, *Gillooley v. State*, 58 Ind. 182; 1901, *Hills v. State*, 61 Nebr. 589, 85 N. W. 836 (bigamy; defendant's memorandum of instructions, given to a clergyman, who was to communicate to the first wife the reasons stated therein for influencing her to abandon the prosecution, admitted).

⁴ 1880, *Toomes' Estate*, 54 Cal. 509, 515 (a priest's testimony to a testatrix' mental condition just before death, admitted, because covering, not a confession, but only the testatrix' "proper condition of mind to make a confession"). Compare *R. v. Hay*, 2 F. & F. 4, cited *ante*, § 2394.

⁵ 1880, *Massé v. Robillard*, 10 Rev. Légale 527 (under the statutory privilege in Quebec, the penitent himself cannot be compelled to disclose the communications of the priest).

advantage gained by the coercion — gained in the shape of assistance to justice — would be casual, and even rare ; the mischief produced by it, constant and all-extensive. Without reckoning the instances in which it happened to the apprehension to be realized, the alarm itself, intense and all-comprehensive as it would be, would be a most extensive as well as afflictive grievance. . . . If in some shapes the revelation of testimony thus obtained would be of use to justice, there are others in which the disclosures thus made are actually of use to justice under the assurance of their never reaching the ears of the judge. Repentance, and consequent abstinence from future misdeeds of the like nature, — repentance, followed even by satisfaction in some shape or other, satisfaction more or less adequate for the past, — such are the well-known consequences of the institution ; though in a proportion which, besides being everywhere unascertainable, will in every country and in every age be variable, according to the degree and quality of the influence exercised over the people by the religious sanction in that form, and the complexion of the moral part of their character in other respects. But, without any violation of this part of his religious duty, and even without having succeeded so far as to have produced in the breast of the misdoer any permanent and efficacious repentance, modes are not wanting in which it may be in the power, as it naturally will be in the inclination, of a conscientious and intelligent confessor, to furnish such information as shall render essential service to the interests of justice. I mean, by ministering to the prevention of such individual misdeeds as, though meditated, are as yet at a stage short of consummation ; or of such others as, though as yet not distinctly in contemplation, are in a way to present themselves to the same corrupted mind. Who the misdoer is, the confessor knows better than to disclose ; as little will he give any such information as may lead to the arrestation of the delinquent, under circumstances likely to end in his being crushed by the afflictive hand of the law. But, without any such disclosure, he may disclose what shall be sufficient to prevent the consummation of the impending mischief. . . . Warnings of this kind, if I understand aright, have not unfrequently been given, — warnings, which might have been given and would have been given in better times, — might (had they been given) have operated as preventives to the most grievous public calamities.”¹

The propriety of the privilege may be tested by the four canons already laid down for privileged communications (*ante*, § 2285). (1) Does the communication originate in a confidence of secrecy ? It is so commonly understood. The ecclesiastical rules, to be sure, do provide in some measure that the penitent cannot obtain absolution unless he makes reparation, which may involve an open repetition of the confession ; and this, it may be argued, indicates that ultimate secrecy is not an assumption of the confessional. Whether in theory or in practice such is the case, must be a question of fact as to actual ecclesiastical rules. In any event the ultimate disclosure in that manner must be supposed to rest upon the priest's discretion according to the needs of each case. Thus, in effect, it may be assumed that a permanent secrecy, subject only to an optional variation by the priest, is an essential of any real confessional system as now maintained. In so far as it may not be, in the discipline of any particular church, the privilege cannot apply. (2) Is confidentiality of communication essential to the relation ? In other words, would penitential confessions, under such a system as the above, continue to be made if they were liable to be demanded for disclosure in a court of justice when needed ? In so far as such confessions concern crimes and wrongs, they

¹ In the following place also the arguments Introductory Report to the Code of Evidence are considered : *circa* 1823, Edward Livingston, (Works, ed. 1872, I, 467).

would certainly, in some indefinite but substantial measure, be discontinued, and the penitential relation be to that extent annulled. (3) Does the penitential relation deserve recognition and countenance? In a State where toleration of religions exists by law, and where a substantial part of the community professes a religion practising a confessional system, this question must be answered in the affirmative. Historically, the failure to recognize the privilege during three centuries in England has probably been due to a reluctance to concede this affirmative answer. The disabilities of adherents of the Roman Church in England and Ireland — the only church actually enforcing a confessional system — also involved a disfavor to that system. In the United States, these disabilities and that disfavor do not exist; they have now disappeared in their original home. The privilege therefore satisfies this canon. (4) Would the injury to the penitential relation by compulsory disclosure be greater than the benefit to justice? Apparently it would. The injury is plain; it has been forcibly set forth by Bentham. The benefit would be doubtful. Even assuming that confessions of legal misdeeds continued to be made, the gain would be merely the party's own confession. This species of evidence, as already noticed in other connections (*ante*, §§ 2251, 2291), ought in no system of law to be relied upon as a chief material of proof; for it tempts prosecutors to lack of diligence and thoroughness in the investigation of the entire case against an accused. In criminal cases, it would be impolitic to encourage a resort to this too facile channel of confessions. In civil cases, the ordinary process of discovery upon oath would be a sufficient equivalent. On the whole, then, this privilege has adequate grounds for recognition.

PART IV: PAROL EVIDENCE RULE (CONSTITUTION OF LEGAL ACTS).

CHAPTER LXXXV.

INTRODUCTORY.

§ 2400. Parol Evidence Rule, not a Rule of Evidence.

§ 2401. Parol Evidence Rule, a group of Rules defining the Constitution of Legal Acts; Four Subdivisions of the Subject.

A. CREATION OF LEGAL ACTS (VOIDNESS AND VOIDABleness).

§ 2404. General Principle; Subject, Terms, and Delivery; Intent and Expression.

§ 2405. History of the Principle.

1. Subject, Terms, Delivery, in general.

§ 2406. (a) Subject must concern Legal Relations; Transactions of Jest, Friendship, Charity, and Pretence.

§ 2407. (b) Terms must be Definite; Terms implied from Conduct; Document void for Uncertainty.

§ 2408. (c) Act must be Final; (1) Delivery, as applied to Deeds; Conditions Precedent; Escrows.

§ 2409. Same: (2) Delivery, as applied to Negotiable Instruments.

§ 2410. Same: (3) Delivery, as applied to Contracts in general; Conditions Precedent and Subsequent; Assent of Third Persons; Blanks; Dates.

§ 2411. Same: (4) Publication, as applied to Wills.

2. Intent and Mistake, as applied to Subject, Terms, and Delivery, of an Act.

§ 2413. Intent and Mistake, in general; Modern Test of Reasonable Consequences, applied to Expressed Intent.

§ 2414. (A) Jural Subject of an Act; Intent not to be Bound.

§ 2415. (B) Terms of an Act; (a) Signing a Completed Document by Mistake; (1) Individual Mistake not Known to or Induced by the Second Party.

§ 2416. Same: (2) Individual Mistake Known to or Induced by the Second Party.

§ 2417. Same: (3) Mutual Mistake; General Principle.

§ 2418. Same: Mutual Mistake as affecting Bona Fide Holders for Value.

§ 2419. Same: (b) Signing a Document having Blanks, or capable of Alteration; Writing one's Name not as a Signature.

§ 2420. (C) Delivery of a Document; Escrow Deeds or Negotiable Instruments delivered to Bona Fide Holder contrary to Intent of Maker.

§ 2421. Unilateral Acts; foregoing Principles applied to Wills and Ballots.

3. Voidable Acts.

§ 2423. Motive as making an Act Voidable; Mistake, Fraud, Duress, Infancy, and Insanity.

B. INTEGRATION OF LEGAL ACTS (VARYING THE TERMS OF A DOCUMENT).

§ 2425. General Theory of the Rule against Varying the Terms of a Writing.

§ 2426. History of the Rule.

1. Integration of Unilateral Acts.

§ 2427. Official Documents (Surveys, Apportionments, Assessments, etc.).

2. Integration of Bilateral Acts.

§ 2429. No Integration at all; Casual Memoranda.

§ 2430. Partial Integration; General Test for Applying the Rule; "Collateral Agreements."

§ 2431. Same: Incorrect Tests; (a) "Varying the Terms of the Writing"; (b) "The Writing is the Sole Criterion"; (c) Fraud, in Pennsylvania.

§ 2432. Receipts and Releases; Bills of Lading.

§ 2433. Recital of Consideration in a Deed.

§ 2434. Warranty in a Sale; Insurance Warranties.

§ 2435. Agreements not to Sue, or not to Enforce, or to hold Conditional only.

§ 2436. Agreements of Counter-claim, Set-off, Renewal, or Mode of Payment.

§ 2437. Agreement to hold a Deed Absolute as Security only; Agreement to hold in Trust.

§ 2438. Agreement to hold as Agent or Surety only.

§ 2439. Fraud.

§ 2440. Trade Usage and Custom.

§ 2441. Novation, Alteration, and Waiver; Subsequent Agreements.

§ 2442. Miscellaneous Applications of the Rule, to admit or exclude "Collateral" Agreements.

§ 2443. Rule Applied to Negotiable Instruments; General Principle.

§ 2444. Same: (a) Agreements affecting the Express Terms of the Document.

§ 2445. Same: (b) Agreements affecting the Implied Terms.

§ 2446. Rule binding upon the Parties to the Document only.

§ 2447. Burden of Proof; Who must Produce the Document.

3. Integration required by Law.

§ 2450. At Common Law: (1) Judicial Records.

§ 2451. Same: (2) Corporate Acts and Records; (3) Negotiable Instruments.

§ 2452. Under Statutes: (1) Wills; (2) Ballots; (3) Insurance Policies.

§ 2453. Conclusive Certificates, distinguished.

C. SOLEMNIZATION OF LEGAL ACTS.

§ 2454. Writing as a Formality; Statute of Frauds.

§ 2455. Same: Discharge and Alteration of Specialties, etc.

§ 2456. Other Formalities than Writing; Signature, Seal, Attestation, Registration, Stamp.

D. INTERPRETATION OF LEGAL ACTS.

§ 2458. General Nature of Interpretation; Standard and Sources of Interpretation.

§ 2459. Same: "Intention" and "Meaning," distinguished.

1. Standard of Interpretation.

§ 2461. General Principle; Four Standards, — Popular, Local, Mutual, Individual.

§ 2462. Rule against "Disturbing a Plain Meaning," or, Forbidding Explanation except of Ambiguities; History and General Principle.

§ 2463. Same: Application of the Rule to Wills, Deeds, etc.

§ 2464. Usage of Trade or Locality, when to apply.

§ 2465. Parties' Mutual Understanding; Identifying a Description.

§ 2466. Individual Party's Meaning; (1) Deeds and Contracts.

§ 2467. Same: (2) Wills.

2. Sources of Interpretation.

§ 2470. General Principle; All Extrinsic Circumstances may be Considered.

§ 2471. Exception for Declarations of Intention.

§ 2472. Same: (1) Exception for Equivocation or Latent Ambiguities.

§ 2473. Same: Blanks and Patent Ambiguities.

§ 2474. Same: (2) Exception for Erroneous Description.

§ 2475. Same: (3) Exception for "Rebutting an Equity" (Legacies, Advancements, and Disinheritance).

§ 2476. *Falsa Demonstratio non Nocet*; General Principle.

§ 2477. Same: Application to Deeds and Wills.

§ 2478. Sundry Rules; Interpretation of Statutes.

INTRODUCTORY.

§ 2400. **Parol Evidence Rule, not a Rule of Evidence.** "Few things," wrote Professor Thayer, "are darker than this, or fuller of subtle difficulties"; and this condition of the law all members of the profession will concede. Two circumstances appear to be responsible for it, — first, an inherent necessity for certain distinctions, simple in themselves but subtle and elusive in their application, and, secondly, the unfortunate prevalence of a terminology in which the subject cannot possibly be discussed with entire accuracy and lucidity. With these two features as marked as they are, it is not strange that the so-called parol evidence rule is attended with a confusion and an obscurity which make it the most discouraging subject in the whole field of Evidence. Rather is it surprising that, in spite of these obstacles, so much has actually been achieved of consistency and of definiteness in the law as it stands. What is chiefly needed to-day, for clarifying the subject and rendering manageable its mass of rules, is, first of all, a systematic arrangement of all the connected principles in their due relation, and, secondly, a simple and accurate nomenclature which shall replace the present absurdly incorrect usage and thus make intelligible discussion possible. No one can attempt to re-state the law, except with a due sense of temerity. But the present condition of the subject is beyond endurance; unless improved, it threatens within a generation to result in an irrational and incurable chaos. In the following

treatment the object will be, while preserving as much as possible the language of present usage, to set forth the rules systematically and to discuss them in their proper terms, and thus to assist the future development to proceed along natural and harmonious lines.

But at the outset certain discriminations must be kept in mind:

(1) First and foremost, *the rule is in no sense a rule of evidence*, but a rule of substantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved. It does not concern a probative mental process,—the process of believing one fact on the faith of another. What the rule does is to declare that certain kinds of fact are legally ineffective in the substantive law; and this of course (like any other ruling of substantive law) results in forbidding the fact to be proved at all (*ante*, § 2). But this prohibition of proving it is merely the dramatic aspect of the process of applying the rule of substantive law. When a thing is not to be proved at all, the rule of prohibition does not become a rule of evidence merely because it comes into play when the counsel offers to “prove” it or “give evidence” of it; otherwise, any rule of law whatever might be reduced to a rule of evidence; a ruling (for example) that on a plea of self-defence, in an action of battery, no evidence of the plaintiff’s insulting words is to be received, would become the legitimate progeny of the law of evidence. This employment of terms of evidence for rulings of substantive law, by reason of the constant dramatic presentation of the latter in the course of a trial, is an old and natural failing of the profession, and has been already noticed at the outset of the general subject of Evidence (*ante*, § 2). But in the present department it has risen to a dominating influence of confusion, because there existed in this branch of the law no systematic terminology capable of holding its ground against the usurpation. Let us dismiss, then, once for all, any notion that the parol evidence rule, in any of its aspects,¹ is concerned with any precautions or limitations based on probative value, or indeed with any regulation of evidence in the legitimate sense of that word. This must be the first step to a clear understanding of the working of the rule.²

(2) Next, *the matter excluded by the rule is not inherently or even most commonly anything that can be properly termed “parol.”* That word (in spite of its numerous other derived applications) signifies and implies essentially the idea “oral,” *i. e.* matter of speech, as contrasted with matter of writing.³ Now, so far as the phrase “parol evidence rule” conveys the impression that what is excluded is excluded because it is oral—because somebody spoke or

¹ Except, perhaps, the statute of frauds and the rule for interpreting by declarations of intention, where there is a possible question.

² 1903, Archbald, J., in *Pitcairn v. Hiss Co.*, 125 Fed. 110 (“According to the modern and better view, the rule which prohibits the modification of a contract by parol is a rule, not of evidence, but of substantive law. . . . The writing is the contractual act, of which that

which is extrinsic, whether resting in parol or in other writings, forms no part”). Compare Professor Thayer’s exposition, in his *Preliminary Treatise*, p. 390.

³ It is necessary to abandon the improper use of “verbal” as synonymous with “oral.” The former signifies “relating to words,” whether written or oral; the latter signifies “spoken,” whether words or sentences.

acted other than in writing, or is now offering to testify orally —, that impression is radically incorrect. When the prohibition of the rule is applicable, what is excluded may equally be written as oral, — may be letters and telegrams as well as conversations; and where the prohibition is applicable on the facts to certain written material, nevertheless for the very same transaction certain oral material may not be prohibited. So that the term “parol” not only affords no necessary clue to the material excluded, but is even positively misleading. It must be understood to be employed in a purely unnatural and conventional sense.⁴

(3) There is *no one and undivided parol evidence rule*. There are at least four distinct principles or bodies of doctrine. They concern a common subject — legal acts —, but their content and details are separate and distinct. The case lies very much as if we possessed one term “action” for all the various forms of remedial procedure. It is true enough that they all may be looked upon as mere species of the general notion of a remedy, but it would be by all conceived impossible to discuss the details of mandamus, certiorari, injunction, capias, replevin, bill in chancery, action on the case, scire facias, subpoena, and the rest, with no better word-materials than the one word “action.” Yet this is not far from the impossible task which has been attempted with the term “parol evidence rule.” There is no one generalization for that rule, — at least none which has any practical consequence. The four general groups of doctrine which go to make up the whole have each a separate set of rules; the chief problem in their application is to ascertain which kind of rule is involved in the case in hand, and to keep one from being mistaken for another.

(4) *The parol evidence rule is not the only rule which concerns the use of written things*. There are several other rules, with which it has nothing to do, that have also something to say about writings, — the chief of which are the rule about Producing Documentary Originals (*ante*, §§ 1177–1282) and the rule about Authenticating Documents (*ante*, §§ 2129–2169). These are rules of Evidence in the genuine sense, and the term “parol” is often naturally employed (especially with the former) in discussing them. But they are of no kith or kin with the Parol Evidence rule proper, as here involved, *i. e.* the rule of substantive law. Their difference from the present rule is plain enough; but the false nomenclature of the latter has sometimes caused a relation between them to be suspected.

(5) Finally, it needs to be insisted, in opposition to the popular and natural view which tends to thrust itself forward at trials, that a *writing has no efficacy per se*, but only in consequence of and dependence upon other circumstances external to itself. The exhibition of a writing is often made as though it possessed some intrinsic and indefinite power of dominating the situation and quelling further dispute. But it needs rather to be remembered that a writing is, of itself alone considered, nothing, — simply nothing. It

⁴ How unnatural it is may be seen from the contrast to “sealed contract,” in *Briggs v. Partridge*, 64 N. Y. 357.

must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has. Granting that there is a writing before us: Has it been brought home to anybody as his act? Was it meant to supersede other materials? Was it essential to the transaction? What external objects does it apply to? These are questions which cannot be answered without looking away from the writing to other data; and until they are answered the efficacy of the writing is merely hypothetical. There is no magic in the writing itself. It hangs in mid-air, incapable of self-support, until some foundation of other facts has been built for it. So far as the parol-evidence rule is concerned with writings at all, it concerns these questions of the relation between the writing and other data, and it points out what other data are essential and available for the proper use of the writing. It conduces, then, to a sound understanding of the rule if we dispel wholly that natural notion which falsely attributes to a writing some mystic independence and automatism.

In short, then, (1) the parol-evidence rule is not a rule of evidence; (2) nor is it only a rule for things parol; (3) nor is it a single rule; (4) nor is it all of the rules that concern either parol or writing; (5) nor does it involve the assumption that a writing can possess, independently of the surrounding circumstances, any inherent status or efficacy.

§ 2401. **Parol Evidence Rule, a group of Rules defining the Constitution of Legal Acts; Four Subdivisions of the Subject.** What, then, is the Parol Evidence rule? It concerns the constitution of legal acts. This requires a brief notice of the nature of legal acts.

Only a small part of conduct is legal conduct, *i. e.* conduct having legal effectiveness. The nature and effect of such conduct as will be given legal effect is therefore a question of general consequence in all departments of the law. Leaving aside the field of crimes (which deal with the relation between State and individual) and of torts (which deal with irrecusable or involuntary civil relations), we are here concerned with voluntary relations, *i. e.* those relations which may be created, defined, transferred, or extinguished by will of the parties. The conduct which is allowed to have such effect is a *legal act*.¹

For the purpose of specific varieties of legal effects — sale, contract, release, and so on —, there are specific requirements, varying according to the subject. But there are also certain fundamental elements, common to all, and capable of being generalized. These elements present problems which run through all

¹ "There is a very important class of acts in which the legal result follows because that result was itself contemplated and desired as one of the consequences of the act. From the fact that legal results are in contemplation in this class of acts, the Germans call them *Rechtsgeschäfte*, Frenchmen call them *actes juridiques*. English lawyers have not yet agreed upon any name for them. The terms 'juristic acts' and 'acts in the law' have been suggested" (Markby, *Elements of Law*, 3d ed., § 235); "It has been

defined, by a high authority [Puchta], as an 'act the intention of which is directed to the production of a legal result.' . . . A better definition [by Windscheid] is 'a manifestation of the will of a private individual directed to the origin, termination, or alteration of rights.' A juristic act has also been well described [by Ihering] as 'the form in which the subjective will develops its activity in creating rights, within the limits assigned to it by the law'" (Holland, *Jurisprudence*, 3d ed., c. 8).

the varieties of legal acts, and must therefore be analyzed and discussed in union. Their principles, when applied to specific kinds of acts, usually give substantially similar results ; and, when they do not, it is merely because special circumstances call for local variances. It is therefore impossible to solve these problems adequately as a peculiarity of any one kind of act, since they do not peculiarly belong there, and do not take their significance from any one variety. For example, whether a mistake due to signing a document unread can avoid the effect of the document is not a question solvable separately for deeds, wills, simple contracts, and negotiable instruments ; it is a question common to all, and solvable only in comparison. So, too, the question whether an oral promise to give money, made at the same time with a written one, is legally effective, is not essentially one question for deeds, another for promissory notes, and another for wills ; whatever variation there is must be a variation from a common principle underneath all. Again, whether the word “dollars” may be considered to signify the lawful money of the United States or the money of the unlawful Confederate States, is the same kind of a question for bills of exchange, for ordinary contracts, and for wills, — a question of some general principle of interpretation. Even when the answer is different for different kinds of acts, it appears in all cases as a variation from some general doctrine. What has to be done, therefore, is to compare under one head the principles common to all legal acts, and to take account of the specific variations for specific kinds of acts. This is what the “parol evidence” rule does in qur law.

These principles fall into four groups, marking the four possible elements of every legal act : (A), The Enaction, or Creation, of the act ; (B), its Integration, or embodiment in a single memorial, when desired ; (C), its Solemnization, or fulfilment of the prescribed forms, if any ; and (D), the Interpretation, or application of the act to the external objects affected by it. Of these four, the first and the fourth are necessarily involved in every legal act ; the second and the third may or not become practically important, but are always possible elements.

A. The Enaction, or Creation, of an act is concerned with the question *whether any legal act at all*, or a *legal act of the alleged tenor*, has been consummated ; or, if consummated, whether the circumstances attending its creation authorize its *avoidance* or *annulment*. Under the first head arise the questions whether a writing is anything more than a preparatory draft, whether it has been completed by delivery, whether its tenor is to be judged by its actual words or the intended words, and the like. Under the second head arise the questions whether it can be avoided because of mistake, fraud, or duress, affecting the motive leading to its enaction.

B. The Integration of the act consists in embodying it in a *single utterance* or *memorial*, — commonly, of course, a written one. This process of integration may be required by law, or it may be adopted voluntarily by the actor or actors ; and, in the latter case, either wholly or partially. Thus the question in its usual form is whether a particular document is the one deemed

by law to be the sole memorial of the act, or how far a particular document was intended by the parties to cover certain subjects of transaction between them and therefore to deprive of legal effect all their other utterances.

C. The Solemnization of the act concerns the *forms* which are *required by law* to attend it in order to give it legal effect. This always becomes a question of some particular subject in the law, because there is no universal formality required in common for all acts. Thus the formalities of attestation, seal, registration, and the like, are essential for some but not for other acts. Writing is naturally the most important and most common instance of a required formality. The resort to writing may sometimes be an instance of Integration and sometimes of Solemnization, but either may exist without the other.

D. The Interpretation of an act is the *application of it to external objects*, in the process of defining and enforcing the right or obligation affected by its terms. The words of a legal act are merely the symbols by which the actor indicates the external objects which the act is expected to affect — a parcel of land or a barrel of sugar or John Doe the legatee. The connection between these words and their possible objects must be judicially established before the terms of the act can be given the effects expected by the parties. In this process of Interpretation, the main questions concern the standard of meaning to be adopted and the data which may be used in determining that meaning.

For these four elements in the act, the principles are independent of each other, — so independent, indeed, that they sometimes appear to be contradictory; and the chief inherent difficulty in their application arises from the necessity of distinguishing which element and which principle is really involved.

In the present exposition, it is impossible to do more than trace the general principles into their main details. Not only is the subject properly one of substantive law, instead of evidence; but it involves logically an application to many particular branches of the substantive law. Nothing short of separate treatises would suffice for a complete collection of precedents. For example, the statute of frauds, with its myriad rulings, is involved; and the doctrine of collateral agreements as applied to negotiable instruments, the doctrine of mistake and misrepresentation as a motive for a deed or contract, the doctrine of judicial records as unimpeachable, — these and numerous other applications of the principle, would require for their complete exposition far more scope than is appropriate in a treatise upon the law of evidence. The purpose in this chapter is to collect in systematic form the various applications of the principles and to examine in as much detail as is necessary those particular topics which have hitherto been commonly discussed as a part of the law of evidence and not of the substantive law.²

² No attempt has been made to collect all of the precedents on any of the topics; but in those topics commonly appropriated to the law of evidence the greatest part of the English cases and a large portion of the American cases are believed to be here collected.

A. CREATION OF LEGAL ACTS

(VOIDNESS AND VOIDABLENESS).

§ 2404. **General Principle; Subject, Terms, and Delivery; Intent and Expression.** A legal act — that is, here, an act regarded as capable of having legal effects in civil relations other than tort — may be analyzed from two points of view. With reference to its *tenor*, it involves three elements, — its Subject, its Terms, and its Stages of Utterance. With reference to the *mental condition* of the actor himself, it involves two elements, Volition and Expression.

1. In the former aspect, it is clear that each of these three elements raises its own set of questions. (a) The act must be *jural*, as to its *subject*. Thus, on the one hand, an act which concerns merely relations of courtesy, or duties of morality, or other non-jural subjects, will receive no legal effects. On the other hand, acts which concern transactions prohibited by some policy of law — such as gambling or cheating — will equally be left without legal effects. (b) The act must be *definite* as to its terms. This excludes all acts whose terms are so uncertain or unintelligible that they are incapable of enforcement. Within these limits, the terms of the act will be whatever the actor has used. (c) The act must be *final* in its *utterance*. It does not come into existence as an act until the whole has been uttered. As almost all important transactions are preceded by tentative and preparatory negotiations and drafts, the problem is to ascertain whether and when the utterance was final; because until there has been some finality of utterance, there is no act. The necessity for a delivery of a document, and the nature of a delivery, are here the most usual questions in practice. — These three elements, then, are all essential to any legal act, and no others are essential to all legal acts.

2. In the second aspect, it is clear that there must be both Volition and Expression; for an unexpressed volition would receive no legal effect, and an expression without some sort of volition would be equally ignored. But the volition and the expression may not correspond, and thus the usual problem is to define the *relation that must exist between volition (or intention) and expression*, in each one of the three elements of (1), above, in order to make the act legally effective. For example, Doe and Roe go through the form of marriage, Doe secretly intending it in jest, but Roe seriously; here the *subject* is jural in Doe's expression, but not in his volition; which shall prevail? Again, Doe by mistake of absent-mindedness writes in a contract "\$100," instead of "\$10," and hands it to Roe; here the *terms*, in expression, are different from the terms in volition; which is to prevail? Again, Doe writes a check payable to bearer and places it in his desk, and the check is stolen and handed to Roe; here, in expression — that is, in outward appearance — there has been *finality of utterance*, but not in Doe's volition; shall the former or the latter be decisive? This is the world-old legal problem, inevitably faced in the history of every jurisprudence, — the problem of the competition between the external and the internal standards, the objective and the subjective

points of view. It is useless to prescribe either that the internal will alone or that the external expression alone shall be decisive. Probably no developed system of law has ever practically enforced either the one or the other standard exclusively. It is rather a question of the relation between the two elements, *i. e.* not whether the legal act shall be only as willed or only as expressed, but what sort of volition is sufficient in order to make the actor responsible for a given expression; and this must depend more or less on varying experience in different epochs and communities and in different kinds of transactions. The modern test, for bilateral acts, will be found, with fair uniformity, to predicate some relation of reasonable consequence (judged by the community's standard) between the outward expression and the inward volition; because in bilateral acts the just reliance of the other party to the transaction upon the first party's outward expression must be the salient consideration. For unilateral acts — chiefly wills — more of a concession can be made, and is made, to the actual volition, so far as it is ascertainable.

Such, then, are the elements and the problems with which we are concerned in defining the creation of legal acts in general.

§ 2405. **History of the Principle.** The two chief problems that have most commonly occupied practical jurisprudence have been that of the finality of the utterance (*ante*, § 2404, (1) *c*) and that of the correspondence between intent and expression (*ante*, § 2404 (2), *i. e.* how far a *formal delivery* of a document is essential and decisive, and how far an *unexpressed intent* can be allowed to overthrow the outward act.

As might have been expected, the progress has been from a strict formalism to a liberal and flexible practicality. The mark of primitive legal standards, throughout all, is formalism, — a characteristic already noted here in its effects upon other parts of the law (*ante*, §§ 2032, 575, 1815). It must be kept in mind, for appreciating the traditions against which the modern law has had to struggle :

1885, Professor *Andreas Heusler*, *Institutions of Germanic Private Law*, I, 70, 74: "Without such formalism the [primitive] people could not perceive their law; it would be to them but a buried treasure; and thus to them form is itself law. They resort to form for its own sake, and because in it alone is law perceived. To us, because we cannot in thought put ourselves back to that stage of intellectual development, this stiff domination of form is too apt to appear as an intolerable fetter of the free exercise of the will. But, when these things prevailed, there was no such attitude towards them. . . . The Frankish period is the flourishing period of this symbolism. Thus, in the process of commendation, the act of placing the clasped hands of the ward or the vassal in the opened hands of the lord symbolizes the submission to the wardship or the suzerainty; the acts of pointing and crooking the fingers in the Saxon release ("*digitis incurvatis abnegationem facere*"), symbolizes the surrender of claim to the transferred property; the handing of twig and turf, the delivery of seisin of land; the grasping of altar-cloth or bell-rope, the taking possession of church and chapel; the widow's act of laying the house-key or the cloak on the bier or the tomb of the deceased husband, her surrender of the entire marriage-estate to the husband's creditors; the handing over of a lock of hair from head and beard, the transfer into household service; the delivery of hat or glove, the transfer of ownership; the lending of staff, scepter, spear, or pennon, the granting of a fief. . . . But by the time of the [Germanic] codes [1200-1300] this symbolism is already in decay.

Writing is the sworn enemy of all symbolic representation. A people who do not write feel the need of making the law visible by external and perceivable symbols, and thereby of providing expression for acts and volitions as legal acts and legal volitions. But as soon as acts come to be put into writing, this formalism becomes first a luxury, then a burden, and finally is repudiated entirely.”

The persistence of this formalism, however, even under the regime of writing, is equally notable in the first stages of Anglo-Norman history. In its present relations, it has left its mark in the technical rule concerning delivery of a deed:

1895, Sir *F. Pollock*, and Professor *F. W. Mailland*, *History of the English Law*, II, 83–86, 190: “[In Bracton’s time] a livery of seisin either on the land or within the view was necessary. Until such livery had taken place there was no gift; there was nothing but an imperfect attempt to give. . . . But this change of possession and the accompanying declaration must be made in very formal fashion. . . . A knife is produced, a sod of turf is cut, the twig of a tree is broken off; the turf and twig are handed by the donor to the donee; they are the land in miniature, and thus the land passes from hand to hand. Along with them the knife also may be delivered. . . . When, under Roman influence, the written document comes into use, this also can be treated as a symbol. It is delivered in the name of the land; the effectual act is not the signing and sealing, but the delivery of the deed, and the parchment can be regarded as being as good a representative of land as a knife or a glove would be. Just as of old the sod was taken up from the ground in order that it might be delivered, so now the charter is laid on the ground and thence it is solemnly lifted up or ‘levied’ (*levatio cartæ*); Englishmen hereafter will know how to ‘levy a fine.’ . . . The written document, which few have the art to manufacture, is regarded with mystical awe; it takes its place beside the *festuca*. The act of setting one’s hand to it is a *stipulatio*; it is delivered over as a symbol along with twig and turf and glove.”

Thus it comes down to the succeeding centuries that the technical and unvarying symbol of finality is a delivery of the deed. “Delivery,” says Chief Baron Gilbert, in the early 1700s,¹ “is necessary to the essence of a deed, and the deed takes effect from the delivery; so that unless the delivery be proved, there is no perfect proof of the deed.” The first signs of flexibility are seen in the concession that a prepared deed (an “escrow,” or mere scroll), placed in the hands of a second person for subsequent handing to the grantee, is not yet effective.² Yet even here the formalism — now becoming dead bark — encases the rule, and the requirement of delivery is merely made abstract, so as not to have inherent connection with the maker’s own hand. This concession, moreover, is still refused for a draft deed placed directly in the grantee’s hands in anticipation of some future event which shall make it effective; there can be no escrow to a grantee, it was said.³ At the same

¹ 5th ed., p. 99.

² 1432, Y. B. 10 H. VI, 25. Later, the rule comes to be analyzed and philosophized: 1523, Y. B. 14 H. VIII, 17, 6 and 7 (Brudnel, J.): “If I deliver a deed [to a second person] to be delivered to another [third person] as my deed, then if he takes it [from the second person] without delivery, though he has the deed, he will have no action; for in these cases the act which

makes them perfect was not accomplished nor performed”).

³ 1612, *Thoroughgood’s Case*, 9 Co. Rep. 137 (“If A makes a writing to B and seals it and delivers it to B as an escrow, to take effect as his deed when certain conditions are performed, it has been adjudged to be immediately his deed; for the law respects the delivery to the party himself, and rejects the words which

time there had already begun an effort to refine this technicality, and to deny effectiveness to a manual transfer even to the grantee himself, if it purported to be, not a true delivery, but only a draft or escrow.⁴ But the authority and vogue of Coke's and Sheppard's writings obscured and suppressed prematurely this progressive conception; and it has been reserved for very modern times to repudiate this last relic of primitive formalism.⁵

Passing to the problem of intent as competing with expression, it is equally plain that the primitive legal conception was strictly formalistic:

1885, Professor *Andreas Heusler*, *Institutions of Germanic Private Law*, I, 60: "A strictly formal system of law knows no contrast between the will and the utterance, and no possibility of a contradiction between the two. This is thoroughly the conception of the Germanic law. The utterance is the law's embodiment. No more, and yet no less, than what is uttered can bind or loose. Hence the minute precision with which obligations of debt were written out. . . . Hence the legal proverbs, 'one man one word,' 'the word stands,' 'words make the bargain,' and the like. A necessary result is that mistake in contractual relations receives but scanty consideration. . . . All that a man does is judged alone by its external manifestations and its objective effect, not by his inward motive. The law concedes nothing either to good or to bad faith, as long as it is concerned with the legal consequences of conduct."

In the field of legal acts the application of this notion to writings plays but a small part until the rise and spread of the seal, in the 1100s and 1200s; for until then the contents of the document seldom enter into the inquiries of a trial.⁶ But it is amply illustrated by the formalism of all oral transactions and pleadings:

1892, Professor *Heinrich Brunner*, *Germanic Legal History*, II, 347: "Plea and answer of the parties were, in the formalism of legal procedure, bound to legal forms. Their utterances must contain the precise formal catchwords. Every assertion of the parties is treated on the principle of strict and literal interpretation. . . . The party is bound to the spoken word. If he has made some faulty utterance, still he cannot correct his speech."

1892, Mr. *Henry C. Lea*, *Superstition and Force*, 4th ed., 78-9: "[In Lille, until 1351,] the minutest regulations were enforced as to this ceremony [of the oath of denial]. . . . The slightest error committed by either party lost him the suit irrecoverably. The royal ordinance [abrogating the older rules] declares that the oath was 'in strange language and peculiar words, not easy to remember or to pronounce,' and yet that if either party 'failed in form or words, or by weakness of tongue misspoke or forgot his words, or lifted his hand more than required by the regular manner, or did not hold firmly his sack in his palm, or failed to preserve and follow various other trifling and vain things and rules belonging to the oath, according to the trial mode of the city when done by parol, he has lost his whole cause.'"

1895, Sir *F. Pollock* and Professor *F. W. Mailland*, *History of English Law*, I, 190: "The old procedure required of a litigant that he should appear before the court in his own person and conduct his own cause in his own words. . . . The extreme captiousness of the

will make the express delivery to the party upon the matter no delivery"); Sheppard, *Touchstone*, IV, p. 58.

⁴ 1601, *Hawksland v. Gatchel*, Cro. El. 835 ("There is not any difference where it is delivered to the party himself as an escrow and where to a stranger; . . . when it is first delivered as

an escrow, though to the party himself, it is clear that it is not his deed until it be performed; . . . for if upon the delivery the words spoken by the obligor purport that it shall not be his deed, it is clear it is not").

⁵ The authorities are examined *post*, § 2408.

⁶ See *post*, § 2426.

old procedure is [in the 1100s] defeating its own end, and so a man is allowed to put forward some one else to speak for him, — not in order that he may be bound by that other person's words, but in order that he may have a chance of correcting formal blunders and supplying omissions. What the litigant himself has said in court, he has said once for all, and he is bound by it; but what a friend has said in his favor he may disavow. . . . Perhaps the main object of having a [professional] pleader is that one may have two chances of pleading correctly."⁷

This strictness of spirit is slow in changing. The chief statutes of jeofails, removing by degrees the primitive crudities which made difficult the amendment of pleadings, are strewn along the statute-book from 1341 to 1711,⁸ and did not even then cease to be needed. The persistence of the older notions, in their application to oral utterances, is seen markedly in the struggle against the modern doctrine of interpretation,⁹ for the "meaning" of words and the "intent" of the speaker were not distinguished, and both alike were supposed to be determinable from the uttered words alone. "The sense and signification of the words must be expounded by the law,"¹⁰ and "the intent of a man is uncertain, and a man should plead such matter as is or may be known to the jury."¹¹ With regard to its present application to the mistaken use of words, modern policy confirms primitive tradition in binding a man, irrespective of his mistakes, to those precise utterances which another party has taken at their face value; but this is a rationalized rule, and falls far short of the early formalism which inexorably and invariably pledged the man upon his spoken word.

If this was the strictness of formalism for acts contained in winged words, it might be assumed to have been at least as marked for written acts. But in one aspect the history seems to have begun to change at an early stage, — namely, the doctrine of mistake as applied to the contents of the writing. That a man who could not read had sealed a document which had been incorrectly read over to him, was recognized, before the 1400s, as sufficient to relieve him from liability.¹² When it is remembered that as yet the mass of the community could not read, this rule is seen to be almost the normal rule, to which the contrary case would be the exception; indeed the rule is in form laid down for "lay people," that is, those who were not

⁷ This general feature has been elaborately demonstrated by Professor Brunner in his *Wort und Form in altfranzösischen Prozess*, 1868 (*Sitzungsber. d. K. Akad. d. Wiss. b. Wien*, vol. 77, p. 655; translated, in 1871, in the *Revue critique de législation et de jurisprudence*, vol. 21, pp. 22 ff.; reprinted in Brunner's *Forschungen z. Geschichte des deutschen u. französischen Rechts* (1894), 260, 266); Professor Heusler, in his *Institutionen des deutschen Rechts* (1885; I, 45) has also acutely analyzed it; see also Professor Siegel's *Deutsche Rechtsgeschichte* (1895), p. 545.

⁸ Blackstone, *Commentaries*, III, 407.

⁹ *Post*, § 2462.

¹⁰ *Ante* 1726, Gilbert, *Evidence*, 4th ed., 79.

¹¹ 1465, Y. B. 4 Edw. IV, 8, 9.

¹² 1371, Y. B. 44 Ass. 30 (here the general

principle appears to be already conceded); 1374, Y. B. 47 Edw. III, 3, 5 ("To every deed there ought to be writing, seal, and delivery, and when a thing is to pass from those who have no understanding except by hearing, there ought to be a reading to them; . . . it would be very unfair if the [other] party's own deceit should help him, for it is a principle of our law, *fraus et dolus nemini patrocinantur*; . . . and for the reason that the law does not favor fraud or trickery, it wishes also that no one shall be prejudiced by his ignorance and error in his deed, for in the one party was *bona fides*, and in the other *dolus malus*"); 1422, Y. B. 9 H. V, 15, 3; 1494, Y. B. 9 H. VI, 59, 8 (here Strange, J., seems to have doubted, on the ground that "he has acknowledged the delivery into the hands of the person").

"clerks" and therefore not skilled in reading. How did such an anomalous rule develop? The course of it would seem to have been somewhat as follows: At the time of the Conquest, the form of most transactions still lay "*in pais*," i. e. livery of seisin or the like. Comparatively few transactions were in writing.¹³ When writing was used, the terms were none the less orally stated, to be proved, if need arose, by the witnesses called in for the transaction; the witnesses' oath controlled, and the terms of the writing played only a minor part.¹⁴ It was thus not a question likely to arise whether the party could read the writing, or whether it had been read over to him beforehand; it *could* not be so read over to him, considering that by the traditional procedure the words were not written on the parchment by the scribe till after formal delivery of it by the maker.¹⁵ But by the 1200s the seal comes into general use, for authenticating documents; legal writings become more common; and the other rule develops, that the terms of a sealed writing shall be indisputable as representing the actual transaction.¹⁶ This development, however, begins while the great mass of the community are still illiterate. They have seals, and can now bind themselves indisputably by affixing the seal, yet they cannot read what they have sealed. They are even bound by a seal stolen and used by the thief.¹⁷ This combination of rules immediately raises the present problem, and presents itself as an intolerable consequence. Hence, almost at the very outset, comes the rule that a layman, not being a "clerk," is not bound by a document sealed by him but erroneously read over to him by another person. The present part of the parol evidence rule thus appears as a natural alleviation and a practically contemporary consequence of the other part of that rule (*post*, § 2425) making the terms of the document indisputable as to the actual transaction. Had printing come into use a century earlier than it did, and had the mass of the community thus earlier ceased to be illiterate, the present rule might not have arisen. As it was, the rule appears almost full-fledged by the 1400s. Perhaps in the earlier cases, the inclination was to restrict it to instances of fraud by the other party to the document, and the Latin maxims used by the judges suggest that they had borrowed something from an alien and more advanced system. But by the 1500s it appears to be conceded that a false reading by a stranger is equally fatal to the deed; and the only controversy then remaining is whether the deed may be valid as to the part correctly

¹³ "To all appearance, writing has hardly been used for any legal purpose [in 1066] except when land is to be conveyed or a last will made. . . . When making a feoffment, it was possible for the giver to impose conditions or to establish remainders, and all this by word of mouth; it is probable, however, that a charter was executed if anything elaborate was to be done" (Pollock & Maitland, *Hist. Eng. Law*, II, 191, 193).

¹⁴ *Post*, § 2426, where this part of the history is examined.

¹⁵ 1877, Brunner, *Die frankisch-romanische Urkunde als Wertpapier*, *Zeitschr. für Handelsrecht*, XXII, 64, 505, 530, republished in his

Forschungen z. Geschichte d. deutschen u. französischen Prozess (1894), 524, 612 ("im juristischen Sinne erfolgt das *scribere cartulam* nach der Uebergabe des Pergaments"). So also Brunner, *Deutsche Rechtsgeschichte*, I, 397; compare Bresslau, *Urkundenlehre*, 778; Posse, *Privaturkunden*, 135.

¹⁶ This part of the rule is examined *post*, § 2426.

¹⁷ Schroeder, *Deutsche Rechtsgeschichte*, 701; Schultze, *Urkundenbeweis* (cited *post*, § 2426), 118; 1187-89, Glanvil, X, 6, § 8; Holmes, *Common Law*, 272. By the time of Britton (65 b), about 1300, this is relaxed.

read while void as to the part falsely read.¹⁸ For literate persons, there seems never to have been any doubt; and the doctrines of mutual mistake and the like (*post*, § 2417) are the product of equity and modern rationalism.

1. Subject, Tenor, Delivery.

§ 2406. (a) **Subject must concern Legal Relations; Transactions of Jest, Friendship, Charity, and Pretence.** Conduct which is to be given legal effects must be jural in its subject (*ante*, § 2404, par. (1) a), *i. e.* must concern legal relations, not relations of friendship or other non-legal relations.¹ The father who promises to bring home a box of tools for his boy is not bound in contract, though the same promise to his neighbor may be binding. The friend who promises to come to dinner is not legally liable, though he who agrees with a restaurant-keeper to dine there is under a contract of liability. Barristers could not, as late as Blackstone's time, recover for their fees, because the client's payment was theoretically "*quiddam honorarium*,"² *i. e.* the transaction was looked upon as outside of the field of legal relations. In all such cases, therefore, the conduct is legally ineffective, or void. In the traditional phraseology of the parol evidence rule, then, it may always be shown that the transaction was *understood by the parties not to have legal effect*.

Ordinarily, the bearing of this principle is plain enough on the circumstances. It has been judicially applied to household services rendered by a *member of the family*,³ and to a writing representing merely a family understanding.⁴ It is of course also applicable to the signature of an *attesting witness*.⁵ When the document is to serve the purpose of a mere *sham*, this principle in strictness exonerates the makers; but a just policy would seem to concede this only when the pretence is a morally justifiable one (as, to calm a lunatic or to console a dying person),⁶ and not when it is morally

¹⁸ 1523, Y. B. 14 H. VIII, 25, 7; 1582, *Thoroughgood's Case*, 2 Co. Rep. 9; 1615, *Pigot's Case*, 11 id. 27.

¹ 1811, Lord Stowell, in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. 54, 105 ("It is said they [marriage engagements] must be serious; so surely must all contracts; they must not be the sports of an idle hour, mere matters of pleasantry and badinage, never intended by the parties to have any serious effect. . . . [But] it is not to be presumed *a priori* that a man is sporting with such dangerous playthings as marriage engagements").

² Commentaries, III, 28.

³ 1870, *Bundy v. Hyde*, 50 N. H. 116, 122 ("The relationship of debtor and creditor depends upon the simple question whether the parties understood that relationship to exist").

⁴ 1872, *Earle v. Rice*, 111 Mass. 17 (husband and wife signed a document providing that her land should be sold and the proceeds handed to trustees for her life and then for her children; her land having been sold and the proceeds given to trustees, it was allowed to be shown, for the wife, that this document was made between husband and wife merely as a memo-

randum of moral obligation, not as a legal transaction).

⁵ 1892, *Tombler v. Reitz*, 134 Ind. 9, 14, 33 N. E. 789 (that a name indorsed on a note was signed as witness only, allowed to be shown); 1898, *Isham v. Cooper*, 56 N. J. Eq. 398, 37 Atl. 462, 39 Atl. 760 (parol evidence admitted to show that initials were signed to a paper, not as a party to the contract, but merely to attest an interlineation); 1844, *Garrison v. Owens*, 1 Pinney 473 (that a name has been signed as attesting witness, admitted).

For the case of a *surety*, see *post*, § 2438.

⁶ 1896, *Church v. Case*, 110 Mich. 621, 63 N. W. 424 (a mortgage for \$6,000 given by a son who had received the land in return for an agreement to support the mother; a showing allowed that no consideration had been received for the mortgage, and that it was given as a mere form, to satisfy the jealous relatives, and to safeguard the interests of the grantor; the mortgage decreed void); 1900, *McCartney v. McCartney*, 93 Tex. 359, 55 S. W. 311 (the plaintiff's wife was losing her mind, and importuned him to execute deed to her, which he did "to satisfy her mind"; he then retained it

beyond sanction.⁷ In all these cases a common understanding for all parties is here assumed to exist; when the intent of one party is different from his outward act as understood by the other, the question becomes a different one, and involves the other part of the principle (*post*, § 2414).

Conduct, furthermore, will be denied legal effect when it falls within a class of facts prohibited by some policy of the law. The act is then commonly said to be void on grounds of *public policy*,—for example, trading with an enemy in war, selling public offices, engaging to render champertous legal services, stifling a public prosecution, ousting a court's jurisdiction, wagering, restraining trade, and scores of other transactions. Such acts are jural, but not lawful. These prohibitions, however, concern the validity of particular kinds of acts, and not legal acts in general or uniformly, and therefore need be referred to here only to note their place in the theory of legal acts.

§ 2407. (*b*) **Terms must be Definite; Terms implied from Conduct; Document void for Uncertainty.** It is clear that the terms of the act need not be in express words; the terms may be *implied from conduct*, as in the case of the commoner contracts of service. *Usage* may thus by implication furnish the terms,—subject to the limitations of another principle (*post*, § 2440).

When express words are employed, they must be in themselves definitely intelligible, so that the act may be capable of enforcement (*ante*, § 2404, par. (1), *b*). It is common learning that a deed or a will is often held *void for uncertainty*. Lord Bacon, giving his classical instance of a grant to "*J. D. et J. S. et heredibus*," calls this a "patent ambiguity . . . by matter within the deed," such as "shall make the deed void for uncertainty." So, too, Mr. Elphinstone's example, "I give my dog Ranger to my nephew John or Thomas,"¹ illustrates the same kind of uncertainty. A blank, an illegible word, an unknown language,—these various instances show how an act which is impossible to comprehend and therefore to enforce cannot be deemed a legal act. This doctrine is more particularly involved in dis-

without recording, and later it was taken from his papers without his knowledge and recorded; this was allowed to be shown to defeat it).

Sometimes, the illustrations of this principle, that a transaction which is a *sham* is without the scope of legal acts, are hard to distinguish from those cases where the transaction is in substance a legal one but the understanding is that it shall be merely *nominal*; here, in effect, one party agrees to hold the other party harmless, and this involves rather the rule about varying a document's terms; these cases are collected *post*, § 2435, but the following will serve as an example: 1896, *Guinz v. Giegling*, 108 Mich. 295, 66 N. W. 48 (that the defendant W. indorsed a note given to the plaintiff for a debt of the defendant G., on the plaintiff's representation that it was a mere matter of form, to induce G. to pay, and that no claim should be made upon the defendant W.; treated as involving

the principle of § 2443, *post*, and not allowed to exonerate the defendant).

⁷ 1900, *Southern St. R. Adv. Co. v. Mfg. Co.*, 91 Md. 61, 46 Atl. 513 (instrument of advertising contract, allowed to be shown to have been signed merely for exhibition to other advertisers to induce them to pay the stated rates; this seems unsound); 1856, *Conner v. Carpenter*, 28 Vt. 237, 240 (written contract of sale and hire of horses; that it was "understood to be a sham, and to be only to keep off the creditors of the plaintiff from attaching the property," held not sufficient to permit the party "to thus escape from his contract"); 1898, *Grand Isle v. Kinney*, 70 id. 381, 41 Atl. 130 (that a party was not to pay anything under a contract signed to deceive the State engineer, excluded).

¹ Juridical Soc. Papers, III, 266.

tinguishing it from the interpretation of "latent ambiguities" (*post*, § 2472); it is enough here to notice its correct place in the theory of legal acts.²

So, far, then, as concerns the precise terms of an act, they will be — if intelligible — whatever the actor has made them. There are no other requirements. When, however, the terms as expressed do not correspond to the terms as intended, we are brought to the other question, — that of Intention (*post*, § 2415).

§ 2408. (c) **Act must be final; (1) Delivery, as applied to Deeds; Conditions Precedent; Escrows.** A legal act does not come into existence as such until its utterance is final and complete (*ante*, § 2404, par. (1) c.).¹ All transactions require an appreciable lapse of time for their fulfilment; most important transactions in writing are consummated only after successive inchoate acts of preparation, drafting, and revision. Moreover, the written terms may be prepared with a precision which leaves nothing to alter (as it turns out), and still may be for a while retained for reflection or submitted for suggestion, without as yet any final adoption. Until some finality of utterance takes place, there is no legal act. Whenever, therefore, certain conduct or writing is put forward against a party as his purporting act, no principle prevents him from showing that there never was a consummation of the act.²

(1) But where shall the line be drawn? The earlier law (*ante*, § 2405) drew the line formally for deeds — *i. e.* sealed instruments — at the stage technically known as "delivery." The mark of finality was the *delivery of the deed*. But it is clear that there can be no fixed and invariable mark of finality; or, in the older phraseology, what amounts to a delivery depends upon the circumstances of the case. No specific manual act is decisive. On the one hand, it is well accepted that the *handing* of the deed to a *third person* is not necessarily final; the document may still be withdrawn, or (less correctly) "revoked."³ On the other hand, the *maker's retention* of the document does not necessarily negative the act's finality; this, too, may be deemed unquestionable law since Mr. Justice Blackburn's masterly exposition.⁴ Again, that specific variety of delivery to a *third person* which con-

² Mr. Justice Holmes' classification (Common Law, 310) of certain contracts under this head seems doubtful; "suppose that A agreed to buy and B to sell 'these barrels of mackerel,' and that the barrels turn out to contain salt; . . . the promise is meaningless; . . . two of its essential terms are repugnant, and their union is insensible." On the contrary, the words are in themselves certain in meaning; it is only in their application to external objects that they become impossible, and the question is not as to a mistake or uncertainty in the terms of the contract, but as to the materiality of an assumption of fact exterior to the contract, *i. e.* a condition rendering it void or voidable, and falling under the principle of § 2423, *post*.

¹ For a German statement of the theory, see Schultze, *Urkundenbeweis* (cited *post*, § 2426), pp. 70, 88, 104.

² 1866, *Wilde, P. J.*, in *Guardhouse v. Black-*

burn, L. R. 1 P. & D. 109 ("The truth is that the rules excluding parol evidence have no place in any inquiry in which the Court has not got before it some ascertained paper binding and of full effect"); 1871, *Dixon, C. J.*, in *Walker v. Ebert*, 29 Wis. 194, 197 ("It must always be competent for the party proposed to be charged upon any written instrument to show that it is not his instrument or obligation").

³ Compare the following cases: 1847, *Merrills v. Swift*, 18 Conn. 257; 1813, *Maynard v. Maynard*, 10 Mass. 456; 1849, *Blight v. Schenck*, 10 Pa. 285; 1857, *Cook v. Brown*, 34 N. H. 460; 1901, *Fred v. Fred*, — N. J. Eq. —, 50 Atl. 776. The case of an escrow is one variety of this sort of delivery.

⁴ *Eng.*: 1826, *Doe v. Knight*, 5 B. & C. 671 (the question "whether when a deed is duly signed and sealed and formally delivered with apt words of delivery, but is retained by the

sists in naming a condition precedent to be performed, and making the act final except for the happening of the condition — the usual meaning of “*escrow*” —, has long been recognized as leaving the act incomplete;⁵ though here it may well be that the document cannot be withdrawn, since nothing but the condition remains to complete the act.⁶ A conditional delivery *in escrow to the grantee*, however, has come down to us traditionally as a complete act, the condition being deemed vain.⁷ But this is an arbitrary distinction; no reason and no policy justifies it. In England, the older rule, as handed down in Coke’s treatises, has for more than two generations been repudiated.⁸ In the United States, it has been generally trenchd upon so far as to recognize an escrow to a co-obligor as incomplete.⁹ In other respects, it is maintained

party executing it, that retention will obstruct the operation of the deed,” was answered in the negative); 1856, *Gudgen v. Besset*, 6 E. & B. 986 (action for rent; whether *indebitatus assumpsit* or covenant was the proper action depended on whether a written and sealed lease in the plaintiff’s possession was in force; the understanding between the parties that the tenant should go into possession but that the lease as signed and sealed and nominally delivered should be kept by the lessor till the payment of a certain sum of money was held to have prevented the operation of the document); 1866, *Xenos v. Wickham*, 2 H. L. C. 296 (insurance policy, signed by the defendant-insurer, but left in his custody according to trade usage; held that it was not “essential that the deed should be given out of the defendant’s possession in order to its perfect delivery as an operative instrument”; Blackburn, J.: “No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it; the mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to show that it is intended by the party to be executed as his deed presently binding on him, it is sufficient”; L. C. Chelmsford: “The question is one more of fact than of law”); *Can.*: 1899, *Zwicker v. Zwicker*, 31 N. Sc. 333, 29 Can. Sup. 527, 532 (following Lord Blackburn, in *Xenos v. Wickham*); *U. S.*: 1861, *Stevens v. Hatch*, 6 Minn. 64 (19); 1869, *Fisher v. Hall*, 41 N. Y. 416.

Distinguish the much-mooted but wholly separate question whether the *grantee’s assent is necessary* for the passing of title: 1866, *Xenos v. Wickham*, *supra*; 1847, *Merrills v. Swift*, 18 Conn. 257; 1860, *Welch v. Sackett*, 12 Wis. 243; 1880, *Jones v. Swayze*, 42 N. J. L. 279.

Whether delivery is necessary for the *gift, pledge, or sale of a chattel* is a question, not of legal acts in general, but of the requisites of a specific kind of act.

⁵ *Ante*, § 2405.

⁶ Cases cited *supra*, note 3. As to the time of an escrow’s taking effect by relation, see the following opinions: 1809, *Belden v. Carter*, 4 Day 66; 1841, *Foster v. Mansfield*, 3 Metc. 412; 1848, *Hall v. Harris*, 5 Ired. Eq. 303; 1860, *Welch v. Sackett*, 12 Wis. 243.

⁷ *Ante*, § 2405. This technical rule does not

apply except where the deed’s delivery is made dependent on a specific condition; the mere manual handing of a finished writing to the grantee does not of itself invoke this rule: 1898, *Curry v. Colburn*, 99 Wis. 319, 74 N. W. 778 (that a deed was handed to the grantee to take to his attorney for inspection, allowed to be shown).

⁸ *Eng.*: 1821, *Johnson v. Baker*, 4 B. & Ald. 440 (delivery of a deed of covenant by a debtor to a creditor, on condition of obtaining other creditors’ signatures, held invalid); 1829, *Hudson v. Revett*, 5 Bing. 368 (deeds of lease and release and of trust for the benefit of creditors, signed, sealed, and delivered by the debtor in prison to the creditors’ agent, with a blank for the amount of a certain claim, which was afterwards filled in, according to the understanding, by the creditors’ agent; Best, C. J.: “This position about delivery as an escrow is merely a technical subtlety; . . . I decide the case on this, that either it was no deed at all until the sums were written in, and that then the jury were warrant in presuming a delivery to make it a deed; or, if it were a deed, it was delivered only to have operation from the time that those sums were written in which were to give it all its effect”); 1843, *Bowker v. Burdekin*, 11 M. & W. 128, 146 (conveyance in fraud of creditors, by one partner to take effect upon the execution by the other two partners; Parke, B.: “I take it now to be settled, though the law was otherwise in ancient times, as appears by Sheppard’s Touchstone, that in order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution”); 1856, *Gudgen v. Besset*, *supra*, note 4; 1866, *Xenos v. Wickham*, *supra*, note 4; 1875, *Watkins v. Nash*, L. R. 20 Eq. 262; *Can.*: 1882, *Confederation L. Ass’n v. O’Donnell*, 10 Can. Sup. 92 (policy forwarded to the agent on conditions, and handed by him to the applicant to read, without countersigning or exacting the conditions; held not valid on the facts; two judges diss.).

⁹ 1808, *Pawling v. U. S.*, 4 Cr. 219, 222 (a bond delivered as an escrow by a surety to the obligor, conditioned on the signatures of others, is not valid if the condition is unperformed).

by the authority of the older decisions in most jurisdictions.¹⁰ But it is being gradually cut away, sometimes by subtly re-casting the definition of a delivery;¹¹ and the solid establishment of the contrary rule (*post*, § 2410) for contracts and writings in general (*i.e.* other than sealed instruments — bonds and land-deeds) will ultimately efface this last tradition of formalism.¹²

There is, therefore, no invariable mark of finality for a deed, — whether it be the act of writing,¹³ or of sealing, or of manually delivering, or of publicly recording.¹⁴ Subject to certain usual presumptions of conduct, the circumstances of each case must control.¹⁵

§ 2409. **Same: (2) Delivery, as applied to Negotiable Instruments.** The English custom of merchants, in respect to the rules for written instruments, represented the advanced ideas of Mediterranean, Flemish, and Hanseatic mercantile law. As early as the 1200s and 1300s, when the common law of the King's courts was still dealing with the raw material of the more primitive Germanic system of a feudal, pastoral, and agricultural life, the mercantile notions were already in a more modern stage, and furnished some of the lessons for the progress of the former.¹ Thus it happened that no formal rule about delivery or escrow-delivery found a place in the law of negotiable instruments, when that law came into the ordinary courts for recognition. In particular, for the acts of *making*, *drawing*, or *accepting*, no one formal piece of conduct has been deemed invariably necessary or decisive.² So also, for the act of *indorsement*, a manual transfer may, on the one hand, be decisive even without writing,³ while, on the other hand, it may not be in it-

¹⁰ Cases cited in Jones, Real Property (1896), § 1303.

¹¹ 1888, *Price v. Hudson*, 125 Ill. 284, 287, 17 N. E. 817 (Shope, J.: "It is not competent to control the effect of a deed by parol evidence when it has once taken effect by delivery; but it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered; unless the grantor, or those claiming under him, are estopped in some way from asserting the non-delivery of the deed"); 1896, *Stanley v. White*, 160 id. 605, 43 N. E. 729 (a deed manually placed with the grantee, on condition that it should not take effect until all the heirs of M. S. signed it, would be ineffective until the condition was fulfilled; but where the mutually understood intention was to give title immediately on delivery, subject to the condition subsequent that other heirs should sign, the non-performance of the condition cannot be set up to defeat the absolute terms of the deed. Of course, a *condition subsequent* is not effective: *post*, §§ 2410, 2435).

¹² The effectiveness of an *escrow* against one ignorant of the *condition* raises the question of *Intention* (*post*, § 2420).

¹³ For the case of a *blank*, to be filled later, see *post*, § 2410.

¹⁴ Even *registration* or *recording* does not of itself and invariably complete the act, though it is of course a strong circumstance of presumption; compare the following opinions: 1862, *Derry Bank v. Webster*, 44 N. H. 264; 1854,

Mitchell v. Ryan, 3 Oh. St. 377; 1859, *Smith v. South Royalton Bank*, 32 Vt. 341.

¹⁵ Whether an instrument is a *deed* or a *will* depends upon the intent of the maker as to the *time of its operation*; whether this intent goes to the existence of the instrument and therefore depends on conduct of the maker exterior to the instrument, or whether it is a part of the terms of the grant and must therefore be determined by the contents of the instrument, is an interesting question; the former view is accepted in *Pollock v. Glassell*, 2 Gratt. 439, 455 (1846), in a useful opinion by Baldwin, J., collecting precedents.

¹ The history is more fully noticed *post*, § 2426.

² 1822, *Bayley, B.*, in *Cox v. Troy*, 5 B. & Ald. 474 (with reference to the completion of an acceptance, "I have no difficulty in saying, from principles of common sense, that it is not the mere act of writing on the bill, but the communication of what is so written, that binds the acceptor"; holding void a bill on which the drawee's signature had been placed and then erased by him before return to the payee's agent); and cases cited in Ames' Cases on Bills and Notes, I, 135, note, 157-166, 207 ff.

³ 1861, *Harrop v. Fisher*, 10 C. B. N. s. 196 ("If by mistake, accident, or fraud, a bill has been omitted to be indorsed upon a transfer, when it was intended that it should be, the party may be compelled by a court of equity to make the indorsement").

self decisive, even when coupled with the writing.⁴ Furthermore, a manual delivery to a third person on a condition precedent may leave the instrument incomplete;⁵ and the doctrine that a deed-escrow to the grantee is binding, in spite of the condition (*ante*, § 2408), never found any orthodox place in this part of the law,⁶ though in some jurisdictions the analogy of deeds has naturally been given recognition.⁷ For purchasers for value without notice, the principle of Intention may affect these results (*post*, § 2420).

§ 2410. **Same: (3) Delivery, as applied to Contracts in general; Conditions Precedent and Subsequent; Assent of Third Persons; Blanks; Dates.** Sealed instruments — otherwise known as deeds — were the chief legal documents, in the earlier history of our legal system, and for a long time the only ones whose contents were indisputable.¹ Other writings thus came down to us without the tradition of delivery as a formal and arbitrary mark of the finality of the act. It has therefore long been well understood, for other writings, that the finality of the writing as a legal act depends upon the circumstances of each case; that it may be left to depend on a third person's assent or upon any other precedent condition, and, in particular, that this is so whether the writing (or escrow) is provisionally handed to the grantee himself or to any one else. The case of *Pym v. Campbell*, in England,² is commonly taken as the leading one. In the United States, the

⁴ 1836, *Brind v. Hampshire*, 1 M. & W. 365 (indorsement is effected, "either by the actual delivery . . . or by some binding engagement"); 1841, *Marston v. Allen*, 8 id. 494 (indorsement followed by a placing in the custody of the indorser's agent, not sufficient).

⁵ 1875, *Chipman v. Tucker*, 38 Wis. 43 (that a note was delivered to a third person with an agreement not to deliver to the payee unless a certain vote of mortgagors took place, and that the custodian delivered it without such a vote, allowed to invalidate the note).

⁶ *Eng.*: 1840, *Adams v. Jones*, 12 A. & E. 455 (bill accepted by the defendant for F. as payee, and indorsed in blank and delivered by F. to the plaintiff as agent for R. only; defendant's plea denying title in the plaintiff, held good); 1848, *Bell v. Ingestre*, 12 Q. B. 317 (indorsement of bills sent by mail to plaintiff, on the express condition that certain other bills should be returned by post, but they were not; "they were delivered to them as mere trustees"; "on a plea traversing the indorsement of a bill, its delivery with intent to transfer an interest is put in issue"); *U. S.*: 1899, *Burns & S. L. Co. v. Doyle*, 71 Conn. 742, 43 Atl. 483 (acceptance of a bill delivered with the condition that it should not operate until a cottage was completed and money became due, admitted); 1899, *Mehlin v. Mutual R. F. L. Ass'n*, 2 Ind. Terr. 396, 51 S. W. 1063 (handing of a note to payee's agent, to be delivered to payee on certain conditions only; allowed); 1893, *Robertson v. Rowell*, 158 Mass. 94, 32 N. E. 898 (agreement to leave a note with payee as incomplete until indorsement by a third person; admitted); 1895, *McCormick Co.*

v. Faulkner, 7 S. D. 363, 64 N. W. 163 (condition enforced that notes should not become operative till signed by a third person); 1894, *Burke v. Dulaney*, 153 U. S. 228, 234, 14 Sup. 816 (admitting proof of an agreement that a note was left in the payee's hands "to become an absolute obligation of the maker in the event of his electing, upon examination or investigation, to take the stipulated interest in the property in question").

⁷ 1877, *Stewart v. Anderson*, 59 Ind. 375; and cases cited *pro* and *con* in *Ames' Cases on Bills and Notes*, II, 99, note.

The question whether a *conditional acceptance* is valid (*i. e.* an acceptance, final as such, but expressly subject to the contingency of a *condition subsequent*) is a different one; see *Ames' Cases on Bills and Notes*, II, 152-154.

¹ *Post*, § 2426.

² 1856, *Pym v. Campbell*, 6 E. & B. 370 (purchase of an invention; a writing formally complete and signed, and delivered to plaintiff, was offered by the plaintiff; the defendant was allowed to show that, upon a meeting of all persons concerned except A., "it was then proposed that, as the parties were all present, and might find it troublesome to meet again, an agreement should then be drawn up and signed, which, if A. approved of the invention, should be the agreement, but, if A. did not approve, should not be one; A. did not approve of the invention when he saw it"; *Erle, J.*: "If it be proved that in fact the paper was signed with the express intention that it should not be an agreement, the other party cannot fix it as an agreement upon those signing. The distinction in point of law is that evidence to vary the

doctrine is not only completely accepted,³ but has even been applied to sealed instruments other than deeds of land⁴ in jurisdictions still bound by precedent to the older rule for deeds (*ante*, § 2408). The only opportunity for doubt arises, not from any question as to the correct theory, but from the difficulty of distinguishing in practical application the present principle and that other one (*post*, § 2435), also a part of the parol evidence rule, which denies validity to any oral part of an act when the act has been reduced completely to writing. By the other principle, a *condition subsequent*, which of course forms a part of the act which it qualifies, must be contained in the writing, in order to be enforced, and an oral one is therefore ineffective. But by the present principle, the act is not an act until the final moment

terms of an agreement in writing is not admissible, but evidence to show that there is not an agreement at all is admissible"); 1856, *Davis v. Jones*, 17 C. B. 625 (agreement for a lease, allowed to be invalidated by the fact that by agreement no obligation was to arise until repairs had been completed and then a date inserted in the instrument); 1861, *Wallis v. Littell*, 11 C. B. N. s. 369 (similar ruling for agreement of assignment of a lease, conditioned on the landlord's assent; *Erle, C. J.*: "It is in analogy with the delivery of a deed as an escrow; it neither varies nor contradicts the writing, but suspends the commencement of the obligation"); 1897, *Pattle v. Hornbrook*, 1 Ch. 25 (allowing proof that the plaintiff signed a lease as lessee, and subsequently the defendant signed it, but handed it to his solicitor and told him "not to complete" until two additional persons signed as responsible lessees).

³ 1899, *Hurlburt v. Dusenbery*, 26 Colo. 240, 57 Pac. 860 (agreement not to be effective until a third person advanced money, admitted); 1896, *Stanley v. White*, 160 Ill. 605, 43 N. E. 729 (cited *ante*, § 2408); 1902, *Sutton v. Griebel*, 118 Ia. 78, 91 N. W. 825 (agreement of subscription; an agreement that the defendant might withdraw, if he substituted another subscriber, before the meeting of the subscribers for final arrangement, allowed to be shown); 1881, *Wilson v. Powers*, 131 Mass. 539 (document by the payee of a note, purporting to extend time to the maker, and thus to discharge the sureties, allowed to be shown to have been delivered to the maker with a condition to become binding only upon assent of the sureties); 1902, *Nichols v. Rosenfeld*, 181 id. 525, 63 N. E. 1063 (effect of a temporary custody of finished documents before final delivery, discussed); 1897, *Cleveland Ref. Co. v. Dunning*, 115 Mich. 238, 73 N. W. 239 (that an order was given conditionally on the consent of a third person which was not given, allowed); 1900, *Ada Dairy Ass'n v. Mears*, 123 id. 470, 82 N. W. 258 (that a contract was signed, but not to be binding until the signer had seen a third person and verified a statement of the promisee's agent, admitted); 1873, *Benton v. Martin*, 52 N. Y. 570, 573 (general principle stated, in a clear opinion by *Folger, J.*); 1894, *Blewitt v. Boorum*, 142 id. 357, 37 N. E. 119 (the present doctrine and

that of deeds, distinguished); 1893, *Kelly v. Oliver*, 113 N. C. 442, 18 S. E. 698 (that an agreement signed by defendant was not to bind until the plaintiff had procured twenty other signatures, admissible); 1895, *Manufacturers' Furn. Co. v. Kremer*, 7 S. D. 463, 64 N. W. 528 (contract delivered to the promisee on condition that it should not be binding till other signatures were obtained); 1888, *Ware v. Allen*, 128 U. S. 590, 595, 9 Sup. 174 (contract to pay money; the fact that "before the paper was signed or agreed upon, it was distinctly understood that it was to be of no effect, unless upon consultation with H. or A. or both of them the defendants were assured that the proceeding was lawful," and that H. and A. were consulted and did not assure them but declined to approve, held to invalidate the instrument); 1898, *Tug R. C. & S. Co. v. Brigel*, 30 C. C. A. 415, 86 Fed. 818 (that an agreement should not be binding until approved by the signer's attorney, admissible); 1901, *Reiner v. Crawford*, 23 Wash. 669, 63 Pac. 516 (contract to sell stock, delivered on condition that the seller's agent at S. had not sold it before the buyer's arrival at S.; condition allowed to be shown); 1897, *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885 (stock subscription; agreement that it should not be binding till a certain number subscribed, admissible).

Curiously, the only Court that insists on adopting here, for writings in general, the analogy of the old escrow-rule for deeds is a Court which had already repudiated that rule (*ante*, § 2409, *infra*, note 4) for notes and bonds: 1903, *Findley v. Means*, — Ark. —, 73 S. W. 101.

⁴ 1893, *State v. Wallis*, 57 Ark. 64, 73, 20 S. W. 811 (agreement that a bond should not bind until another person signed, admitted); 1894, *Blewitt v. Boorum*, 142 N. Y. 357, 37 N. E. 119 (contract under seal, delivered not to be binding till the plaintiff had acquired the interest of a third person; admitted, distinguishing between this and the special prohibition of escrow of deeds to the grantee).

The principle seems also to be generally accepted for *insurance policies*: 1897, *Joyce, Insurance, I*, §§ 90-102; and cases cited *ante*, § 2408.

appointed, and that moment may by the parties be made to depend upon some future event, which thus becomes a condition precedent to the legal existence of the act. Theoretically, these two things are entirely distinct, but in particular negotiations it may become difficult to determine judicially which of them the parties were providing for. In such cases, opposite results may turn upon an apparently trifling difference of phrase.⁵

It follows, from the present principle, that a writing signed and delivered, but left with a *blank part*, may or may not be final, according to circumstances; and that whether the filling up of the blank by a third person completes the instrument and makes it effective depends upon whether this circumstance was agreed upon beforehand as the decisive one.⁶ It also follows that the *date* of a document's execution may be established by proving the actual time of the conduct, regardless of any statement of date contained in the writing;⁷ because the time of finality of the utterance, as a legal act, is something essentially independent of and exterior to the writing itself. It may also be suggested that the much-mooted questions, in the specific field of contracts, whether the *acceptance of a contractual offer*,⁸ or the *revocation* of such an offer,⁹ must be communicated, are dependent (in part, at least) upon this principle that the finality of an act varies according to circumstances and cannot be prejudged by any invariable test.

§ 2411. **Same: (4) Publication, as applied to Wills.** The formal rule of delivery was never applied to wills,—partly, no doubt, because their history was distinct from that of other written acts, and partly because the notion of delivery does not naturally suggest itself for unilateral acts. Yet the element of finality of utterance must somehow be marked, and the term “publication” came to be used for that purpose. But this test, concededly, was flexible. Apart from the statutory formality of attestation, no arbitrary or uniform mark of finality was ever fixed upon in the law of wills. Thus, for all wills between the statute of Henry VIII (1540) and the statute of Charles II (1678), and for wills of personalty from the latter date until the

⁵ The cases of doubt are placed *post*, § 2435. Compare the instructive case of *Stanley v. White*, 160 Ill. 605, 43 N. E. 729, cited *ante*, § 2408.

⁶ 1829, *Hudson v. Revett*, 5 Bing. 368 (a deed may be prepared leaving a blank, and prescribing this to be filled by a specified person, and will then have effect from the time when the blank is filled in; quoted *ante*, § 2408). The following ruling is therefore unsound: 1811, *Weeks v. Maillardet*, 14 East 568 (contract to sell certain machinery “as per schedule annexed”; the parties signed, sealed, and delivered duplicate originals, lacking any schedule, and separated; held, that a schedule afterwards written in by one G. P., a subscribing witness, in accordance with the understanding and expectation of the parties, was no part of the deed).

⁷ 1804, *Hall v. Cazenove*, 4 East 477, 482 (date of delivery); 1866, *Reffell v. Reffell*, L. R. 1 P. & D. 139 (a will's date of 1855, shown to

be a mistake for 1865; thus effecting a revocation of a will of 1858); 1898, *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509 (date of execution of undated paper attached to a deed); 1892, *Saunders v. Blythe*, 112 Mo. 1, 6, 20 S. W. 319 (deed); 1893, *Vaughan v. Parker*, 112 N. C. 96, 100, 16 S. E. 908 (deed); 1895, *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426 (deed).

⁸ 1879, *Household F. & C. A. Ins. Co. v. Grant*, L. R. 4 Exch. D. 216; 1857, *Hallock v. Ins. Co.*, 26 N. J. L. 268; 1871, *White v. Corlies*, 40 N. Y. 467 (“A mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other; nor does an act which in itself is no indication of an acceptance become such because accompanied by an unvinced mental determination”).

⁹ 1880, *Byrne v. Van Tienhoven*, L. R. 5 C. P. D. 344; 1887, *Coleman v. Applegarth*, 68 Md. 21, 11 Atl. 254.

statute of Victoria in England (1837) and the corresponding statutes in the United States, the problem constantly arose whether a particular testamentary writing had been finally acted upon by the decedent; and this question depended entirely upon the circumstances.¹ But under the statutory solemnity of attestation (*post*, §§ 2421, 2456) this question practically disappeared; for the attestation serves as an unquestionable mark of finality.²

2. Intent and Mistake, as applied to Subject, Terms, and Delivery, of an Act.

§ 2413. **Intent and Mistake, in general; Modern Test of Reasonable Consequences, applied to Expressed Intent.** The elements of an act, in themselves considered, being its subject, its terms, and its final utterance (*ante*, § 2404, par. 1), it is obvious that these must all be preceded and brought into being by some sort of volition or intent.¹ The result, however, that is thus brought into outward being does not always correspond with the inward intent; and the problem thus arises (*ante*, § 2404, par. 2) how far either the expression or the intent shall be treated as legally paramount the one to the other. The primitive law (*ante*, § 2405) looked only at the expression. Juristic speculation of the metaphysical sort tended in modern times at first to regard the intent as vital. But in truth neither can be exclusively the standard; it is a question of adjusting the due relation between the two; and this is the trend of the last half-century in law and in juristic thought.

In order to solve the problem, it is indispensable that the different possible meanings of the words "intent" or "intention" be kept apart, and that the distinction between "volition" and "intention," in the proper sense of the words, be established:

Circa 1832, Mr. John Austin, Jurisprudence, Campbell's ed., Sect. XVIII, XIX, §§ 602-617: "In order that we may settle the import of the term 'intention,' it is necessary to settle the import of the term 'will.' For, although an intention is not a volition, they are inseparably connected. . . . These expressions, and others of the same import, merely signify this: Certain movements of our bodies follow invariably and immediately our wishes or desires for those same movements. . . . For example: If I wish that my arm should rise, the desired movement of my arm immediately follows my wish. There is nothing to which I resort, nothing which I wish, as a mean or instrument wherewith to attain my purpose. But if I wish to lift the book which is now lying before me, I

¹ 1814, *Nichols v. Nichols*, 2 Phillim. 180 (a paper drawn merely as an example of conciseness in testamentary language was held not to be a will); 1853, *Boling v. Boling*, 22 Ala. 826 (certain unfinished papers, held not a will of personalty; "the final action, the settled purpose of mind to pass his property, did not then exist"; here the paper was olographic, but undated and unsigned).

² Temp. Geo. II, *circa 1730, Allen v. Hill*, Gilbert 257, 261 ("The design [of the statute requiring attestation] was that the will may appear to be complete, and not a preparation only; for by taking the names of the witnesses

to his paper, the testator has shown that he has completed his will").

¹ 1568, *Brett v. Rigdon*, Plowd. 340, 343 ("The making of a testament consists of three parts, as do all other human acts which are done with discretion [*i. e.* sound mind], viz., inception, progression, and consummation. . . . But there is one same thing annexed to each of these parts, and that is the intent of the party, for every one who does any act with discretion has an intent in the inception of it, . . . and in the progression and consummation of it the same intent also subsists; so that one same intent runs through all the parts and continues in the doing of them").

wish certain movements of my bodily organs, and I employ these as a mean or instrument for the accomplishment of my ultimate end. . . . Our desires of those bodily movements which immediately follow our desires of them, are therefore the only objects which can be styled volitions. And as these are the only volitions, so are the bodily movements, by which they are immediately followed, the only acts or actions properly so called. . . . Most of the names which seem to be names of acts, are names of acts coupled with certain of their consequences. For example: If I kill you with a gun or pistol, I shoot you. And the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an act, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon, point it at your head or body and pull the trigger. These I will. The contact of the flint and steel, the ignition of the powder, the flight of the ball towards your body, the wound and subsequent death, with the numberless incidents included in these, are consequences of the act which I will. I will not those consequences, although I may intend them. But in common language the words 'will' and 'intend' are often confounded. . . . To desire the act is to will it. To expect any of its consequences is to intend those consequences. The act itself is intended as well as willed. For every volition is accompanied by an expectation or belief that the bodily movement will immediately follow the wish. And hence (no doubt) the frequent confusion of will and intention. Feeling that will implies intention, numerous writers upon jurisprudence (and Mr. Bentham amongst the number) employ 'will' and 'intention' as synonymous or equivalent terms. They forget that intention does not imply will."

It may be assumed, then, that there must at least be a volition of some sort preceding every legal act. But it is also apparent that the act, as expressed and apprehensible to the world at large, or to the other party in particular, may not be such an act as was intended. In those cases, then, where a volition was exercised, but the outward consequences were not produced according to intention, are we to say that because there was a volition, the person is necessarily to be fixed with all the consequences, of whatever sort they be? Or are we to say that, because there was no intention of certain consequences, the person is necessarily not to be fixed with them? We are to accept neither solution in this absolute form. The latter solution is not fair to the community dealing with the person. The former solution is not fair to the person himself. No practical system of law could be content with either, applied in rigid uniformity. The established doctrine of tortious responsibility suggests an analogy and provides a solution. We are to fix the person with such expressed consequences as are the reasonable result of his volition. In other words, *the act as legally effective will be determined, in respect to the three elements of subject, terms, and finality, by that expression of it which results, to the other person in the transaction, as the consequence, reasonably to have been anticipated under all the circumstances, of the volition of the actor.* This avoids on the one hand the impracticality of the merely external standard, so far as it would have held the person liable for an apparent act which was not the reasonable consequence of his conduct; and, on the other hand, it avoids the impracticality of the merely internal standard, so far as it would have exonerated the person from an unintended consequence which he ought to have foreseen and might have avoided. In short, it adapts, to the general doctrine of legal acts, the test of *negligence, i. e.* responsibility

resting on a volition having consequences which ought reasonably to have been foreseen.

Such, without doubt, is the general principle of the modern law. Whatever may happen to be said, here and there, broadly declaring an actual and precise intent either to be necessary or to be immaterial, nevertheless, whenever the precise problem is presented, modern judicial good sense has usually accepted this median rule, for all sorts of legal acts:²

1886, Professor *T. E. Holland*, *Jurisprudence*, 3d ed., 99: "It was laid down by Savigny that, in order to the production of a juristic act, the will and its expression must be in correspondence. This view is in accordance with the *prima facie* interpretation of most of the relevant passages in the Roman lawyers, and is still predominant in Germany, but certainly cannot be accepted as universally true. An investigation into the correspondence between the inner will and its outward manifestations is in most cases impossible, and where possible is in many cases undesirable. . . . Is it the case that a contract is not entered into unless the will of the parties are really at one? Must there be, as Savigny puts it, 'a union of several wills to a single, whole, and undivided will?' Or should we not rather say that here, more even than elsewhere, the law looks, not at the will itself, but at the will as voluntarily manifested? When the law enforces contracts, it does so to prevent disappointment of well-founded expectations, which, though they usually arise from expressions truly representing intention, yet may occasionally arise otherwise. If, for instance, one of the parties to a contract enters into it, and induces the other party to enter into it, resolved all the while not to perform his part under it, the contract will surely be good nevertheless. Not only will the dishonest contractor be unable to set up his original dishonest intent as an excuse for non-performance, but should he, from any change of circumstances, become desirous of enforcing the agreement against the other party, the latter will never be heard to establish, even were he in a position to do so by irrefragable proof, that at the time when the agreement was made the parties to it were not really of one mind. . . . The language of systems of positive law upon the point is generally ambiguous, nor is this to be wondered at. The question is practically a new one. The process of giving effect to the free acts of the parties to a contract, rather than to the fact that certain rigidly defined formalities have been complied with, has lasted so long that legal speculation has only recently begun to analyse the free act itself into its two factors of an inner will and an outward expression, and to assign to one or to the other a dominant place in the theory of contract. Just as the Romans used, without analysing them, the terms '*velle*,' '*consensus*,' '*sententia*,' so the modern Codes, though some appear to look rather to the inner will, others rather to its outward expression, as a rule employ language which is capable of being interpreted in either direction. The same may be said of the English cases. In these one constantly meets with such phrases as 'between him and them there was no *consensus* of mind,' 'with him they never intended to deal'; but one also meets with much that supports the view of the question which we venture to hope may ultimately commend itself to the Courts as being at once the most logical and the most favourable to the interests of commerce. . . . In other words:³ the legal meaning of such acts on the part of one man as induce another to enter into a contract with him, is not what the former really intended, nor what the latter really supposed the former to intend, but what a 'reasonable man,' i. e. a judge or jury, would put upon such acts. This luminous principle at once sweeps away the ingenious speculations of several generations of moralists, while it renders needless long lists of subtle distinctions which have been drawn from decided cases."

² For tortious responsibility, its phrasing was first broadly given in the epoch-making book of Mr. Justice Holmes, *The Common Law* (pp. 110, 161).

³ This principle is here put forward by the learned author for contracts only.

1859, *Pollock, C. B.*, in *Cornish v. Abington*, 4 H. & N. 549, 555 : "The word 'wilfully,' in the rule as laid down in *Pickard v. Sears*, means nothing more than 'voluntarily.' Lord Wensleydale, perceiving that the word 'wilfully' might be read as opposed not merely to 'involuntarily' but to 'unintentionally,' showed that if the representation was made voluntarily, though the effect on the mind of the hearer was produced unintentionally, the same result would follow. If a party uses language which, in the ordinary course of business and the general sense in which words are understood, conveys a certain meaning, he cannot afterwards say he is not bound if another, so understanding it, has acted upon it. If any person, by a course of conduct, or by actual expressions, so conducts himself that another may reasonably infer the existence of an agreement or license, whether the party intends that he should do so or not, it has the effect that the party using that language, or who has so conducted himself, cannot afterwards gainsay the reasonable inference to be drawn from his words or conduct."

1871, *Blackburn, J.*, in *Smith v. Hughes*, L. R. 6 Q. B. 597, 607 : "I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman v. Cooke*.⁴ If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

1840, *Denman, L. C. J.*, in *Trueman v. Loder*, 11 A. & E. 588 (action on a contract of sale in the name of one Higginbotham; the plaintiff was allowed to show that H., though carrying on business in his own name, had been held out by the defendant as his agent, so that the business was virtually the defendant's, done in H.'s name) : "Some cases were quoted in which the question whether an agent or a partner bound himself only, or his principal or firm, has been held to depend on his intention to deal for himself or for the principal or partnership. But on examining all those cases, it will be found that the contracting party was carrying on two different concerns, one for himself, the other for his principal or his firm. The world would know him in two different characters; and each party dealing with him was bound to inquire in which he appeared on any particular occasion. But here is the case of one exclusively an agent for another, and in that light only regarded by the customer. Having full authority so to represent himself, he forms the design in his own mind to divert one of his numerous contracts from its expected destination to some purpose of his own. But that design cannot operate to oust the opposite party of those rights against the principal, which both the principal and agent had by their conduct concurred in persuading him that he possessed. Suppose a landed proprietor to send his steward habitually to the neighboring fairs and markets to make sales and purchases for him in matters connected with the management of his estate; that the steward makes all these contracts in his own name, but that he is universally known to have no land of his own, and to be acting solely for his employer, by his direction and on his credit; could his intention to make himself the owner of articles bought on one particular occasion in the course of the same dealing deprive the vendor of his recourse against the master? Certainly not."

1884, *Elliott, J.*, in *Indianapolis v. Kingsbury*, 101 Ind. 201, 213 : "We fully agree with counsel for the appellees that an essential element of dedication is the intent of the owner to devote his land to a public purpose, and we unhesitatingly affirm that without such an intention it is impossible that there should be a valid dedication. But the intention to which Courts give heed is not an intention hidden in the mind of the landowner, but an intention manifested by his acts. It is the intention which finds expression in con-

duct, and not that which is secreted in the heart of the owner, that the law regards. Acts indicate the intention, and upon the intention clearly expressed by open acts and visible conduct the public and individual citizens may act. Nor is it to mere secret agreements or arrangements unknown to public officers and to purchasers of lots that Courts are to look. What they do look to, and what good conscience and fair dealing require they should regard, is the conduct of the landowner; that is open to the scrutiny and knowledge of the community and its members."⁵

The foregoing principle, it will be noticed, throws useful light on the time-honored but misused distinction between *void* acts and *voidable* acts. The *voidness* of an act (or, more correctly, of conduct which has never become a legal act) is seen to be a quality *purely relative*, *i. e.* an instrument may be void, as against the grantee or payee, yet valid as against the indorsee or the grantee's grantee. It may even be valid as against one of two grantees, though void as against the other, or valid for one clause and void for the next, — consequences thoroughly accepted in the modern judicial rulings (*post*, §§ 2415–2420, *passim*). The conception, so often met with, that voidness, when conceded for one person, necessarily involves voidness in the absolute sense, *i. e.* for every other person,⁶ is therefore unfounded and unpractical, since the test of reasonable consequences will differ for different persons affected by the conduct.

As a part of the same erroneous conception, the *relative quality* of an act, as valid for one person while invalid for another, has been associated exclusively with the term *voidable*. But this is the confounding of two separate ideas in the same term. A voidable act is one which may be annulled at the actor's option (*post*, § 2423), but is valid till annulled; while a void act is of itself null, and requires no further act exercising an option, — the practical differences being, first, that the voidable act remains valid if the option is

⁵ The following opinions further illustrate this principle: 1898, *Fox v. R. Co.*, 70 Conn. 1, 38 Atl. 871 (transfer of bonds; the transferor was not allowed to be asked, "Was it your intention to convey the coupons?" because it called for "the actual, secret, unmanifested intention of H., which under the circumstances was of no legal significance; the real question was as to his manifested intention, and this could be ascertained only from the contract, read in the light of the circumstances under which it was made"); 1880, *Stoddard v. Ham*, 129 Mass. 383 (the plaintiff sold goods to L., believing without good ground that he was only agent for the defendant, and the defendant bought the goods from L.; the defendant was held not liable; "a party cannot escape the natural and reasonable interpretation which must be put on what he says and does, by showing that his words were used and his acts done with a different and undisclosed intention"); 1893, *Hobbs v. Massasoit W. Co.*, 158 id. 194, 33 N. E. 495 ("the general principle that conduct which imports acceptance or assent is acceptance or assent in the view of the law, whatever may have been the actual state of mind of the party"; per Holmes, J.); 1854, *Lennig v. Ralston*, 23 Pa. 137 (under a statute giving

extra damages for dishonor of a bill drawn in Pennsylvania upon a foreign drawee, the defendant was held liable upon a bill bearing the word "Philadelphia" but actually completed by the defendant's partner in England; "it bore the dress of a bill of exchange drawn in Pennsylvania, and, upon the principle that every one is presumed to intend to produce all the consequences to which his acts naturally and necessarily tend, the presumption is that the defendants intended that the purchasers should receive it under the belief that it was a bill drawn in Philadelphia"). For the state of juristic opinion in Germany, see *Der Irrthum bei nichtigen Verträgen*, Rudolf Leonhard, Berlin, 1882, *passim*; and the references in Holland, *Jurisprudence*, 3d ed., c. 8, p. 101, note 1.

⁶ *E. g.*: 1824, *Parker, C. J.*, in *Somes v. Brewer*, 2 Pick. 184, 191: "Between the grantor and the grantee in such cases, the technical difference between 'void' and 'voidable' is wholly immaterial. Whatever may be avoided may in good sense, to this purpose, be called void. . . . But in regard to the consequences to third persons the distinction is highly important, because nothing can be founded upon a deed which is absolutely void; whereas from those which are only voidable fair titles may flow."

never exercised, and, secondly, that its invalidity must be pleaded affirmatively.⁷ Now the relative quality — *i. e.* of affecting one person though not another — is concededly true of voidable acts. But that it is not their inherent mark may be perceived from two circumstances; on the one hand, that a voidable act may continue to be voidable in the hands of a third person, so far as he is a transferee with notice (*i. e.* the voidability, like the voidness, may absolutely affect the act under certain circumstances), and, on the other hand, that some acts ordinarily voidable are by modern doctrine (*e. g.* the contracts of a lunatic⁸) valid for even the immediate promisee, if he did not and could not know of the avoiding circumstance.

The result is, then, that the distinction between relative and absolute validity must be separated from the idea of voidness and voidableness. The only place for the former contrast is between acts permitted and acts prohibited by public policy (*ante*, § 2414). So long as an act does not fall within the classes absolutely prohibited and made null, *its validity is always relative*, depending on the foregoing principle of reasonable consequences as governing intent.

The application of that principle is now to be examined. It comes to be applied under each of the three elements (*ante*, § 2404) of a legal act, namely, (A) its subject, (B) its terms, and (C) its finality.

§ 2414. (A) **Jural Subject of an Act; Secret Intent not to be Bound.** The result of the foregoing principle, as applied to the requirement that an act must be jural in its subject (*ante*, §§ 2404, par. (1), *a*, § 2406) is plain. When the first party has so conducted himself that the natural outward import of his act is a legal transaction, it is immaterial what his own actual intent was, — whether to jest, or to do a charity, or otherwise to be without legal consequences. This rule has been applied to *marriage ceremonies*, to *household services*, and to a variety of transactions.¹

In the other aspect (*ante*, § 2406), however, in what concerns the prohibitions of *public policy against transactions* of certain kinds, making them void, this is obviously independent of the will of the parties. They cannot

⁷ 1765, *Zouch v. Parsons*, 3 Burr. 1794, 1805 (L. C. J. Mansfield: "An infant, or they who stand in his place, cannot plead '*non est factum*' and give the infancy in evidence; but they must plead the infancy specially, to avoid the deed").

⁸ 1892, *Imperial Loan Co. v. Stone*, 1 Q. B. 599; *Harriman, Contracts*, § 409.

¹ *Eng.*: 1727, *Osborn v. Guy's Hospital*, 2 Str. 728 (services as a friend, not as a broker, in transacting stock affairs); 1813, *Taylor v. Brewer*, 1 M. & S. 290 (a promise that "such remuneration shall be made as shall be deemed right"; this was held "merely an engagement of honor," "throwing the plaintiff upon the mercy" of the defendant); *U. S.*: 1876, *Day v. Caton*, 119 Mass. 513 ("The circumstances of each case would necessarily determine whether silence, with a knowledge that another was doing valuable work for his benefit and with the expectation of payment, indicated that consent which

would give rise to a contract"); 1863, *Keller v. Holderman*, 11 Mich. 248 (check for an old watch, given as a jest); 1870, *McClurg v. Terry*, 21 N. J. Eq. 225, 227 (marriage in jest); 1851, *Perkins v. Hersey*, 1 R. I. 493 ("It is not necessary for you to consider that there was an express promise made and accepted in terms; but if his conduct was such as to induce her to believe that he intended to marry her, and she acted upon that belief, . . . that will raise a promise"); 1890, *Henderson Bridge Co. v. McGrath*, 134 U. S. 260, 275, 10 Sup. 730 (an assurance to "do what was right"); 1845, *Andrus v. Foster*, 17 Vt. 556 (household services of a child; "it is incumbent upon her to show that at the time it was expected by both parties that she should receive such compensation, or that the circumstances under which the services were performed were such that such expectation was reasonable and natural").

be allowed to control or evade the prohibition in any manner; hence, the nature of the transaction, as being *usurious* or the like, may always be shown, and the parol evidence rule interposes no obstacle.²

§ 2415. (*B*) *Terms of an Act; (a) Signing a Completed Document by Mistake; (1) Individual Mistake not known to or induced by the Second Party.* In applying the general principle (*ante*, § 2413) to the second element of an act, namely, its terms or contents (*ante*, § 2404, par. 1, *b*), the doctrine of reasonable consequences calls for several important distinctions in order to solve the various forms of practical problems. In the first place, a distinction may arise between *negotiable instruments* and other documents, for in the former a new person, entering posterior to the original circumstances, may by the law acquire original rights; and thus the rule may have a different result according as the second party is the immediate or the subsequent holder of the instrument. Furthermore, specific kinds of contracts are in experience often accompanied by inattention or by imposition — such as bills of lading and insurance policies —, and the principle of reasonableness may be affected by this feature of practical life. In the second place, and running through all kinds of legal acts, a distinction is necessary (based on the principle of reasonable consequences) between *individual* and *mutual mistake* (*i. e.* by one party alone and by both parties), and also between *unilateral mistakes* which are *known to the second party* and those which are *not known* to him. In the third place, a distinction is necessary between signing a specific and *complete document* under mistake as to its actual terms, and signing a paper which is *blank* or *unfinished* or is capable of being altered. These various distinctions are to be noted separately under each head.

(*a*) *Signing a Completed Document by Mistake; (1) Individual Mistake, not known to or induced by the Second Party.* Where a legal act is executed by *signing* a specific and *complete* document, the second party has a right to treat the signed contents as representing the terms of the act. The principle of reasonable consequences plainly requires this result. That the signer did not intend to execute such terms is immaterial; and whether the lack of intent was due to a failure to read it over, or to some other cause, is immaterial. In other words, his individual innocent mistake or deliberate secret dissent cannot be shown. Such may be taken to be the general rule.¹ As

² 1767, *Collins v. Blanter*, 2 Wils. 347 (usury); 1781, *Lowe v. Waller*, 2 Doug. 736 (usury); and cases cited in *Ames' Cases on Bills and Notes*, I, 400, note, 416, note, 464, note, 574, note.

¹ *Eng.*: 1860, *Lewis v. R. Co.*, 5 H. & N. 867 (Pollock, C. B., sanctioned a ruling "that if a person signs a contract [without reading], and will not venture to deny that he was aware it was a contract, and that he saw the 'conditions,' and there is no evidence to detract from the apparent result, he is bound by it"); *U. S.*: 1903, *Georgia Med. Co. v. Hyman & Co.*, 117 Ga. 851, 45 S. E. 238 ("that igno-

rance [of the contents] was due to his own negligence"); 1884, *Black v. R. Co.*, 111 Ill. 351, 358 ("When a party of mature years and sound mind, being able to read and write, without any imposition or artifice to throw him off his guard, deliberately signs a written agreement without informing himself as to the nature of its contents, he will nevertheless be bound"; whether here the plaintiff was misled by the defendant's representations that a release of liability was a free pass, held a question of fact); 1894, *State National Bank v. Butler*, 149 id. 575, 36 N. E. 1005 (defendant held liable as partner, to the payee of a partnership note, the

exceptions to this rule, there may be two classes of cases. 1. Where a document was drafted and *prepared by the second party*, and contains also parts which physically constitute virtually a separate document and are not included in the scope of the first party's signature, it may be proper, in order to protect against imposition, to exonerate him if he misunderstood the extent of the terms to which his signature apparently applied. This may be the case for an *insurance application*.² 2. Where a person is *illiterate*, or *blind*, or *ignorant of the alien language* of the document, his case, again, is to be tested by the doctrine of reasonable consequences as applied to the circumstances. In other words, he is of course not bound as against the second party if that party himself misrepresented the contents (*post*, § 2416), nor is he bound against a transferee of a chose in action, who can be in no better position; but if the instrument is negotiable, and has come to the hands of a *bona fide* holder for value, then the signer is liable if under the circumstances he had not taken proper precaution to ascertain the contents, *i. e.* if he was negligent.³

partnership agreement having been signed by the defendant in ignorance of its contents and in reliance upon the statements of her brother, who was a partner); 1903, *Johnson v. Richardson*, 67 Kan. 521, 73 Pac. 113 (release of liability for injuries); 1858, *Diman v. R. Co.*, 5 R. I. 130 (the defendant, being solicited to increase or renew his subscription to stock of the plaintiff railroad company, having formerly been a subscriber to 10 shares of a total value of \$1000, took the subscription-book from the agent, intending to renew his old subscription, and wrote 20 shares and \$2000, and handed the book to the agent; on later discovering his mistake, the subscription as written was held binding; "grant that he designed, and at the time expressed his design, of renewing only his old subscription, . . . and permitted his hand to write what his will did not direct," yet this "necessarily imported, in such a personal act, negligence or carelessness on his part"); 1896, *Coates v. Early*, 46 S. C. 220, 24 S. E. 305 (the plaintiff sent the defendant a sample card of needles containing 25, and a blank order for "needle cards"; the defendant filled out an order for five thousand needle cards; held, that the defendant could not show that he thought that he was ordering five thousand needles, instead of five thousand cards of needles).

For individual mistake as a bar to *specific performance*, see *post*, § 2417.

² 1895, *Yoch v. Ins. Co.*, 111 Cal. 503, 44 Pac. 189 (application for insurance, containing the words "less than 15 rooms," and signed by the insured; the insured was allowed to testify that he did not read the application nor know that the words were there; the ordinary rule was held not to apply where "the instrument contains no words of obligation and the clause invoked by the signer does not purport to be a statement by him or in answer to a question put to him"); 1875, *Hartford L. Ins. Co. v. Gray*, 80 Ill. 28, 31 (insurance application; the signature being proved, "it affords *prima facie*

evidence that the contents of the instrument were known to the subscriber, and that it is his act, and hence that the burden is upon those who assert the contrary"); 1903, *Gwaltney v. Provident S. L. Assur. Co.*, 132 N. C. 925, 44 S. E. 659 (insurance policy handed to the insured on the street; failure to read, allowed to be shown). The following opinion collects numerous cases: 1902, *Bostwick v. Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246 (insurance policy signed without reading).

³ The earlier rule, as laid down in *Thoroughgood's Case* (*ante*, § 2405), seems to have made it a formal test whether the illiterate demanded a reading and obtained a false one; but the modern rule is more flexible: *Eng.*: 1869, *Foster v. Mackinnon*, L. R. 4 C. P. 704 (when a document is falsely read over to a blind or illiterate person, "then, at least if there be no negligence, the signature so obtained is of no force"); *U. S.*: 1871, *Puffer v. Smith*, 57 Ill. 527 (similar to *Walker v. Ebert*, Wis., *infra*); 1896, *Green v. Wilkie*, 98 Ia. 74, 66 N. W. 1046 (note signed by an illiterate person on false representations that it was a note of an entirely different tenor from the one agreed, held invalid in the hands of a *bona fide* holder for value; "the rule we apply is not the usual one in which innocent holders of negotiable paper are protected against fraud in the inception of a note; in such cases there is a note, but the *bona fides* of it is questioned; in this case the note has never existed in the sense of the minds of the parties meeting, and there is no negligence to render the defendant liable on other grounds"); 1881, *Trambly v. Ricard*, 130 Mass. 259 ("The fact that the plaintiff was an unlettered person, who could not read and write, is of controlling importance; . . . a party who is ignorant of the contents of a written instrument, from inability to read, who signs it without intending to, and who is chargeable with no negligence in not ascertaining the character of it, is no more bound than if it were a forgery"); 1903, *New*

Where the document has been *not signed*, but merely *taken into possession* — as a bill of lading or a notice —, it is less easy to fix upon a definite test. For formal *bills of lading*, there is a tendency to lay down a general rule that the shipper's acceptance of the manual custody of the document from the carrier is conclusive;⁴ though even here it is in Illinois always left to the jury as a question of fact in each case.⁵ But for *tickets, receipts, and notices*, the circumstances of each case are usually investigated (as a question of law, however), and the decision turns upon varying considerations of good sense and experience.⁶

§ 2416. **Same: (a) Signing a Completed Document; (2) Individual Mistake known to or induced by the Second Party.** Where the party's error as to the contents of his signed document is *known to the second party*, the first party may, of course, by the general principle (*ante*, § 2413), insist upon the terms as supposed by him, because these are identical with those which he appeared to the second party to be intending to utter. In other words, the actual and therefore the reasonable consequence of his volition to express himself in certain terms was precisely what the second party understood to be that expression. 1. The ordinary instance is that of *fraudulent misrepresentations* of the document's terms by the second party;¹ and, in

York C. & H. R. R. Co. v. Difendaffer, — C. C. A. —, 125 Fed. 893 (contract signed by an illiterate person, without seeking explanation from the other party or from third persons, held binding); 1871, Walker v. Ebert, 29 Wis. 194, 196 ("the party whose signature to such paper is obtained by fraud as to the character of the paper itself, who is ignorant of such character and has no intention of signing it, and who is guilty of no negligence in affixing his signature or in not ascertaining the character of the instrument, is no more bound by it than if it were a total forgery, the signature included").

⁴ 1868, Grace v. Adams, 100 Mass. 505 (a consignor of a package held to assent to the terms of a bill of lading taken by him without reading; "it was his duty to read it; the law presumes, in the absence of fraud or imposition, that he did read it, or was otherwise informed of its contents and was willing to assent to its terms without reading it; . . . the defendants have a right to this protection, and are not to be deprived of it by the wilful or negligent omission of the plaintiff to read the paper").

⁵ In Illinois, the mere acceptance of the bill of lading, or even the reading of it, is treated as *per se* inconclusive: 1873, Anchor Line v. Dater, 68 Ill. 369 ("the shipper had no alternative but an acceptance of it, and his assent to its conditions cannot be inferred from that fact alone"); 1895, Chicago & Alton R. Co. v. Davis, 159 id. 53, 42 N. E. 382; 1893, Wabash R. Co. v. Harris, 55 Ill. App. 159, 162 ("It was necessary to show that he accepted it with a full understanding on his part of the condition or limitation, and actually intended to assent to it; and these were questions for the jury").

⁶ 1848, Rice v. Mfg. Co., 2 Cush. 80 (regula-

tions for mill hands, given to an applying employee, who thereupon went to work; held that the plaintiff was bound "if she had read the regulations, or if she had received from the operatives in the mill or from other sources general information as to their contents, and was content to waive further inquiry"); 1891, Fonseca v. Cunard S. Co., 153 Mass. 553, 27 N. E. 665 (the plaintiff held to have assented to the conditions of a passenger ticket, printed on two large quarto pages, received by him but not signed nor read, the circumstances being such that "the passenger taking it should have understood that it was a contract containing stipulations"; the case of a check or pasteboard ticket distinguished, because it does not "purport to be a contract"); 1870, Blossom v. Dodd, 43 N. Y. 264 (a passenger held not to have assented to terms printed in small type on the face of a baggage receipt given to him at a time and place which made it illegible and given without oral notice of its tenor).

¹ 1896, Bank of Guntersville v. Webb, 108 Ala. 132, 19 So. 14 (as between the parties, a deposit-slip signed without reading, upon the faith of misrepresentations by the other party as to the contents, is not binding); 1879, Kilmer v. Smith, 77 N. Y. 226 (conveyance containing an undertaking to pay a mortgage debt; the parties not having orally understood this as a term, and the defendant having inserted it deliberately with the intent of deceiving the plaintiff, though the plaintiff signed it without noticing the clause, the clause was struck out); 1881, Albany C. S. Instit. v. Brndick, 87 id. 40 (facts and ruling similar to Kilmer v. Smith, *supra*).

particular, a false reading to a person illiterate, blind, or alien.² Where the instrument is negotiable, and a *bona fide* holder later receives it, the question becomes one of negligence at large, *i. e.* whether, with reference to the possible consequences to people in general of signing documents, the person signing used such caution as was reasonable; and this principle will be the same for illiterate³ as for literate⁴ persons, though the decision of it might be different in the two cases. 2. Where the first party's error is merely *known* to the second party, *without fraudulent means* by the latter, the result is still the same, for the latter cannot claim that the first party's expressed words were reasonably so accepted by him;⁵ the only difference ought to be that in this case the first party should be satisfied with having the document reformed, while in the case of fraud he ought to be entitled to repudiate the entire transaction, by way of penalty upon the trickster. 3. Where the first party's error was *not known* to the second party, but was *induced by the latter's own conduct*, here also the first party may not be bound; for in such case it may well be that the terms actually expressed did not come to be expressed as the natural consequence of the first party's volition, but were due rather to the second party's own conduct. In that event the latter is not entitled to charge the former with them; in the contrary event the case becomes the ordinary one of individual mistake, which is immaterial (*ante*, § 2415). This distinction in practical application may lead, of course, to fine shades of interpretation of conduct.⁶

² Cases cited *ante*, § 2415, note 3, and the following: 1900, Pioneer Cooperage Co. v. Romanowicz, 186 Ill. 9, 57 N. E. 864 (release of right of action by a workman); 1901, Cameron v. Estabrooks, 73 Vt. 73, 50 Atl. 638.

³ Cases cited *ante*, § 2415, note 3.

⁴ 1869, Foster v. Mackinnon, L. R. 4 C. P. 704 (C. brought to the defendant, who was aged, a bill of exchange, stating that it was a guarantee, and the defendant, seeing only the back of the paper, and believing it to be a guarantee of a sort formerly signed, wrote his name; an instruction that the defendant was not liable to a *bona fide* holder if he signed it on fraudulent representations "in the belief that it was a guarantee and if the defendant was not guilty of any negligence in so signing the paper," was held correct; "it was not his design, and, if he were guilty of no negligence, it was not even his fault, that the instrument he signed turned out to be a bill of exchange; it was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album").

⁵ 1885, Loomis v. Day, 52 Conn. 483 (the plaintiff was held entitled to the correction of certain bonds whose terms made them redeemable in 20 years, instead of in 10 years as by the vote of the town-meeting; the plaintiff's treasurer having signed the bonds without reading them, but the defendant knowing of the error; good opinion by Loomis, J.); 1883, Shelton v. Ellis, 70 Ga. 297 (the plaintiff printed some schedules of railroad-fares, in which by mistake a certain fare was printed as \$21.25 in-

stead of \$36.70; the defendant, knowing of the error, bought from an agent of the railroad a quantity of tickets at the erroneous price; the plaintiff was held entitled to have the tickets impounded); 1888, Keister v. Myers, 115 Ind. 312, 17 N. E. 161 (similar situation for a mortgage; "a party who admits that an instrument which a court of equity is asked to reform does not set forth the agreement as it was actually made, and as the other party believed it did, will not be heard to say that he intentionally brought about or silently acquiesced in the discrepancy between the instrument and the agreement as made"); 1903, Story v. Gammell, — Nebr. —, 94 N. W. 982; 1890, Wanner v. Landis, 137 Pa. 61, 20 Atl. 950 (the plaintiff signed a deed on the representation that its contents affected only a tenancy in common, but it in fact included a release of dower; the defendant purchased at a public sale, but after notice of the error given by the plaintiff; the deed was held invalid as to the dower).

⁶ *Eng.*: 1869, Mackenzie v. Coulson, L. R. 8 Eq. 368 (the defendants, desiring to secure an insurance against particular average by rust, engaged F. to secure insurance; F., acting through H., who acted through S., whose clerk W. negotiated, procured from the plaintiffs a memorandum which expressly excepted particular average, but in filling out the policy this clause was inadvertently omitted, and the plaintiffs signed the policy without reading it or knowing of the omission, and the policy on being transmitted to the defendants was accepted by them as being in accordance

§ 2417. **Same: (a) Signing a Completed Document; (3) Mutual Mistake; General Principle.** Concerning mutual mistake and its effect on the terms of the legal act, it is necessary at the outset to exclude two questions which do not involve the present principle. In the first place, the question what sort of mistake — including individual mistake — will suffice to *bar a bill for specific performance*, is a distinct one; it involves merely the choice of remedies, not the terms of the valid act.¹ In the next place, the question whether an act may be avoided for a *mistaken assumption of fact external to the contract*, is a distinct one, belonging under the principle of avoidability (*post*, § 2423). This kind of question arises for all varieties of acts, — for example, a will or a gift is made to a younger son on the erroneous assumption that the elder one is deceased; or a deed is made of land seen by the parties and accurately described in the deed, on the erroneous assumption that it contains forty acres, though in fact it contains only thirty acres; or a deed attempting merely to release dower employs, by error of law, terms which effect a transfer of the wife's estate sole.² In all such instances the present principle is not involved. This is to be seen in three respects; for one thing, the terms of the act itself are not the subject of error; they are precisely as intended, and the error is as to a fact exterior to the instrument; for another thing, there is no variance between the oral understanding and the subsequent document; the question would be precisely the same had no writing been used, — as when a horse,

with their intention; held, (1) that the policy as signed and sent by the plaintiffs was a mere proposal, and became a contract only when accepted; (2) that the defendant was not responsible for the erroneous transcription by S.'s clerk; and (3) that the plaintiffs' own carelessness made them responsible for the terms of the instrument as transmitted by them and accepted by the defendant); *U. S.*: 1887, *Palmer v. Ins. Co.*, 54 Conn. 488, 9 Atl. 248 (the parties having agreed to renew a policy of insurance, the defendant wrote into the new policy, without calling the plaintiff's attention, a new clause of co-insurance, and the plaintiff signed it without reading; "the rule of law that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted is subject to this limitation, namely, that it is not to be applied in behalf of any person who by word or act has induced the omission to read"); 1896, *Marshall v. Westrope*, 98 Ia. 324, 67 N. W. 257 (defendant and plaintiff, negotiating for a sale, differed as to the medium of payment; the defendant, having said that he would consider the matter and make a final proposition, sent by mail a draft-contract signed by himself containing his original terms, which the plaintiff after reading signed, in the supposition that the terms represented his own original terms; held, that the only agreement made "was the one expressed in writing," and that even if the plaintiffs wished to cancel it, "their own negligence in signing the contract would seem to be a bar"); 1878, *Moran v. McLarty*, 75 N. Y. 25 (plaintiff held not en-

titled to the reformation of an instrument containing a guaranty clause, which was to have been a part of the agreement by the defendant's understanding but not by the plaintiff's, the plaintiff having partially read the instrument and then signed it without noticing the clause).

¹ 1746, *Joynes v. Statham*, 3 Atk. 388; 1794, *Rich v. Jackson*, 6 Ves. Jr. 334, note (L. C. Hardwicke: "Parol evidence of the conduct of the parties, the manner of conducting the transaction, the unfairness and hardship, may afford a good ground to leave the party in the condition in which he puts himself at law, to make what he chooses to make of it; but ought not to make this Court give him any aid"); 1801, *Townshend v. Stangroom*, 6 Ves. Jr. 328, 333 (L. C. Eldon; holding it not true "that because parol evidence [of unilateral mistake] should not be admitted at law, therefore it shall not be admitted in equity upon the question whether, admitting the agreement to be such as at law it is said to be, the party shall have a specific execution"); compare the cases and citations in *Ames' Cases on Equity Jurisdiction*, 374 ff.

² The following cases will serve as examples: 1871, *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 318 (where the mistake is only as to the legal effect of intended words, reformation will not be granted); 1889, *Newton v. Tolles*, 66 N. H. 136, 19 Atl. 1092; 1875, *Bush v. Hicks*, 60 N. Y. 298, 301 (a deed reformed in which the descriptive words of the boundaries were the intended ones, but the description covered more land than was intended).

sold orally, proves to have been dead at the time of the sale; and, finally, in these cases the problem varies for different kinds of acts, for the rules about materiality of error as applied to the case of a testator or donor are different from those which apply to deeds and contracts.

The kind of mutual mistake involved in the present principle is purely a mistake as to the *actual words intended to form part of the act*, just as in the cases of individual mistake already considered (*ante*, §§ 2415-2416). This sort of mutual mistake can rarely occur in oral acts, but it is common enough in written acts. The case is the simple one of an oral agreement which, when reduced to writing for signature, contains terms varying from the actual understanding of the parties, but is nevertheless signed by them both in ignorance of the variance. No one appears ever to have doubted that in such cases the instrument should be judicially amended to represent the actual agreement.³ The only uncertainty has been in the theory of this proceeding. The important aspect of theory is that the amendment ought not to be conceived as a change or correction of the actual agreement. The erroneous instrument itself is not the actual agreement; *that* is found in the parties' common supposition of what the instrument contained, because, on the general principle (*ante*, § 2413), the terms of the act, for either party, are such as were reasonably caused by him to be apprehended by the other, and these clearly the instrument itself does not represent. "Neither party," in the language of Mr. Justice Holmes, "has purported or been understood to express assent to the conveyance as it stands."⁴ Hence the frequent emphasis of judicial opinion upon this theory of the process:

1869, *James, V. C.*, in *Mackenzie v. Coulson*, L. R. 8 Eq. 368: "Courts of equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts."

1858, *Ames, C. J.*, in *Diman v. R. Co.*, 5 R. I. 130: "A court of equity has no power to alter or reform an agreement made between parties, since this would be in truth a power to contract for them; but merely to correct the writing executed as evidence of the agreement, so as to make it express [to all the world] what the parties actually agreed to. It follows that the mistake which it may correct in such a writing must be, as it is usually expressed, the mistake of both parties to it; that is, such a mistake in the draughting of the writing as makes it convey the intent or meaning of neither party to the contract."

1879, *Rapallo, J.*, in *Whitemore v. Farrington*, 76 N. Y. 452: "The jurisdiction to reform written instruments in cases free from fraud is exercised only where the instrument actually executed differs from what both parties intended to execute and supposed that they were executing or accepting."

1894, *Torrance, J.*, in *Park Bros. & Co. v. Blodgett & C. Co.*, 64 Conn. 28, 29 Atl. 133: "The written agreement certainly fails to express the real agreement of the parties in a material point; it fails to do so by mutual mistake; . . . and the instrument, if corrected,

³ The doctrine goes back to the beginnings of modern equity: 1750, *Baker v. Paine*, 1 Ves. Sr. 456 (bill for account on a sale of goods, with a deduction for certain charges; but "it appeared by the minutes and the calculations made by themselves at the time that this was contrary to the intent and a mistake by the drawer"; L. C.

Hardwicke held that "these minutes must be taken to be the agreement of the parties, and if any material variation (as is admitted by the defendant), the articles must be rectified").

⁴ 1891, *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228.

will place both parties just where they intended to place themselves in their relations to each other."

There is therefore an insidious fallacy in the language of an early and much quoted decision⁵ which places this doctrine upon the ground of enforcing *specific performance of contracts*, *i. e.* of assuming that there are two acts of contract, the prior one including by implication an oral agreement to reduce the oral transaction to written form. But written contracts are not necessarily preceded by oral ones; the moment of assent, and thus of the beginning of obligation, to the terms as finally settled upon may be the moment of signature of the writing, — as in numerous negotiations by mail; and in such instances it is equally possible (though not common) for an erroneous term to be inserted in the draft at the last moment. The correction of erroneous instruments therefore does not rest necessarily upon any assumption that a prior completed oral contract is being enforced. This fallacious assumption has, however, led practically, in a few jurisdictions, to the anomalous doctrine that a term *omitted* from the writing *by mutual mistake* (as distinguished from a term inserted by mistake) cannot be inserted in amendment, if the contract is one *required by the statute of frauds to be in writing*.⁶ If it had been appreciated that the process of reformation consists in making the instrument state what the parties supposed that it represented — in short, in making it represent what they *are* doing, not what they have already agreed to do, this anomaly would not have been accepted. For example, if the parties, for the first and last time, met and signed a document in ink which proved to be a disappearing ink and became straightway invisible, the Court could undoubtedly cause the terms to be indelibly restored according to the parties' understanding of what the paper contained; here the process is in effect precisely the ordinary one known as "reformation," and yet there is no writing as required by the statute. The theory of reformation is that the instrument already *is* subjectively — *i. e.* to the parties — what they supposed it to be, and therefore that the statutory requirement of writing is, subjectively at least, satisfied; and that the "reformation" is needed only to make the instrument appear to all the rest of the world as it appeared (and therefore legally was) to the parties when they signed it.

The really complicated and troublesome questions concerning mutual mistake, as commonly so called, are those of the character first mentioned, namely, questions as to the materiality of some expressed term or unexpressed assumption. These are questions common to all contracts, written or unwritten, and involve the theory of avoidability (*post*, § 2423).

⁵ 1825, Washington, J., in *Hunt v. Rousmanier*, 1 Pet. 1: "The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisprudence, and if the instrument which is intended to execute the agreement be from any cause insufficient for that purpose, the agreement remains as much unexecuted as if one of the parties had refused altogether to comply with his engagement; and a court of equity will in the exercise of its ac-

knowledge jurisdiction afford relief in the one case as well as in the other, by compelling the delinquent party fully to perform his agreement according to the terms of it and to the manifest intention of the parties."

⁶ 1869, Glass *v.* Hulbert, 102 Mass. 24 ("From the oral agreement there can be derived no legal right, either to have performance of its stipulations or written evidence of its terms").

§ 2418. **Same: (a) Signing a Completed Document; (3) Mutual Mistake, as affecting Bona Fide Holders for Value.** The theory of reformation is to make the instrument state, objectively and in appearance to others, what it did subjectively state to the parties themselves. The one party is not bound to the other by the purporting tenor of the act, because the other party shared the error. But as against third persons, who are not sharers of the same supposition, and who are authorized by the substantive law to rely upon the instrument as defining the rights acquired by it, the tenor of the instrument controls, as a necessary result of the general principle (*ante*, § 2413) that the actor is responsible for the reasonable consequences of his act. In other words, an instrument may be reformable as against one person, but not as against another; the only condition being, in the latter case, that the transaction is one by which subsequent transferees may acquire rights not wholly dependent on the title (*i. e.* the legal acts) of their transferors. This will of course be the case with *commercial paper*. It should also be recognized for *deeds*.¹ The theory of the law is well illustrated in the circumstance that the same deed may at the same time be reformable as against one of the original parties to it, though not as against another.²

§ 2419. **Same: (b) Signing a Document having Blanks, or capable of Alteration; Writing One's Name not as a Signature.** (1) When a document as signed contains a *blank space*, and the blank is afterwards filled in by another person, the liability of the maker to be charged with the terms thus filled in is determined by the general principle of reasonable consequences (*ante*, § 2413). As against the *person filling the blank*, the maker is of course chargeable for such terms as accord with his own authority or consent,¹ and is not chargeable with any other terms. But even against *third persons* who may by substantive law rely on the instrument as the foundation of their rights, the maker may be chargeable, by the test of reasonable consequences; because an improper insertion by the immediate transferee may be (in the circumstances) a consequence which a prudent man might well have apprehended. For negotiable instruments,² as well as for deeds,³ this principle

¹ 1862, *Garrard v. Frankel*, 30 Beav. 445 (the plaintiff and the defendant agreed for a lease by the former to the latter at 230*l.*, but the plaintiff, in filling out the blanks, wrote by mistake 130*l.* for 230*l.*; the defendant signed the lease with knowledge of the discrepancy; held, (1) that the defendant might give up the lease, but if she retained the lease, could do so only at a rent of 230*l.*; but (2) that B., who had advanced money to the defendant on an assignment of the lease, was to be treated as a purchaser for value without notice and have a lien on the house for the amount of the advances, whether the defendant retained or gave up the lease); 1891, *Holmes, J.*, in *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228 ("As things stand, a purchaser without notice could hold him to the words which he has used").

² 1862, *Garrard v. Frankel*, *supra*; 1876, *Wilcox v. Lucas*, 121 Mass. 22 (W. sold his

share of mining land to L. and A., and, by mistake in supposing certain ore land not to be within the share, an intended reservation of rights was omitted; reformation was ordered as to L., who shared the mistake, "to prevent him from relying on the grant," but not as to A., who did not share the mistake).

¹ 1829, *Hudson v. Revett*, 5 Bing. 368 (quoted *ante*, § 2408).

² 1853, *Montague v. Perkins*, 22 L. J. C. P. 187 (defendant held liable on an acceptance in blank, filled up and negotiated by the payee twelve years later; "he must be taken to have intended the natural consequence of his act"); and cases cited in *Ames' Cases on Bills and Notes*, I, 526, note.

³ 1890, *State v. Matthews*, 44 Kan. 596, 25 Pac. 36 (the grantor executed a deed with a blank for the grantee's name, and left it with M. to negotiate with a proposed grantee; M. filled

seems to have settled into a rule of thumb, where the blank is expressly left for the purpose of later completion and the document is *handed away*. But where the document, though expressly left incomplete, is *retained* by the maker and later leaves his custody without his consent,⁴ or where the blank is a mere superfluous space left uncanceled in an otherwise complete instrument,⁵ the act is treated as not negligence *per se*, and the question turns upon the circumstances of each case.

(2) Where after execution a document has been *altered* and is acquired by a third person in its altered condition, the same principle serves as a test;⁶ here the question seems always to be open upon the circumstances of each case.

(3) Where the person charged had not signed any document at all, but had *written his name alone*, *i. e.* for some other purpose than as a signature to a preceding written statement, it is natural to find the Courts holding him not responsible, as a matter of law.⁷ Only rarely could the circumstances here justify leaving the question of negligence to the jury.

in his own name, and recorded the deed, then mortgaging the land to T., on the faith of the record; T. was held to obtain a good title); 1889, *Dobbin v. Cordiner*, 41 Minn. 165, 42 N. W. 870 (a deed executed by a married woman without reading it, on her husband's false representations, was left blank as to grantee and description of property, and the husband filled it with a grantee's name and a description of the wife's property; the *bona fide* grantee was held to obtain a good title, on the ground of the wife's "culpable negligence").

⁴ 1839, *Van Amringe v. Morton*, 4 Whart. 382 (a deed executed and acknowledged, with a blank for the grantee's name, locked by the grantor in a drawer of which the key was given to his brother, who abstracted the deed, filled out the name of a grantee and delivered it, was held not effective, there being no negligence or default in the maker).

⁵ 1827, *Young v. Grote*, 4 Bing. 253 (defendant held liable for checks signed by him in blank, left in his wife's custody, and so filled out by her direction that a blank space before the amount could be filled in to make 50*l.* into 350*l.*; "we decide here on the ground that the banker has been misled by want of proper caution on the part of his customer"; "the checks, left by him to be filled up by his wife, when filled up by her become his genuine orders"); 1854, *Barker v. Sterne*, 9 Exch. 684 ("whether the better ground for supporting that decision is that the drawer is responsible for his negligence . . . or that the rest of the world must judge of the authority to fill it up by the paper itself and not by any private instructions, it is unnecessary to inquire"); 1875, *Halifax Union v. Wright*, L. R. 10 Exch. 183 (the ruling in *Young v. Grote* approved, as "perhaps only an application of one of those general principles . . . that a man cannot complain of the consequences of his own default against a person who was misled by that default without any fault of his own").

⁶ *Eng.*: 1859, *Ingham v. Primrose*, 7 C. B. N. s. 82 (defendant held liable on an acceptance delivered to M. without consideration to be discounted, returned to the defendant by M. after failing to obtain discount, then torn in two pieces by the defendant and thrown into the street, and picked up by M. in the defendant's presence, and afterwards negotiated by M.; "the case appears to turn on the question whether the act of tearing the bill in two pieces, being manifest on the face of it, is such an act as *prima facie* ought to have indicated to the plaintiff that it had been withheld or withdrawn from circulation; . . . it was properly a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn for the latter purpose"); *U. S.*: 1870, *Wait v. Pomeroy*, 20 Mich. 576 (defendant held not liable on a note from which, before indorsement to the plaintiff, had been detached a memorandum at the foot, conditioning payment on delivery of a machine; "no one is bound to guard against every possibility of felony"); 1870, *Harvey v. Smith*, 55 Ill. 224 (similar note, bearing the condition in pencil, which was erased before transfer; the defendant held guilty of "gross carelessness," and an instruction that he was liable if the erasure could have been made "without leaving any trace which could be detected by a prudent and careful man," held proper); 1875, *Brown v. Reed*, 79 Pa. 370 (defendant signed an agreement to pay over the proceeds of machines sold by him as agent, the words being so printed that, on separating the paper vertically, one half bore the signature and a form of promissory note; "whether there was negligence in the maker was clearly a question of fact for the jury").

⁷ 1869, *Foster v. Mackinnon*, L. R. 4 C. P. 704 ("It was as if he had written his name on a sheet of paper for the purpose of franking a letter, or in a lady's album"); 1870, *Caulkins v. Whisler*, 29 Ia. 495 (the defendant wrote his

§ 2420. (C) **Delivery of a Document; Deed or Negotiable Instrument delivered to Bona Fide Holder contrary to Intent of Maker.** The third element of every act, its finality of utterance (*ante*, § 2404, par. 1, c, § 2408) — usually marked by the delivery of the instrument — is equally governed, in respect to the competition between intent and expression, by the principle of reasonable consequences (*ante*, § 2413). Whether the act has been completed, or delivered, is not to be determined by the actual intention of the actor, but by the inquiry whether his conduct produced as a reasonable consequence the appearance of finality to the other person.

Where the other person is an *immediate party to the transaction*, and the mutual understanding is that the document has not yet been finally issued and delivered, there is no difficulty; in such cases, the first party is of course not to be charged with the document.¹ But where the other party is a *subsequent transferee* in good faith, and the document is of that sort which permits third persons to acquire independent rights under it, the conduct of the first party, in so dealing with it that as a reasonable consequence it appeared to have been delivered, may charge him, even when he has not actually intended to consummate its delivery. For *commercial paper* there is no doubt, whether the document has been manually handed away subject to a condition,² or whether it has been retained after preparation but unlawfully abstracted from the maker's custody;³ though in the latter case it would of course be rare that the conduct would be deemed negligent, while in the former case the manual transfer would as a rule be made at peril. For *deeds*, an *escrow to the grantee* would be treated as absolute, by the Courts accepting the modern doctrine (*ante*, § 2408), if the grantee was reasonably led to suppose that the delivery was absolute, in spite of the grantor's private intent to the contrary;⁴ and even in those Courts which preserve the traditional arbitrary

name upon a blank piece of paper and gave it to S. to be sent to S's employer so as to identify the defendant's signature when orders for machines were sent to them bearing his name as sales-agent; S. filled in with the words of a note; the defendant was held not liable, because not "so far in fault in the transaction that he ought to be required to bear the loss resulting from the crime").

¹ The cases in §§ 2408-2410, *ante*, illustrate this.

² 1841, *Marston v. Allen*, 8 M. & W. 494 (indorsed bill placed in the custody of the indorser's agent and by him transferred in fraud, held binding); 1860, *Fearing v. Clark*, 16 Gray 74 (defendant held liable on a note wrongfully negotiated by the custodian in escrow; "it is essential that there should have been a delivery of the note by the maker, to take effect as a contract; . . . but this rule is qualified and limited as between the maker and a *bona fide* holder"); and cases cited in Ames' Cases on Bills and Notes, I, 573, note.

³ 1878, *Baxendale v. Bennett*, 3 Q. B. 525 (the defendant held not liable on a bill of exchange, written by him, with an acceptance to his own order, but without a drawer's name,

this being then stolen from his desk and negotiated after filling in the drawer's name; Bramwell, L. J.: "The defendant here has not voluntarily put into any one's hands the means, or part of the means, for committing a crime; . . . I confess I think he has been negligent, . . . but then this negligence is not the proximate or necessary cause of the fraud; a crime was necessary for its completion"; Brett, L. J.: "It was not negligence, for two reasons, first, he did not owe any duty to any one, and, secondly, he did not act otherwise than in a way which an ordinary careful man would act"); 1870, *Burson v. Huntington*, 21 Mich. 415, 431 (holding invalid a note which had been signed by the maker, left on a table pending the obtaining of a surety and the delivery of the payee's deed, and thence taken forcibly by the payee and transferred to the plaintiff).

⁴ 1856, L. C. J. Campbell, in *Gudgen v. Besset*, 6 E. & B. 986, 992 ("I should attach no weight whatever to what the grantor might think or intend when he delivered the instrument, unless I thought that it was intended and agreed by both parties that the delivery should operate only as the delivery of an escrow").

rule making absolute an escrow to the grantee (*ante*, § 2408), there is a tendency to rest the result on the ground of negligence, where a *bona fide* third party's interests are involved.⁵ Where the escrow has been made to a *third person*, the principle of reasonable consequences, and the analogy of all the preceding rules, require that the grantor should be bound, to one subsequently holding it, by a delivery made without observance of the condition and contrary to his intent; and such is the rule of most Courts to-day.⁶ But the metaphysical error that a specific actual intent is an indispensable feature of every act (*ante*, § 2413), and the failure to perceive (what the foregoing topics amply illustrate) that the very same conduct may constitute a valid legal act as against one person, though at the same time not as against another person, *i. e.*, that nullity is a relative term only, has induced some Courts to refuse to accept this rule, and to deny title to the subsequent holder.⁷

§ 2421. **Unilateral Acts; foregoing Principles applied to Wills and Ballots.**

(1) A *will* is a unilateral act, *i. e.* there is no second party who acts upon the faith of it as a part of the transaction. Is there then the same reason to require the enforcement, for wills, of the general principle of intent (*ante*, § 2413), namely, that the terms of the act shall be such as were by the actor caused to be expressed as a reasonable consequence to the other party dealing with him? It would seem not. (*a*) So far as the *terms of the will* are concerned, it is clear that the law does not attempt to apply that principle in its stringency. The signing of a specific document as a will does not, as it does with bilateral acts (*ante*, § 2415), conclude all consideration of the signer's intent to enact those terms into the will; the question of intent is still open. Nevertheless, since the maker is deceased, and the ascertainment of his actual intent is always an elusive and jeopardous inquiry, some practical rule of thumb must if possible be adopted, taking some tangible circumstance of outward conduct as the mark of intent. Such a circumstance, for one, is the

⁵ 1879, *Ordinary v. Thatcher*, 41 N. J. L. 403 (guardian's bond delivered to the county surrogate as agent for the probate judge, the obligee; a delivery in escrow, conditionally on another surety's signature, held absolute; though the old doctrine was invoked, the opinion proceeded upon the ground that "if the matter is left in doubt as to the character of the delivery of this instrument, such doubt should be resolved in favor of the innocent person to secure whom the bond was given, rather than to the advantage of these defendants, whose carelessness has at all events produced this situation").

⁶ 1849, *Blight v. Schenck*, 10 Pa. St. 285, 294 (escrow delivered by the third person without performance of conditions prescribed by the grantor, held effective in favor of a *bona fide* grantee, "who acts on the presumption that the records of the county are not intended to mislead, but speak the truth, that the acts and declarations of the grantor are such as they purport to be"); 1892, *Hubbard v. Greeley*, 84 Me. 340, 24 Atl. 799 ("Escrows are deceptive in-

struments; they are not what they purport to be; they purport to be instruments which have been delivered, when in fact they have not been delivered; . . . they are capable of being used to deceive innocent purchasers, and the makers of such instruments cannot fail to foresee that they are liable to be so used; . . . [the maker] ought to be responsible for the use that may in fact be made of it").

⁷ 1903, *Mays v. Shields*, 117 Ga. 814, 45 S. E. 68 (yet modifying the doctrine to some extent on lines of negligence); 1859, *Smith v. South Royaltan Bank*, 32 Vt. 341 (Bennett, J.: "The deed not having been delivered, it was a nullity and void, or, more properly speaking, never existed; . . . there is a radical distinction, as it respects the rights of a *bona fide* purchaser or assignee without notice, between a void and a voidable instrument; . . . let the principle be as it may in regard to commercial paper, no question can be made as to a void deed"). The authorities are collected in Jones, *Real Property*, §§ 1315 ff.

reading over of the will to or by the testator; and there may be other circumstances which mark his knowledge of the document's contents. Given his knowledge and his ensuing act of signature, and further inquiry must cease, — subject only to those varying circumstances of fraud which may here and there arise. Such apparently is the judicial attitude to-day:

1866, *Wilde, P. J.*, in *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109: "The following propositions commend themselves to the Court as rules which, since the statute, ought to govern its action in respect of a duly executed paper: First, that before a paper so executed is entitled to probate, the Court must be satisfied that the testator knew and approved of the contents at the time he signed it. Secondly, that except in certain cases, where suspicion attaches to the document, the fact of the testator's execution is sufficient proof that he knew and approved the contents. Thirdly, that although the testator knew and approved the contents, the paper may still be rejected, on proof establishing, beyond all possibility of mistake, that he did not intend the paper to operate as a will. Fourthly, that although the testator did know and approve the contents, the paper may be refused probate, if it be proved that any fraud has been purposely practised on the testator in obtaining his execution thereof. Fifthly, that, subject to this last preceding proposition, the fact that the will has been duly read over to a capable testator on the occasion of its execution, or that its contents have been brought to his notice in any other way, should, when coupled with his execution thereof, be held conclusive evidence that he approved as well as he knew the contents thereof. Sixthly, that the above rules apply equally to a portion of the will as to the whole."¹

(b) So far as concern the *finality* of the act — that which corresponds to delivery in deeds — the question was once an open one, as already noticed (*ante*, § 2411); whether an intent to consummate execution existed, was a question of the circumstances of each case. But the formality of attestation has indirectly put such questions at rest; for this formality, indispensable to almost all wills, effectually marks the final adoption of the document as a testamentary utterance;² and no one has ever suggested that such a thing as an attestation in escrow would be judicially sanctioned. Only for holographic wills, so far as these are still recognized, can the question of finality be now raised.³

(2) *Ballots* of election furnish the only other important type of unilateral act. Here again, theoretically, the general principle (*ante*, § 2413) does not

¹ *Accord*: 1873, *Harter v. Harter*, L. R. 3 P. & D. 11; 1891, *Boehm's Goods*, Prob. 247; 1901, *Garnett-Boothfield v. same*, Prob. 335; 1896, *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334 (the testator had personally requested the witnesses to sign the document he produced as his will; the Court listened to evidence as to its non-conformity with the instructions and as to his probably not having read the final draft; but decided that the presumption arising from his act of signing was not overthrown); 1834, *Downey v. Murphy*, 1 Dev. & B. 82 ("It should have been left to the jury to say whether . . . the presumption, from execution, that the party knew the contents of the paper, understood them, and assented to them, was in fact rebutted by the state of his mind and health at the time the will was prepared and executed, by

its contents, and by the circumstances relied on by the defendant").

Consequently, *words inserted by mistake* may be struck out, though (perhaps inconsistently) words omitted by mistake will not be inserted: 1891, *Boehm's Goods*, *supra* (bequest of 10,000*l.* each to two daughters F. and G.; the name of F. having been inserted by mistake instead of G., it was struck out, though the Court would not replace it by the name of G.); 1901, *Garnett-Boothfield v. same*, *supra*; 1991, *Schott's Goods*, Prob. 190; 1902, *Brisco v. Baillie Hamilton*, Prob. 234; 1902, *O'Connell v. Dow*, 182 Mass. 541, 66 N. E. 788.

² See the quotation *ante*, § 2411.

³ But the actual *date* of a will is always open to inquiry (*ante*, § 2410).

necessarily govern, and the voter's intent—for example, in voting by mistake for an unintended person—might be open to inquiry. But the difficulties of investigation and the possibilities of cajolery and fraud are too great to permit this. Practical needs oblige us to take the written expression of the ballot as the sole and definite element of the voter's act:

1863, *Selden, J.*, in *People v. Pease*, 27 N. Y. 72, 84: "It is proper to ask him for whom he intended to vote; not however, on the ground that his intention as an independent fact could be material, but on the ground that it was a circumstance tending to raise a presumption for whom he did vote; *Denio, C. J.*: "It is only the intention of the voter as expressed by the ballot—interpreted, if necessary, as all written evidence may be—by proof of the concomitant circumstances—which can be taken into consideration on the trial. If the elector who deposited the vote should swear ever so strongly that he intended it to be for a particular candidate, it could not be allowed to him, unless it appeared upon the other competent evidence that his name was actually written or printed upon it." ⁴

3. Voidable Acts.

§ 2423. **Motive as making an Act Voidable, Mistake, Fraud, Duress, Infancy, and Insanity.** The distinction between acts void and voidable is well enough established, and the specific conditions of avoidability are for the most part settled in the law. It is here necessary merely to ascertain the part played by this doctrine in the so-called parol evidence rule.¹

That an act is voidable assumes that it is an act,—in other words, that all the requirements of an act, as already examined, are satisfied. So far, then, as an act is held to be voidable, it must be for some other reason than one of the foregoing elements, that is, some reason which concedes that the act is jural and lawful in its subject, intelligible and definite in its terms, and final in its utterance, and that in all these respects there existed in the actor an intention to do the act, or a volition having consequences equivalent to intention. The inquiry, therefore, is, What is the distinction between these elements, the lack of which leaves the act void, and those other elements which merely make the act voidable?

The other elements are all reducible finally to a single consideration, namely, that of motive,—*i. e.* the relation between the actor's state of mind and some fact external to himself and his act.² This consideration of Motive falls under three general heads:

1. When the fact creating the motive is somewhere mentioned in the *terms of the act*, it is commonly spoken of as a *Condition*. Conditions may be

⁴ *Accord*: 1875, *Beardstown v. Virginia*, 76 Ill. 34, 48 (that a ballot was cast by mistake, held inadmissible); 1898, *Tutt v. Hawkins*, 53 Nebr. 367, 73 N. W. 692 (that ballots were improperly printed in distinguishing between full and unexpired terms, excluded); 1896, *State v. Steinborn*, 92 Wis. 605, 66 N. W. 798 (a voter's intent to vote for a different person, excluded).

How an *ambiguous ballot* may be interpreted is a different question (*post*, § 2461). Whether the ballots, not the *election officer's certificates*,

are the ultimate subject of inquiry is another question (*ante*, § 1351).

¹ Whether an act may be void or voidable as to one person, but not to another, has already been considered (*ante*, § 2413).

² "It is not true, then, as it is sometimes said, that the law does not concern itself with the motives for making contracts. On the contrary, the whole scope of fraud outside the contract is the creation of false motives and the removal of true ones" (Holmes, *The Common Law*, 326).

established by *express stipulation* in the act, or by *implication* of law. Of the latter sort may be, for example, in contracts, a warranty of a horse's pedigree; in deeds, a description of land as containing specified buildings; in wills, a recital (incorrectly) of the death of an elder son as the reason for devising to a younger one.³

2. When the fact creating the motive is *not* mentioned in the terms of the act, the recognized grounds of avoidance are of two general sorts, *Error* and *Compulsion*. (a) *Error* may exist either by the inducement of the second party, or without it. (1) *Error induced by the second party* may involve a fact misrepresented *fraudulently* or *innocently*. In both cases, the fact must have been material as a motive to induce the act; but the right to avoid is much narrower in scope in the latter case than in the former. In both cases, however, the avoidance is due to a fact external to the legal act itself,⁴ and this marks the distinction between void and voidable acts. (2) *Error not induced by the second party* will involve either mutual or individual mistake. Where the mistake is *mutual* — for example, where the parties agree to buy and sell a specific lot of land, supposing it to contain forty acres, and in fact it contains thirty-four acres only, but the price is made proportionate to forty acres, and the terms of the deed do not mention the area —, the question is whether this mistaken mutual motive will authorize either the total avoidance of the act, or at least its judicial reformation on equitable lines. This is one of the chief sources of controversy in the so-called doctrine of mutual mistake; and it has been already noticed (*ante*, § 2417) that this is entirely distinct in its problem from the doctrines of mutual mistake as to the actual contents of a document signed. So, too, a mutual erroneous assumption as to the legal effect of words intentionally used belongs under the present head. The practical problem here is a difficult one, and the rules are by no means uniform in acceptance; but in nature it is a problem common to all legal acts, whether oral or written.⁵ Where the mistake is *individual* only — for example, in the above case, if one party alone entertained the mistake as to area —, it is generally conceded that the act cannot be avoided. (b) *Compulsion*, or duress, so far as it means a coercion to choose between the signing of a document and the suffering of some harm, whether corporal or otherwise, signifies that the act has been consummated because of the motive of fear of

³ Under this head falls Mr. Justice Holmes' well-known illustration (Common Law, 810) of a sale of "this barrel of mackerel," the barrel turning out to contain salt. Here the question is merely whether the mackerel contents are by implication an essential term and therefore a condition, just as when land is described by metes and bounds and by area and the two are inconsistent. In both cases the terms of the contractual act in themselves are perfectly intelligible and valid, and it is only in application to the external objects that they prove inaccurate; hence it seems not the real explanation to hold (Common Law, 811) that the act is "meaningless," and therefore void; rather, it is sensible and valid, but it rests upon the as-

sumption of the external correctness of an essential term, and is therefore voidable.

⁴ 1751, *Pitcairn v. Ogbourne*, 2 Ves. Sr. 375 ("The present evidence [of fraud] is offered not to contradict the import of the bond on the face of it; . . . it is admitted the written instrument is as it was designed to appear at the original transaction").

⁵ For ordinary parol contracts, but little recognition seems to be given to such mutual mistake as a ground of avoidance (Harriman on Contracts, 2d ed., § 418). But in equity the term "mutual mistake" is so often employed without discrimination that the legitimate doctrine as to the terms of the writing (*ante*, § 2417) has often been used to extend to the present cases.

that harm. Since motive alone is thus involved, it follows that compulsion, like fraud, merely makes the act voidable. In fact, then, compulsion is always of this nature, and there is no clear distinction of principle between "equitable" and "legal" duress so-called. The only conceivable case in which duress could go to deny the very existence of the act is that of the physical seizure of the person's hand, and a forcible movement of his pen, by another person, for there the first person's volition (*ante*, § 2413) is lacking.⁶

3. A peculiar variety of the foregoing doctrine is found in the avoidability of acts of *infants* and *lunatics*. Here a rule of thumb is adopted, by which the person's age or disease serves of itself virtually to raise a fixed presumption of fraud or compulsion, and thus to create the option to avoid, regardless of any inquiry whether there was in the individual case deceit or duress. The general probability of it is regarded as sufficient. At the same time there has always been a tendency, in one or another court, to break from the fixed rule, and to treat such persons' contracts, especially after performance on one side, as voidable then only when in fact there was in the particular case fraud or duress. It may be added that the earlier doctrine that a lunatic's contracts are void, not merely voidable, is referable to the natural opportunity for doubting whether his mental condition, as respects legal acts, is that of total absence of real volition or merely of an unintelligent apprehension of the proper motives of his conduct; for, if the former be the case, it is logical to treat his act as void. — The voidness of a *married woman's* acts at common law was a pure anomaly; either it had no reason at all (as modern legislation practically pronounces), or it was based on an apprehension of imposition, in which view the rule of voidability should have been applied. The invalidity of acts *ultra vires* of a *corporation* does not involve the present principle, but rather that of prohibited acts (*ante*, § 2414); for the law's prohibitions of such acts by corporations are of the same nature as its prohibition of gaming or trading contracts by natural persons.

B. INTEGRATION OF LEGAL ACTS (VARYING THE TERMS OF A DOCUMENT).

§ 2425. **General Theory of the Rule against Varying the Terms of a Writing.** When parties negotiate at a distance, by letters and telegrams, — first an offer, then a declination, then a revision of the offer, then a halt upon an important term, afterwards an offer of its concession in return for the concession of some prior term now to be changed, and finally an acceptance of

⁶ 1887, *Fairbanks v. Snow*, 145 Mass. 153, 13 N. E. 596 (Holmes, J.: "No doubt, if the defendant's hand had been forcibly taken and compelled to hold the pen and write her name, and the note had been carried off and delivered, the signature and delivery would not have been her acts; . . . there sometimes still is shown an inclination to put all cases of duress upon this ground; but . . . it is well settled that where, as usual, the so-called duress consists only of threats, the contract is only voidable;

. . . the ground upon which a contract is voidable for duress is the same as in the case of fraud, and is that, whether it springs from a fear or a belief, the party has been subjected to an improper motive for action; but if duress and fraud are so far alike, there seems to be no sufficient reason why the limits of their operation should be different"). Compare the article of Professor J. B. Ames, *Specialty Contracts and Equitable Defences*, 1895, *Harvard Law Review*, IX, 49.

this concession, and thus an end of the negotiations, — where are the terms of this contract to be found? Obviously, in this congeries of letters and telegrams, as mutually modifying and complementing each other. The whole of the contract is not in any one document. Nor, on the other hand, does the whole of any one document (probably) represent a part of the contract, because some of its terms have been impaired and replaced by other documents in the series. Nor can it be said that there is a series of legal acts, each one independent, successively modifying the preceding ones; for each letter and telegram is merely tentative and preparatory, and there exists no legal act (*ante*, §§ 2401, 2404) until the final assent is given. That assent, when it comes, adopts and vivifies the entire mass, which until then was legally inchoate only. The process is not unlike the fall of cards in the play of a trick at whist; the total effect cannot be determined till the last card has fallen, and no one card exhibits in itself the effect of the trick; yet, when all are played, the second card may prove to be the decisive factor and may remain unimpaired by any later play.

On the other hand, if instead of leaving the net effect of the negotiations to be gleaned from the mass of writings, a single document is finally drawn up to replace them and to embody their net effect, and is signed or otherwise adopted by the parties, this document will now alone represent the terms of the act. Instead of leaving the wheat mingled with the chaff, the wheat has been definitely selected and set apart in a single mass. The wheat existed there, no less before than now, but it has now been placed in a single receptacle by itself.

This process of embodying the terms of a legal act in a single memorial may be termed the Integration of the act, *i. e.* its formation from scattered parts into an integral documentary unity. The practical consequence of this is that its scattered parts, in their former and inchoate shape, have no longer any legal effect; they are replaced by a single embodiment of the act. In other words: *When a legal act is reduced into a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act.*

This principle, perfectly well settled in our law, has several aspects which it is necessary here to notice:

(1) In the first place, it is *not a rule of evidence*, because it has nothing to do with the probative value of one fact as persuading us of the probable existence of another fact (*ante*, § 2). It is a rule of substantive law, because it deals with the question where and in what sources and materials are to be found the terms of a legal act (*ante*, § 2401). This understanding of the rule is plain enough in the modern judicial utterances, in spite of the frequent loose employment of the word "evidence" — a faulty habit, but easily enough succumbed to when applying the rule at trials:

1813, *Gibbs, J.*, in *Pickering v. Dowson*, 4 Taunt. 779, 786: "I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens and cor-

rects the representations; and whatever terms are not contained in the [written] contract do not bind the seller, and must be struck out of the case."

1824, *Abbott, C. J.*, in *Kain v. Old*, 2 B. & C. 627, 634: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming parcel of the contract (though not always, because matter talked of at the commencement of a bargain may be excluded by the language used at its termination). But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract."

1846, *Parke, B.*, in *Knight v. Barber*, 16 M. & W. 66 (the plaintiff and the defendant had made an oral agreement for the sale of shares; on the same afternoon the defendant signed a memorandum, which was then handed to the plaintiff, reciting the sale, the price, etc.; it was held that this memorandum should have borne a stamp): "With respect to the first point made by Mr. Baines [for the plaintiff], that there was a distinct parol contract between these parties before the memorandum was signed, if that memorandum was afterwards made and signed by the defendant, and was intended to contain the terms of the contract and to be acted upon by the plaintiff, it became, when it was so acted upon, the real contract between the parties. The parol agreement goes for nothing, if it was intended that it should be reduced into writing and this is afterwards done."

1875, *Blackburn, J.*, in *Angell v. Duke*, 32 Law T. Rep. N. S. 320: "It is a most important rule that, where there is a contract in writing, it should not be added to, if the written contract is intended to be the record of all the terms agreed upon between the parties. Where there is a collateral contract, the written contract does not contain the whole of the terms."

1880, *Van Fleet, C.*, in *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233: "What was said during the negotiation of the contract or at the time of its execution must be excluded, on the ground that the parties have made the writing the only repository and memorial of the truth, and whatever is not found in the writing must be understood to have been waived and abandoned."¹

(2) In the next place, this rule has no necessary relation to any rule of law *requiring* acts to be done with a *particular formality*, such as *writing*. On the one hand, a contract may be entirely in written form, prescribed by law, and yet the terms may be scattered through many writings and not integrated in a single document; for example, a will of personalty under the statute of Charles II (against frauds and perjuries) had to be in writing, and yet the ecclesiastical Courts constantly dealt with valid wills which were made up from numerous separate writings of all sorts.² On the other hand, even where no form of writing is prescribed, the rule of integration applies if the parties have in fact embodied their act in a single memorial.³

¹ In the following passages the theory is concisely stated: 1781, L. C. Thurlow, in *Irnham v. Child*, 1 Bro. Ch. C. 92 ("The rule is perfectly clear that where there is a deed in writing, it will admit of no contract that is not part of the deed"); 1859, Pollock, C. B., in *Harris v. Pickett*, 4 H. & N. 1, 7 ("The rule relied on by the plaintiffs only applies where the parties to an agreement reduce it to writing and agree or intend that that writing shall be their agreement"); 1859, Martin, B., in *Langton v. Higgins*, 4 H. & N. 401, 408 ("Where two parties enter into a contract and put it into [a single] writing, that writing determines the terms of the bargain"); 1861, Hoar, J., in *Kelly v. Cun-*

ningham, 1 All. 473 ("The writing is the contract of the parties, in the view of the law, and supersedes all the previous parol agreements"); 1878, Depue, J., in *Franklin F. Ins. Co. v. Martin*, 40 N. J. L. 568, 581 ("The written contract shall be regarded as the sole repository of the intentions of the parties").

² See the cases cited *post*, § 2454.

³ 1845, Pollock, C. B., in *Eden v. Blake*, 13 M. & W. 614, 618 ("Whatever be the value of the goods sold, whether it be such as calls for a memorandum in writing, under the statute of frauds, or not, if there has been a memorandum in writing, it cannot be altered by extrinsic evidence").

(3) As a consequence of the same principle, it is to be noted that, in theory, the rule of Integration would apply equally to an act embodied in *oral form*, *i. e.* to a single oral pronouncement.⁴ Such a transaction is entirely unlikely in fact; it can be imagined, perhaps, in a contract by heliograph or by unwritten electric telegraph. But it serves to illustrate and emphasize the principle that the essence of the present rule is the embodiment of the act in a single utterance, and that the rule applies to acts as acts, independently of whether the form be written or oral.

(4) Finally, the notion of Integration is not that any *additional terms* are involved in that process, but merely that the terms are contained in a different material or embodiment; and therefore the act is complete and binding when finally assented to before integration, even if it is an agreed condition that the act shall be so reduced or integrated.⁵

§ 2426. **History of the Rule.** Looking back to find the origin and development of this rule, the precise inquiry, then, is this: The modern rule being that when the parties have embodied a transaction in a single document, the writing is indisputable as to the terms of the transaction, how far back in our history does this rule go, and what were the circumstances of its origin and development?

It might have been supposed that this great principle of our law had come down to us as a continuous tradition from the earliest days. The indisputability of the terms of a writing seems to harmonize with that rigid formalism of primitive days which is elsewhere in the law constantly observable (*ante*, § 2405). Resting though it does now on a rational foundation of experience and policy, did it not nevertheless exist, even at the very beginning, as a natural part of the earlier system? Curiously enough, its history is quite the contrary. Our primitive system knew it not. Only towards the end of the middle ages does it come into being; and only in fairly modern times does it gain complete recognition. Its history falls, by a rough division, into three periods: I, from primitive times till the vogue of the seal, in the 1200s; II, then, on English soil, till the statute of frauds and perjuries, in 1678; III, and thence, its modern recognition.

I.¹ In the primitive Germanic notions, at the time of the barbarian inva-

⁴ 1854, Mr. (later Justice) Blackburn, arguing, in *Brown v. Byrne*, 3 E. & B. 703 ("It may be convenient first to answer a question, put from the Bench, as to whether there is a distinction between written and verbal contracts. There is a difference; but in this respect there is none. If the parties met for the first and last time, and made a contract entirely by [oral] words, these words would, if proved, have precisely the same construction as if they had been written down"); 1885, *Mulkey, J.*, in *Gilbert v. McGinnis*, 114 Ill. 28, 28 N. E. 382 ("The rule here stated [as to interpolating a usage] is equally applicable to a verbal contract, where the terms of it are definitely fixed, as they are in the present case").

⁵ 1894, *Sanders v. Pottlitzer B. F. Co.*, 144

N. Y. 209, 39 N. E. 75 (defendant and plaintiff had settled by letters and telegrams upon the terms of their contract, and had mutually assented, the intention being also to embody the terms thereupon in a single document; the defendant then refused to execute the document unless a new condition was inserted; held, that the understanding that the contract should be embodied in a single document did not involve the addition of any substantive terms to the obligation, and that the contract could therefore be enforced in spite of its not having been so embodied).

¹ The materials for this first part of the story are to be gleaned from the following works: 1877-8, Ficker, *Beiträge zur Urkundenlehre*; 1885, Heusler, *Institutionen des deutschen Pri-*

sions and under the Merovingian and Carolingian monarchies, there was certainly no notion of the indisputability of the terms of a document. This is explained, and was indeed predetermined, by the character of the civilization of those peoples. When the Germanic tribes spread west and south, and absorbed the Roman territories in Gaul, Spain, and Northern Italy, they brought with them two marked traits, — an ignorance of letters, and a legal system of formal oral transactions. They found writing in use among the Romanized peoples, and (in Italy at least) an advanced habit of transaction by notarial documents; and this they in part fell in with. But it remained alien to their own ideas; and after the dissolution of the Carolingian empire and the subsidence of Romanesque influence (say, by the 900s), the alien element that had found entrance was excised, and the development of their native system proceeded on its own main lines.² The document, then, even in its most definite type (*carta*), is in the Germanic system merely one of the symbols that entered into the formalism of the transaction, and, like the wand, the glove, and the knife, has an efficacy independent of its written tenor, — which indeed could mean nothing to the parties who employed it:

“In the legal affairs of a people who, from the lowest churl to the great Emperor Charles, were unskilled alike in reading and in writing, the written document could have but a precarious position, and its acceptance into legal practice was opposed by all sorts of obstacles, — in particular, by an almost ineradicable distrust of everything written, which they feared with the fear of a man who stands weaponless and helpless. For us moderns a written document is quite another thing than for the Germanic tribes, confronted with it yet not comprehending it. Nowadays, our documents of debt, or the like, we write ourselves, or at least sign them after perusal; we are masters of them, and we know that the thing we have written or signed is precisely what it is, and no fearsome mysterious thing. Quite otherwise with the Germanic peoples, confronted with the alien practice of legal writings, upon their invasions of Roman regions. The grantor of land, the borrower of money, could neither read nor write the document which might be executed in his name; he could but mark his cross at the bottom, and hope that all was right. Thus we hear, even in the early 1200s, a certain bailiff of the abbey of Pruem, in a litigation with the abbey before Henry IV, scornfully protesting, when the abbey produces a royal charter against him, that a partisan scribe could indite whatever he might please to

vatrechts; 1887, Posse, Die Lehre von Privaturkunden; 1889, Bresslau, Handbuch der Urkundenlehre für Deutschland und Italien, I, 476-555; 1887-92, Brunner, Deutsche Rechtsgeschichte (based upon earlier separate essays by the same author, especially his Rechtsgeschichte der römischen und germanischen Urkunden); 1903, Brunner, Grundzüge der deutschen Rechtsgeschichte (confirming his earlier results); 1895, A. S. Schultze, Zur Lehre vom Urkundenbeweise, Zeitschrift für das privat- und öffentliches Recht, XXII, 70; 1898, Déclareuil, Les preuves judiciaires dans le droit franc du V^e au VII^e siècle, Nouv. revue hist. du droit fr. et étrang., XXI, 220, 747, 757 (independently reaching results in harmony with the German scholars); 1902, Schroeder, Lehrbuch der deutschen Rechtsgeschichte, 4th ed., 361, 698. All these scholars are in substantial agreement upon the historical facts to be referred to; Ficker and

Bresslau having contributed most to establish the correct story of the great fact, the relation of the seal and the attesting witnesses to the effect of the document. Pertile (Storia del diritto italiano, ed. 1900, VI, pt. 1, pp. 417-419) is in accord as to most points, yet does not notice the importance of the seal; but in Italy the early vogue of notaries gave a different turn to the story of its local law. Stouff (Etude sur la formation des contrats par l'écriture dans le droit des formules du V^e au XII^e siècle; Nouvelle revue hist. de droit, XI, 249; 1887) ignores entirely the historical place of the seal; but Bresslau and Posse had not at that date published their researches copiously confirming Ficker's.

² Ficker, I, 83-88; Brunner, R. G., I, 399, II, 420; id., Grundz., 41, 119; Pollock & Maitland, II, 88-190.

invent ('*irridens testamenta, dicens quod penna cuiuslibet quelibet notare posset, non ideo suum jus amittere deberet*'). So too, in even a later age, there was an almost proverbial verse⁸ which ran, 'On parchment, scribes may place with ease Exactly what their own minds please.' It is, in short, easy to imagine the mistrust which must in those days have attached itself to the written document. . . . The truth is that the legal value of the *carta* consisted in this, that by means of it the legal transaction was completed. . . . The grantor of a piece of land could transfer it in the ancient national form of *sale* and *vestitura*, or he could now accomplish the transfer by means of the document (*per cartam venditionis*), and the *traditio per cartam* effected the transfer of ownership, just as before this the *sale* had done. . . . Thus the *traditio cartæ* was itself a formal act. The act of delivery of the document was performed by the maker grasping the still blank parchment, lifting it from the earth (in land transfers at least, by Frankish usage), calling upon the witnesses to grasp it with him, handing it to the scribe to fill out the writing, and, after signatures affixed, delivering it to the grantee."⁴

In this stage, then, the *carta* merely plays a convenient part, first, by enabling the formal delivery of the land to be made symbolically away from the premises, and, next, by preserving against future forgetfulness the names of the witnesses.⁵ The important and unquestionable fact is that the tenor of the writing *does not legally and bindingly establish anything*.⁶ If the truth of its statement is disputed — the amount of money loaned, the area of land conveyed, the conditions of tenure annexed —, the terms of the transaction may and must be proved by calling the witnesses to it, regardless of any contradiction of the writing.⁷ The attendant witnesses continued to be, as they had been, the main reliance for the proof of a disputed transaction. The procedure for disputing by the witnesses' oaths the correctness of the document was elaborate and well-settled, and its ultimate settlement might turn upon a wager of battle. How long was the persistence of this subsidiary status of the document, and how continuous the connection between Germanic usage and early Anglo-Norman legal ideas, may be seen from the following record of English litigation two hundred years after the Conquest:

1292, *Anon.*, Year Book 20 Edw. I, 258 (Horwood's ed.): "A brought the mordances-ter against B, on the death of his father, for tenements in C; and he prayed the assise. — B. 'There ought not to be an assise: for see here your father's charter, by which he enfeofed us and put us in good seisin. Judgment if there ought to be an assise.' — A. 'I admit perfectly that the charter is the deed of my father; but I tell you that he gave you the tenements by that charter upon these terms, viz., that you should hold it for one month, and that at the end of the month you should espouse his daughter Emma; and that if you did not, the land should revert to him and his heirs. Now, he died within the month, and at the end of the month you would not marry his daughter; therefore we pray judgment if there ought not to be an assise.' — B. 'You have admitted the charter, which is simple and unconditional. Judgment if there ought to be an assise.' — A. 'Whatever the words of the charter may be, such was the covenant between my father

⁸ Konrad von Würzburg, Schwannritter, I. 571.

⁴ Heusler, I, 86.

⁵ Ficker, I, 85; Bresslau, I, 729, 730.

⁶ Ficker, 82 ff.; Posse, 63; Brunner, R. G., I, 393, II, 420; id., Grundz., 76, 119, 159; Heusler, I, 91; Déclaireuil, 757; Bresslau, 483, 500, 799; Schultze, 101; Schroeder, 361, 698;

Pertile, I, pt. 1, p. 417, pt. 2, p. 192; Glasson, Hist. du droit et des inst. de la France, III, 503.

⁷ "That the probative value of a document lay only in its witnesses may be gathered from the fact that the word *wirkunde* meant nothing else than 'witness'": Schroeder, 361; so Brunner, R. G. II, 391.

and his friends and your friends; ready, etc.' — B. 'The reverse. — Therefore to the country.' — The Jurors said that such was the contract even as A said; and that his father died within the month. — They were asked if he died seised in his demesne as of fee. — The Jurors. 'We pray your assistance.' — The Justice. 'And inasmuch as it is found that the estate of B was conditional, which condition was not specifically performed, by reason of the default of B, and therefore his seisin was null.'⁸

II. The *rise of the seal* brings a new era for written documents, not merely by furnishing them with a means of authenticating genuineness (*ante*, § 2161), but also by rendering them indisputable as to the terms of the transaction and thus dispensing with the summoning of witnesses. The vogue of the seal and of the transaction-witness wax and wane, the one relatively to the other.⁹ This legal value of the seal was the result of a practice working from above downwards, from the King to the people at large. It is involved, in the beginning, with the Germanic principle that the King's word is undisputable. Who gives him the lie, forfeits life. The King's seal to a document makes the truth of the document incontestable. This leads, along another line, to the modern doctrine of the verity of judicial records, — to be noticed later. Here, for private men's documents, its significance is that the indisputability of a document sealed by the King marked it with an extraordinary quality, much to be sought after. As the habitual use of the seal extends downwards, its valuable attributes go with it. First, a few counts and bishops acquire seals; and then their courtesies are sought in lending the impress and guarantee of their seal to some document of an inferior person, as serving him in future instead of witnesses.¹⁰ Finally, the ordinary freeman comes usually to have a seal; and his seal too makes a document indisputable — at least, by himself. This extension of the seal begins in the 1000s, and is completed by the 1200s.¹¹ Thus the old regime of proof by transaction-witnesses disappears by degrees; by the 1300s they are almost superfluous.¹² This means that when a transaction has been made by writing, the parties rely for their future proof no longer on witnesses called in at the time of the transaction, but on the opponent's seal found affixed to the document, which thereby makes its terms indisputable by him as representing the actual terms of the transaction between the parties.¹³

⁸ Another case of a similar sort is cited by Professor Thayer (Preliminary Treatise on Evidence, 106) from Forsyth, who cites from Jocelyn de Brakelonde. About the 1300s, the following passage also is found: *Mirror of Justice*, *ubi infra*, pp. 75, 115, 152, 163 ("a charter is vicious if it testifies that a gift has been made, whereas as yet there has been no delivery of seisin").

⁹ Ficker, I, 94, 95, 106, 107, 115; Bresslau, 510-549; Brunner, R. G., I, 393, II, 420, 523.

¹⁰ Ficker, 94; Posse, 130; *ante*, § 2161.

¹¹ Ficker, 91, 97; Posse, 129; Bresslau, 534 ("by the second half of the 1200s even ordinary burgers seal their documents"); Holmes, *The Common Law*, 272; Pollock and Maitland, II, 221 ("at the date of the Conquest the Norman duke has a seal, and his cousin the late King of

England had a seal; . . . before the end of the thirteenth century the free and lawful man usually had a seal").

¹² Ficker, 95-97; Bresslau, 545. The course of thought is seen in the attribution of the qualities of a witness to the seal, as in a much quoted passage of the *Schwabenspiegel*, c. 34, § 2: "Hilfet ein toter geziuge [*i. e.* die briefe] als wol dir als ein lebendiger" (Schultze, 119).

¹³ Ficker, 82-91; Bresslau, 546 ("there is therefore no counter-proof allowable against the statements of fact [*den sachlichen Bericht*] in a sealed document"); *id.* 539 ("as a first principle of the law for documentary proof in Germany after the 1200s, it may be considered . . . [exceptions excepted] that the sealing was an indispensable requirement for the legal evidential force of a document, no matter who was its

The tool for shaping the new doctrine had now been supplied; and it remained to develop and extend the doctrine. Here it must be remembered that in Anglo-Norman times people are still, on the whole, unfamiliar with writing, and that the chief varieties of transaction — namely, those affecting land — are still practised with oral forms;¹⁴ the essential, working conception is the livery of seisin, not the charter. Whatever virtue there is in the writing is testimonial only. It furnishes one sort of proof; but it is not a necessary kind of proof, and the main thing is something done apart from the writing. "This indenture" merely "witnesseth"; and the now time-worn phrase was once the actual conception.¹⁵

So long as this notion of the operative element of transactions persisted, it must oppose a constant obstacle to the progress of the idea of an indisputable sealed document. Since the writing is not the vital thing, why yield to its terms? And so for two centuries or more the extension and adaptation of the new idea is slow. For mercantile contracts, the advance seems to have been settled by the 1300s.¹⁶ But for land-transactions there was more tardy progress. By that time, charters (*i. e.* deeds) were becoming necessary accompaniments;¹⁷ but they were not yet indisputable in every respect. For example, Littleton, about 1466, tells us¹⁸ that where the deed is in terms absolute but the livery of seisin was made with an oral condition, still the condition is enforceable, because "nothing of the tenements passeth by the deed, for that the condition is not comprised"; and again, that though, for a condition attached to the transfer of a freehold, some writing must be shown, yet "a man may be aided upon such a condition by the verdict of twelve men taken at large,"¹⁹ — just as the twelve men, in the case (above cited) of two centuries before, aided the plaintiff by a verdict directly contradicting the deed.²⁰

author"); Schroeder, 701; Schultze, 103, 118. This was long ago noted by Mr. Justice Holmes for English law: 1881, *The Common Law*, 272. Space does not suffice to note the very interesting stages of progress, pointed out by Ficker and Bresslau, by which this result was reached. The indenture or chirograph of the Anglo-Saxons was one of the intermediate expedients for securing genuineness and conclusiveness. But the seal proved its superiority for the latter purpose, and finally prevailed.

¹⁴ Pollock & Maitland, II, 83, 93, 202, 217 (quoted *ante*, § 2405).

¹⁵ The word *witkunde* signified, by etymology, "witness": note 7, *supra*. This was the usual conception still in the 1300s and 1400s; see the citation *supra*, n. 12, *infra*, n. 19; and the following: Circa 1300, *Mirror of Justices*, b. II, c. 27, *Seld. Soc. Pub. VII*, 75 ("escritz tesmonials de contracts," *i. e.* deeds); b. III, c. 23, *ib.* 107, 152 ("by way of aid for men's memory are writings, charters, and muniments very necessary for to testify the conditions and the points of contracts"); 1466 (?), Littleton's *Tenures*, sect. 365, 371 ("unescript south seale provent mesme la condition"); 1881, Holmes, *The Common Law*, 270 ("a writing was a more general way

of establishing a debt in Glanvill's time than witnesses; . . . [it was] only another, although more conclusive, mode of proof"); and it persists as a phrase to the time of Sheppard's *Touchstone*, in the 1600s: c. IV. p. 50 ("a deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed").

¹⁶ 1368, Y. B. 41 Edw. III, 10, 6 (quoted *infra*, note 30).

¹⁷ Pollock & Maitland, II, 82, 91.

¹⁸ *Tenures*, sect. 359.

¹⁹ *Ibid.*, sect. 366. Compare the following, in 1523: Y. B. 14 H. VIII, 17, 6 and 7 (Brudnel, J.: "Such things as pass by parol, are as well by parol as written on condition; for every grant of a chattel is good on condition without writing; for a deed is nothing but a proof and testimonial of the agreement of the party, — as a deed of feoffment is nothing but a proof of the livery, for the land passes by the livery; but when the deed and the livery are joined together, that is a proof of the livery").

²⁰ In a later day, this tradition is thus expounded: *Ante* 1726, Gilbert, *Evidence*, 84

On the other hand, Littleton in the very same treatise²¹ is mentioning as "common learning" that a plea of condition, except in some special cases, shall not defeat a freehold "unless he showeth the proof in writing." The 1400s were evidently a transition period. By the time of Coke's commentary upon Littleton and of Sheppard's Touchstone — by the 1600s, on the whole — the modern rule of indisputability is established for all transactions affecting realty.²²

No doubt by that time the surrounding circumstances had facilitated, and judicial reflection and conscious policy had stimulated, the natural growth of the newer rule. In the first place, the community had become *more generally lettered*, and this in its turn had resulted from the spread of the printing process in the late 1400s. Reading and writing were no longer the mysterious arts of a few. It was natural to hold that a man was bound by his written version of the transaction, when he might easily guard himself against the writing's being deficient in some of the agreed terms;²³ and it was the more natural to rely wholly upon the writing since the dying out of old methods (due in part to jury-trial) had made transaction-witnesses not commonly available. In the second place, *mercantile custom* had already pointed the way in advance. The Lombards in London (and doubtless also — somewhat later — the Flemings and the Hansas) were employing the commercial forms which had developed with the revival of commerce in the preceding three centuries. These mercantile documents of debt had already invented the device of indisputability, — to some extent, no doubt, preserving in tradition the expedients of the advanced Roman law. Such models can be seen to have had some influence upon English ideas.²⁴ In the third place, the rigid

("Things that lie in livery may be pleaded without deed; . . . so a man may plead a demise, without deed, and give the indenture in evidence, for the indenture may be used as an evidence of the contract that would be good whether there were any indenture or not. . . . [Livery of seisin] is a fact a man cannot impeach or deny, and this is from the notoriety of the ceremony, . . . therefore if the defendant *pleads* the livery and seisin of the plaintiff, the plaintiff cannot reply that the livery was conditional, without showing the deed, inasmuch as the plaintiff is estopped to defeat his own livery by a naked averment and parol evidence only. But the jury are not estopped on the *general issue* from finding such a conditional feoffment, for the jury are men of the neighborhood that are supposed to be present at the solemnity . . . and by consequence may exhibit the condition on the feoffment. But since the use of the solemnities before men of the country hath ceased . . . therefore the statute of frauds and perjuries hath enacted that no . . . [estates] shall be assigned, granted, or surrendered unless it be by deed or note in writing").

²¹ Sect. 365.

²² Yet, even in Sheppard's day, relics remain, as where he says (c. IX) that if the words of livery are to one effect and the deed to another effect the deed is void; though if the livery is

secundum formam chartæ, any additional words of oral livery are void.

²³ *E. g.*, Babington, J., in 1430, Y. B. 8 H. VI, 26, 15, repudiating proof of an oral condition to qualify a deed: "And it will be adjudged my own folly that I did not wish to have it written in." The contrast between this effect of the spread of letters, and the effect on the doctrine of intention or mistake (*ante*, § 2405), is worth noticing; in the latter aspect, it bound a man to what was *in* the deed; in the present aspect, it kept out what was *not* in the deed.

²⁴ As early as the 1200s, this leaven is seen working; "Note that by the law merchant a man cannot wage his law against a tally": 1222, Y. B. 20 Edw. I, p. 68; and the same rule for a sealed confession of debt is put forward as late as 1460 as a "custom of London": Y. B. 39 H. VI, 34, 46, cited in Thayer, Preliminary Treatise, 394. Further illustrations are furnished in Pollock & Maitland, II, 212, 222. For this doctrine of the foreigners' commercial law, see Baldus, Consilia I, no. 48 ("Stabiles et firmæ debent esse scripturæ mercatorum, — juxta illud vulgare dictum 'quod scripsi scripsi,' quia scriptura mercatorum et camporum habetur pro sententia et sua fide transit in rem judicatam"), quoted in Goldschmidt, Handb. des Handelsrechts, (1891) 3d ed., I, 1, p. 389, note; see also ib. 306; Franken, Das Französische Pfand-

control of the jury influenced the judges, indirectly, by leading them to keep from the jury all alleged oral transactions which might be misused by them to overturn the words of the writing. The safety of written proof was supposed to be at stake. If the parties were allowed to put in averments extraneous to the writing, it must go to the jury, and there was no telling what the jury might do; but if the judges took exclusive charge, they could better control the situation. This reasoning is not much reported till later times,²⁵ but it was plainly there.²⁶ Finally, a general policy of regard for the *trustworthiness of writing*, as against the shiftiness of mere testimonial recollection, was beginning to be consciously avowed, irrespective of any discrimination against the jury. This is a distinctly modern attitude, but it emerges as one of the considerations that finally tended to fix the rule. "Thus you would avoid a matter of record by simple surmise," says Paston, J., in 1430.²⁷ Coke, of course, furnishes such reflections in plenty, by the time of the 1600s; "it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give but it should be controlled by collateral averments."²⁸ Thus a judicial legislative policy comes to reinforce the other influences.

But, meantime, what of the theory of the rule? At the outset, in the Anglo-Norman times, as already noticed, it arises merely as a testimonial rule; the writing replaces the transaction-witnesses as a mode of proof. But in its modern shape it is a constitutive rule (*ante*, § 2425). The writing itself is operative; the writing *is* the act, not merely one of the possible ways of proving the act. By what sequence of ideas was this transition of theory effected?

(1) At first, the new principle appears merely as a *waiver of ordinary proof*, permitting the substitution of another. The man who has sealed a document is not allowed to bring his transaction-witnesses or his compurgators to prove what the transaction really was; he has in advance waived this right. Such was the notion on the Continent;²⁹ and such was the first con-

recht (1879), 258; Pertile, VI, pt. 1, 421. The part played by foreign mercantile custom in developing other aspects of our law is well illustrated in Mr. Hazeltine's essay on The Gage of Land in Mediæval England (1904, Harvard Law Review, XVIII, 36, 43).

²⁵ The examples cited *supra*, note 8, show how the earlier juries might make short work of deeds. A passage in Thayer, Prelim. Treat. 105, further illustrates this. It must be noted, too, as indicated in the quotation from Gilbert, *supra*, note 20, that "the use of the solemnities of livery before men of the country" was dying out, and that so long as the vital thing had been this livery, the matter might well be left to them; but there was no reason for considering a transaction of writing as within their province.

²⁶ 1610, Altham's Case, 8 Co. Rep. 155 ("It was resolved that the said foreign or collateral averment out of the said deed [setting up a prior inconsistent agreement] was not of any

force or effect in the law. For every deed consists upon two parts, *scil.*, matter of fact, and upon the construction in law; matter of fact is to be averred by the party and triable by the jurors; the other, being matter in law, is to be discussed by the judges of the law"); 1659, Lawrence v. Dodwell, 1 Lutw. 734 (Powell, J.: "The averment should be gathered from the words of the will; it is not safe to admit a jury to try the intent of a testator"); 1708, Strode v. Russell, 2 Vern. 621 (in chancery; "We will consider how far it shall be allowed and how far not, after it is read; and this is not like the case of evidence to a jury, who are easily biased by it, which this Court is not").

²⁷ Y. B. 8 H. VI, 26, 15.

²⁸ 1591, Lord Cheyney's Case, 5 Co. Rep. 68a; 1605, Countess of Rutland's Case, ib. 26 (quoted *infra*, note 38).

²⁹ Ficker, I, 93.

ception in England. This waiver is commonly spoken of as an "estoppel," *i. e.* a conception which concedes that the truth might be as alleged, and that ordinarily the party would have a right to prove it in the usual way, but that here he is "stopped" from that proof, by his own sealed act. "It does not lie in your mouth to say the obligation is not good."³⁰ The merely subjective effect of the seal in this respect is well illustrated by a controversy surviving in Littleton's time;³¹ some lawyers thought, where a feoffment had been made, and a deed-poll given (*i. e.* in the single name of the feoffor, not sealed by both and indentured), naming a condition to the feoffment, that the feoffor could not take advantage of the condition; that is, because it could be used only by way of estoppel, and the feoffee was not estopped by a deed which he had not sealed; the effect being to refuse efficacy to the condition though named in the deed.³²

(2) Alongside of this theory, but playing gradually a more important part, was the theory that a transaction of one "nature" cannot be overturned by *anything of an inferior "nature."* This is the real lever which helps on the progress to the modern idea. But it appears early, and apparently as a borrowing from the Roman law.³³ It has broad aspects, and is responsible for some other rules, now mostly abandoned, — such as the rule that the oral payment of a bond is no discharge.³⁴ But in its present relations it serves to introduce and emphasize the operative notion of a writing. Once concede the possibility that a sealed document may be indisputable, and then this other idea will expand and reinforce the former in every direction. In particular, the sealed instrument will "discharge" and "determine" any prior transactions, whether really separate and distinct in time, or practically contemporaneous. In other words, the sealed instrument will not merely *prove* the transaction, but rather, by replacement, will now *be* the transaction. This theory was struggling for ascendancy in the 1400s. For example, in 1422, where the plaintiff sues for money given on account, and the defendant asks for proof of the deed of acknowledgment given by him, and argues that the deed superseded everything else, just as a bond for 20*l.* would have discharged a prior simple contract for the same, the plaintiff, replying, concedes

³⁰ 1368, Y. B. 41 Edw. III, 10, 6. So also in 1460: Y. B. 39 H. VI, 34, 46: "If I bring a writ of debt, and count that the defendant bought of me a horse for 10*l.*, and he wishes to wage his law, I may estop him by the specialty proving the said contract; the same law of a receipt, — if he wishes to plead, 'never received,' and tenders his law, he will be estopped of his law by the specialty proving the receipt," but some were of contrary opinion. In the neat phrase of Mr. Justice Holmes (The Common Law, 262), "if a man *said* he was bound, he *was* bound."

³¹ Tenures, sect. 375.

³² This notion of estoppel is illustrated in Pollock & Maitland, II, 205–222, *passim*. It is still seen in Sheppard's day: Touchstone, c. 14 (in deeds, "an estoppel doth bar and conclude either party to say or except anything against anything contained in it").

³³ It has been noted, in Pollock & Maitland, II, 219, as occurring in Bracton and elsewhere, *e. g.* Y. B. 33–5 Edw. I, pp. 331, 547 (1306). In the Digest, it appears in *de solutionibus*, 46, 3, 80, and also in *de diversis regulis*, 50, 17, 35 (Ulpian: "Nihil tam naturale est quam eo genere quidque dissolvere quo colligatum est; ideo verborum obligatio verbis tollitur; nudi consensus obligatio contrario consensu tollitur").

³⁴ 1542, Waberley v. Cockerel, Dyer 51 (payment of a bond is no discharge; "although the truth be that the plaintiff is paid his money, still it is better to suffer a mischief to one man than an inconvenience to many, which would subvert a law; for if matter in writing may be so easily defeated and avoided by such surmise and naked breath, a matter in writing would be of no greater authority than a matter of fact").

the case put, "for the contract and the bond are two different contracts, and by the greater I am discharged from the less; but in the case of this receipt of money, and the deed which proves its receipt, there is but one contract," *i. e.* a contract by delivery of the money, the deed being merely evidence.³⁵ Again, in 1460, "if I make a contract [of loan] by deed indented, I shall not be compelled to count on the indenture; for the contract is not 'determined' by the indenture, but continues [as independent], and a man may elect how he will bring his action,"³⁶ — although if he had chosen to bring it on the deed, its terms could not have been disputed.³⁷ Here appears plainly enough the idea of the indisputability of the document coexisting with the idea that the transaction is something independent of the document and is merely proved by it; and yet the notion that the document "determines" and merges the whole transaction is winning its way. For two centuries to come this mode of speech — that the writing "dissolves," "discharges," "determines," or "destroys" all other prior or coexisting transactions — is predominant in expounding the theory of the rule.³⁸ The way is thus prepared for the modern idea of operativeness, forming the third stage of the rule's history.

III. However, one step still remains to be taken. As yet — say, in the 1500s — this theory is applicable to "matter of a higher nature," *i. e.*, specialties, sealed documents, and *not to writings as such*. How and when did this last extension of ideas occur?

The Statute of Frauds and Perjuries, in 1678, seems to note the modern epoch's full beginning. The result was predetermined by the influences already mentioned; this statute appears, of course, as the mark rather than the cause of the final development. But still its literal scope was limited, as to the kinds of transactions and documents; and it had a really causal influence of its own, as a plain example leading the Courts to complete the process by expanding and familiarizing the general idea for all writings whatever.

That example was furnished by the first and third sections, in which the estate was spoken of as "*put in writing*" and as "assigned, granted, or surrendered, . . . by *deed or note in writing*." Here were two notable features,

³⁵ Y. B. I H. VI, 7, 31; cited in Thayer, Prelim. Treat. 394.

³⁶ Y. B. 39 H. VI, 34, 46; cited in Thayer, *ubi supra*.

³⁷ Again: 1439, Y. B. 18 H. VI, 17, 8 (where a lease is by deed, and action brought on it, "the foundation of my action, which is a specialty, is so high in its nature that it cannot be destroyed by anything except a thing of as high a nature as it is, such as a release").

³⁸ 1605, Countess of Rutland's Case, 5 Co. Rep. 26 ("every contract or agreement ought to be dissolved by matter of as high a nature as the first deed; . . . also it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory"); *Circa* 1610; *Burglacy v. Ellington*, Brownl. 191 (title to

land by deed of bargain and sale, alleged to be void for usury; plea that the buyer orally agreed that the seller could keep the rents; the counsel for the deed's validity "put that maxim that everything must be dissolved by that by which it is bound, and his whole argument depended upon that"; notice that he was evidently relying on the phrase of Ulpian, quoted *supra*, note 33); 1696, L. C. J. Holt, in *Falkland v. Bertie*, 2 Vern. 334, 339 ("the last will . . . must be admitted sufficient to repeal all former wills, and much more to control all parol declarations"); *ante* 1726, Gilbert, Evidence, 279 (a release under seal is a good discharge of an account, for "any deceit or mistake in former payments is but matter in *pais*, and therefore not of as high a nature as the deed; and in giving evidence, everything must be contradicted by a matter of the same notoriety as that whereby it is proved").

practically novel in this relation. The legal act was to be constituted, not merely proved, by the document, and the document might be an ordinary writing, not necessarily a "deed," *i. e.*, under seal. It is true that these features were not absolutely without precedent. There had been already two other statutes, — one in 1535, requiring a transfer by bargain and sale to be "made by writing,"³⁹ and the other in 1540, permitting freedom of devise of lands by "last will and testament in writing."⁴⁰ But the former statute had required the writing to be a deed, "indented and sealed," so that in this respect it involved no novelty; and the latter statute was as yet so little conceived from the modern point of view that in its construction the Courts had preserved rather the old testimonial idea, and had virtually treated the testator's oral utterance as merely evidenced by the writing.⁴¹ The contrast between this attitude of the 1500s and the attitude of a century later is seen in the corresponding provision (sect. 5) of the statute of frauds, which requires devises of land to "be in writing and signed, . . . or else they shall be utterly void and of none effect." The lingering of the old, also, and its meeting with the new, are to be seen in the same statute's provisions about trust estates; for the creation of these (by sect. 7) "shall be manifested and *proved* by some writing signed, . . . or else they shall be utterly void and of none effect," while their assignments (by sect. 9) "shall likewise *be* in writing signed, . . . or else they shall likewise be utterly void and of none effect." The contrast between the two ideas is further apparent in the phrases of sect. 4 ("unless the agreement, . . . or some note or memorandum thereof, shall be in writing"), which distinctly signified that the contract and the writing might be separate things.

The significance of the statute for the present purpose, then, was in the main, first, that it abolished the practice of creating estates of freehold by oral livery of seisin only, and, secondly, that it permitted the required document (for leases) to be a writing without seal.⁴² By the former, it emphasized the constitutive (as opposed to the testimonial) nature of the document; by the latter, it extended the conception of constitutive documents beyond sealed ones to include all writings. The scope of these provisions was limited; but their moral and logical influence was wide and immediate. The statute now began to be appealed to, in all questions of "parol evidence," as setting an example and typifying a general principle.⁴³

The important consequence was that for that great mass of transactions

³⁹ St. 27 H. VIII, c. 16.

⁴⁰ St. 32 H. VIII, c. 1, § 1.

⁴¹ Sheppard's Touchstone, 406 ("If the nortary do only take certain rude notes or directions from the sick man, which he doth agree unto, and they be afterwards written fair in his life-time, and not showed to him again, or not written fair until after his death, these are good testaments of lands").

⁴² These effects have been clearly analyzed in *Mayberry v. Johnson*, 3 Green N. J. Eq. 116.

⁴³ *E. g.*: 1696, *Falkland v. Bertie*, 2 Vern. 833 (proof of the testator's parol intention con-

trary to the legal effect of his will was excluded; L. C. J. Holt said that "the great uncertainty there is of proof in this case shows how necessary it was to make the statute against frauds and perjuries"); 1708, *Strode v. Russell*, 2 Vern. 621 ("No parol proof or declaration ought to be admitted out of the will to ascertain it; . . . and now since the statute of frauds and perjuries, this is stronger, because by that statute all wills are to be in writing"). Compare also Chief Baron Gilbert's remarks, about the same period, quoted *supra*, note 20.

which were not affected by the statute, but were none the less put in writing voluntarily by the parties, though not sealed — *i. e.* transactions for which by the older idea the writing would merely have been “evidence” —, the writing now came to be treated and spoken of as the constitutive thing. The modern view had come into complete existence; and the period of this seems to be about the end of the 1600s.⁴⁴ There are still recurring traces of the older theories;⁴⁵ but the modern result is practically achieved. The Chancellor's Court seems to have been slow to accept the full doctrine, — partly, no doubt, because of the older idea that it had something to do with the untrustworthiness of juries,⁴⁶ but also partly because that Court was still invoked as having a discretionary power to relieve against fixed rules of law.⁴⁷ But this inconsistency of practice soon disappeared; and the transition-period of four hundred years was accomplished. A legal transaction when reduced in writing was now to be conceived of as constituted, not merely indisputably proved, by the writing, — and this whether the writing was a requirement of law or merely voluntary, and whether it was sealed or unsealed. The reminiscence of the older idea, in the use of the term “parol evidence,” to designate that which was legally inoperative, still persisted as a convenient term of discussion; but the correct legal theory, whenever it has been forced into consideration, has not failed to be avowed.

It remains to notice the development of the older conception in one other direction but to the same end. The King's word, it has been seen, was incontestable, and this quality attached itself to his sealed sanction of documents.⁴⁸

⁴⁴ 1719, Lilly's Practical Register, 48, as quoted in Viner's Abridgment, “Contract,” G. 18 (“If an agreement made by parol to do anything be afterwards reduced into writing, the parol agreement is thereby discharged; and if an action be brought for the non-performance of this agreement, it must be brought upon the agreement reduced into writing, and not upon the parol agreement; for both cannot stand together, because it appears to be but one agreement, and that shall be taken which is the latter and reduced to the greater certainty by writing; for *vox emissa volat, littera scripta manet*”).

⁴⁵ As in the passages from Lilly and Gilbert, *supra*, and in Benson v. Bellasis, *infra*.

⁴⁶ See Strode v. Russell, *supra*, note 26.

⁴⁷ 1673, Tyler v. Beversham, Rep. temp. Finch 80 (deed of conveyance of a farm; the oral agreement was much considered, and apparently became decisive); 1673, Feilder v. Studley, ib. 90 (covenant in deed, not enforced); 1673, Cheek v. Lisle, ib. 98; 1674, Garnan v. Fox, ib. 172; 1681, Fane v. Fane, 1 Vern. 30 (“One may aver a trust of personal estate,” here upon testimony to the testator's intention); 1681, Lee v. Henley, ib. 37 (a scrivener's mistake in a settlement of land, in the nature of a will, was not allowed to be corrected); 1684, Beachinall v. Beachinall, 1 Vern. 246 (a deed of marriage-settlement, proved to have been “not drawn according to the agreement,” was ordered

by L. C. Nottingham to be “left out of the case”; but this decree was reversed by L. Keeper Guilford, to the extent of letting the deed be “given in evidence” at the trial at law); 1681-5, Benson v. Bellasis, 1 Vern. 15, 369 (deed of marriage-jointure; a parol agreement “made on the marriage” was set up; L. C. Jeffries said that “the jointure-deed is an evidence that all the precedent treaties and agreements were resolved into that”; but afterwards he increased the jointure “on evidence of her father and uncle that B., [the husband,] when he proposed the treaty of marriage, offered to settle £500 per annum jointure; . . . but note, there was no [written] covenant or agreement proved whereby he bound himself to make a jointure of that value”); 1686, Harvey v. Harvey, 2 Ch. Cas. 180 (similar agreement of marriage-settlement allowed to overturn a deed); 1689, Towers v. Moor, 2 Vern. 98 (a testator's instructions were not received to show a mistake in a will; “we cannot go against the act of Parliament”; but in case of a surrender made [on the roll] by a steward of a copyhold, “if there be any mistake there, that is only a matter of fact, and the Courts of law will in that case admit an averment that there is a mistake, etc., either as to the lands or uses”); 1706, Hill v. Wiggett, ib. 547 (good example of the overturning by parol of such a copyhold-transfer).

⁴⁸ *Supra*, note 10.

But, long before this, it was also conceived to sanction the indisputability of his judges' reports of their judicial doings.⁴⁹ Their *recordatio* (recollection or relation), oral though it be, is made indisputable. The progress of this doctrine is traced in the following passage:

1895, Sir *F. Pollock* and Professor *F. W. Mailland*, *History of the English Law*, II, 666: "The distinction that we still draw between 'courts of record' and courts that are 'not of record' takes us back to very early times when the King asserts that his own word as to all that has taken place in his presence is incontestible. This privilege he communicates to his own special court; its testimony as to all that is done before it is conclusive. If any question arises as to what happened on a previous occasion, the justices decide this by recording or bearing record (*recordantur, portant recordum*). Other courts, as we have lately seen, may and, upon occasion, must bear record; but their records are not irrefragable; the assertions made by the representative doomsmen of the shire-moot may be contested by a witness who is ready to fight. We easily slip into saying that a court whose record is incontrovertible is a court which has record (*habet recordum*) or is a court of record, while a court whose record may be disputed has no record (*non habet recordum*) and is no court of record. In England, only the King's court—in course of time it becomes several courts—is a court of record for all purposes, though some of the lower courts 'have record' of some particulars, and sheriffs and coroners 'have record' of certain transactions, such as confessions of felony. In the old days, when as yet there were no plea rolls, the justices when they bore record relied upon their memories. From Normandy we obtain some elaborate rules as to the manner in which record is to be borne or made; for example a record of the Exchequer is made by seven men, and, if six of them agree, the voice of the seventh may be neglected. In England at a yet early time the proceedings of the royal court were committed to writing. Thenceforward the appeal to its record tended to become a reference to a roll, but it was long before the theory was forgotten that the rolls of the court were mere aids for the memories of the justices; and as duplicate and triplicate rolls were kept there was always a chance of disagreement among them. A line is drawn between 'matter of record' and 'matter in pays' or matter which lies in the cognizance of the country and can therefore be established by a verdict of jurors."

As the art of keeping the written records developed, and the practice of indisputability became trite, it might have been supposed that the constitutive feature of these writings would have developed early. But it is late in appearing; the record is usually said to "import absolute verity";⁵⁰ but no further progress is for a long time made. And naturally enough; for any other theory, however necessary, is here palpably artificial. When a seller orally names a price and then writes it in a contract, it is easy to conceive of the writing as displacing the oral utterance and constituting alone the act. But when a counsel files a pleading or makes a motion, or a jury renders a verdict, it is plain that the clerk's act of writing is an actually separate thing from any of these. Only for the utterances of the judge himself is it entirely

⁴⁹ Brunner, *Schwurgerichte*, 189; *Rechtsgeschichte*, II, 523; *Wort und Form im alt-französischen Prozess*, republished in his *Forschungen z. Geschichte des deutschen und französischen Prozess*, 269 (quoting the maxim, "Ne contre recort ne puet en riens fere").

⁵⁰ 1628, Coke upon Littleton, 260a ("Recordum is a memoriall or remembrance in rolles of parchment of the proceedings and acts of a

Court of justice. . . . And the rolles, being the records or memorialls of the judges of Courts of record, import in them such incontrollable credit and veritie as they admit no averment, plea, or prooffe to the contrarie; . . . and the reason hereof is apparent, for otherwise [as our old authors say, and that truly] there should never be any end of controversies, which should be inconvenient").

natural to think of the record as *per se* his own act. Nevertheless, in the end, the most practical and easily handled notion is that which identifies the record with the proceedings. This theory has finally prevailed,⁵¹ and the notion of a constitutive writing is now extended to include the record of a judicial proceeding.⁵²

1. Integration of Unilateral Acts.

§ 2427. **Official Documents (Surveys, Appointments, Assessments, etc.).** The reduction of an act to a writing, so as to bring it under the present rule (*ante*, § 2425), may be made as well for a unilateral act (*i. e.* an act involving a single party only) as for a bilateral act (*i. e.* an act involving two or more parties). In either case, it is a question of the nature of the act and of the party's intention to embody it solely in the writing.

Of ordinary acts of private persons, there are few that are integrated. A notice or demand would be a not uncommon instance; for example, if orally a party should give notice of a lease's termination or forfeiture, or should demand a payment, and then should follow this by the same notice in written form, the latter would presumably merge and replace the former, and the terms of the writing would be decisive, so far as concerned the sufficiency of the act of notification.¹ Other instances are rare.²

Of acts of officials, there are occasional instances of integration, though they come infrequently into litigation. It may be said that where the act is not by law required to be integrated, the Courts are not inclined to discover a voluntary integration. For example, the appointment of a sheriff's deputy³ or the enlistment of a recruit⁴ have been allowed to be proved as oral acts, even though a writing was also made. On the other hand, the levy of an assessment has been treated as embodied solely in the book-entry.⁵

Both the foregoing classes of cases must be distinguished from cases involving the application of two other principles, superficially similar, namely, compulsory integration (*post*, § 2453) and conclusive testimony (*ante*, § 1345):

(1) Where by law an act is required to be done in writing, *i. e.* is ineffective

⁵¹ 1774, L. C. J. Mansfield, in *Jones v. Randall*, Cowp. 17 ("The minutes of the judgment are the solemn judgment itself"); 1846, Nisbet, J., in *Bryant v. Owen*, 1 Ga. 355, 367 ("The record is tried by inspection; and if the judgment does not there appear, the conclusion is that none has been rendered").

⁵² The history of the two other chief instances of the application of the principle, negotiable instruments and records of corporate proceedings, is beyond the present purview.

¹ Though so far as concerned the state of mind of the party notified, both sources of his information would be equally material.

² The following is an example: 1820, *Thistlewood's Trial*, 33 How. St. Tr. 757 (high treason; inquiry was made as to certain proclamations prepared by the defendant; the latter dictated the words to H., who wrote them down, but owing to a difference of opinion as to the phras-

ing, the writing was not completed; the Court doubted as to the propriety of any inquiry as to the words spoken in dictation, and intimated that the contents of the document alone were to be regarded).

³ 1895, *Pentecost v. State*, 107 Ala. 81, 18 So. 146 ("It was like a receipt").

⁴ 1869, *Wilson v. McClure*, 50 Ill. 366 (that substitutes were received into the service of the army; the officer's entry of it not necessary to be proved).

⁵ 1903, *Allen v. McKay*, 139 Cal. 94, 72 Pac. 713 (the assessment-roll, completed and certified by the assessor, "is the only evidence of his acts and intentions"); 1897, *Dresden v. Bridge*, 90 Me. 489, 38 Atl. 545 (assessment to "S. J. B., Est. of"; evidence of the assessor's intention to assess the tax to the executor, excluded).

unless so done, the writing is of course the only permissible subject of proof. It is immaterial what the person intended; his act must be in the writing and must be judged by the writing alone (*post*, § 2453).

(2) Certain official documents are sometimes made *preferred conclusive testimony*, and it is difficult to distinguish whether that principle or the present one is involved.⁶ For example, the question may be whether a sheriff's record of prisoners received is conclusive,⁷ or whether a State auditor's books are conclusive,⁸ and here the mere principle of conclusive testimony is concerned. But when the question is whether an official survey is conclusive as to boundary lines,⁹ it is in fact an inquiry as to the terms of the government's grant as defined by the grantor's agent; the written survey therefore constitutes the surveyor's act, and is not merely a testimony to some independent fact. In general, then, where an official writing represents the act itself of the officer, it is an instance of the present principle of integration; but where the official writing states another person's acts or some external happening, it is an instance of testimony; how far, in the latter case, it is preferred and is made conclusive has been already examined under that head (*ante*, §§ 1345-1353). The practical differences in the effect of the two rules have also been there pointed out (*ante*, § 1346), but may here be compared. (a) If a conclusive testimonial writing *never was made*, then the fact to be proved may be otherwise evidenced, — for example, where an officer's jurat (or certificate of an oath made before him) has not been recorded on the document, the fact of the swearing may be otherwise evidenced;¹⁰ though if the written jurat had been the sole embodiment of an official act, the failure to write it would be the failure to act at all, and hence no other proof could have been made. (b) If a conclusive testimonial writing was made but is *lost*, its preferential nature is at an end, and any other testimony to the fact in issue may be received in its stead;¹¹ but if a written legal act is lost, the proof must be of its contents, because the very fact to be proved is the writing itself. Thus, while these marked differences result, there remains the common feature that, by both principles, the oral utterance of the official cannot be proved, nor can the terms of the writing (if available) be

⁶ Compare the additional cases cited *ante*, §§ 1335, 1339, 1345-1352.

⁷ 1898, *Goodrich v. Senate*, 92 Me. 248, 42 Atl. 409 (sheriff's calendar of prisoners kept, not conclusive).

⁸ 1878, *State v. Newton*, 33 Ark. 276, 284 (action on an official bond; the State Auditor's books held not conclusive under a statute making them "sufficient evidence").

⁹ 1814, *Ringgold v. Galloway*, 3 H. & J. 451, 461 (an official survey being lost, a junior survey of the same estate was admitted; in the absence of loss, the former would be conclusive); 1897, *Carter v. Hornback*, 139 Mo. 238, 40 S. W. 893 (U. S. survey, held conclusive as to "the actual locations of the boundary lines of sections," etc.); 1895, *Reusens v. Lawson*, 91 Va. 226, 21 S. E. 847 ("Such [extrinsic] declarations of the sur-

veyor are not admissible, because the policy of the law forbids that his solemn acts, done in the discharge of his official duty, should be annulled by his subsequent declarations").

Whether a *ship-survey* is conclusive is a question of contract.

¹⁰ 1895, *Bantley v. Finney*, 43 Nebr. 794, 62 N. W. 213.

¹¹ 1855, *People v. Clingan*, 5 Cal. 389 (a certificate of election being lost, testimony was admitted both of its contents and of the fact of election as known to others); 1847, *Dutchess Co. Bank v. Ibbotson*, 5 Denio 110 (a notary's certificate of demand and notice, made evidence by statute; if lost, its contents cannot be proved; the notary's testimony in some other form must be obtained); 1846, *Lloyd v. McGarr*, 3 Pa. St. 475, 482 (similar).

contradicted by his oral utterance; yet this is due in the one instance to the conclusiveness of the written testimony, and in the other instance to the operative character of the writing as an act.

2. Integration of Bilateral Acts.

§ 2429. **No Integration at all; Casual Memoranda.** The mere circumstance that *some* writing has been made by parties, for the better recollection of the terms of their transaction, does not of itself make that writing the sole memorial of the transaction, even to the extent covered by the writing. There may have been no integration at all, in spite of the written notes; *i. e.* no attempt to make the writing embody the transaction or any part of it (*ante*, § 2425), but merely to furnish an aid to the writer's recollection or a written admission for the other party's satisfaction. The essential idea remains for it, that the writing is something distinct from the transaction itself. There can hardly be any precise test; the circumstances of each case, as indicating the parties' intent, must control.¹

§ 2430. **Partial Integration; General Test for applying the Rule; "Collateral Agreements."** The most usual controversy arises in cases of partial integration, *i. e.* where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to *so much of the transaction as is so embodied, but not to the remainder.*

It is of course incorrect to assume that what was not so embodied was in truth a part of that same transaction; it may have been a totally distinct transaction, merely coinciding in time. For example, a banker, at an interview with a promoter, who comes from a distant city and compresses all their affairs into a short interview, may within the same half-hour sign articles of incorporation, authorize an overdraft, assign a mortgage, and join in a committee's report to stockholders. Or a purchaser of land, negotiating with a broker, may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent to sell another piece. In such instances,

¹ *Eng.*: 1803, *Dalison v. Stark*, 4 Esp. 163 (action for goods sold; the plaintiff called his selling agent, who had taken the order, and it appeared that "the order was given to him verbally by the defendant, and that he had put it down in writing to assist his own recollection, merely as a memorandum; it was not made by the buyer, nor was his name signed"; held, that the writing was not the contract); 1814, *Ramsbottom v. Tunbridge*, 2 M. & S. 434 (a memorandum of a lease handed to a purchaser by an auctioneer after the knocking down; held, not an integration); 1820, *Doe v. Cartwright*, 3 B. & Ald. 326 (a memorandum of tenancy, drawn up and assented to, but conditional on getting a surety, and never signed; held, not controlling); 1835, *R. v. Wrangle*, 2 A. & E. 514 (employer and employee went to a clerk,

who entered the terms of hiring in writing, which however was not read or shown to them or signed by them; held not integrated); 1838, *Allen v. Pink*, 4 M. & W. 140 ("Bought of G. P. a horse for the sum of 7*l.* 2*s.* 6*d.*, G. P.," held to be intended "merely as a memorandum of the transaction or an informal receipt for money, not as containing the terms of the contract itself"); *U. S.*: 1900, *Atwater v. Cardwell*, — Ky. —, 54 S. W. 960 (a mere temporary memorandum, held not indisputable); 1895, *Vaughan v. McCarthy*, 63 Minn. 221, 65 N. W. 249 (a "mere informal memorandum," held not indisputable); 1897, *Burditt v. Howe*, 69 Vt. 563, 38 Atl. 240 (a series of letters, held not to have been made the sole memorial of the contract).

the transactions are so clearly distinct, that each one, if integrated, will certainly be embodied in a writing wholly distinct from the others and regardless of whether the others are reduced to writing at all; and no controversy can plausibly arise. But in those instances in which a negotiation concerns one general subject — such as the purchase of a single lot of land having buildings on it — and yet several more or less separable features of bargain, the relation between the writing and the whole bargain is usually difficult to ascertain, and forms a perpetually recurring controversy. To say that the question is whether the parties intended to embody “the whole of the transaction” or only a part, is therefore hardly correct; because by hypothesis the writing *does* represent the whole of what was finally done on the subject covered by it; and because to assume that the subject not covered was a “part” of the transaction covered would be inconsistent, and would involve holding that the writing which embodies the transaction does not embody that “part” of it. More correctly, the inquiry is whether the writing was intended to cover *a certain subject* of negotiation; for if it was not, then the writing does not embody the transaction on that *subject*; and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect “parts” of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing.

In searching for a general test for this inquiry, three propositions at least are capable of being generally laid down:

(1) Whether a particular subject of negotiation is embodied by the writing *depends wholly upon the intent of the parties* thereto.¹ In this respect the contrast is between voluntary integration and integration by law (*post*, § 2450). Here the parties are not obliged to embody their transaction in a single document; yet they may, if they choose. Hence it becomes merely a question whether they have intended to do so.

(2) This intent must be sought where always intent must be sought (*ante*, §§ 42, 1714, 1790), namely, in the *conduct and language* of the parties and the *surrounding circumstances*. The document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered. Thus the apparent paradox is committed of receiving proof of certain negotiations in order to determine whether to exclude them; and this doubtless has sometimes seemed to lower the rule to a quibble. But the paradox is apparent only. The explanation is that these alleged negotiations are received only provisionally. Although in form the witnesses may be allowed to recite the facts, yet in truth the facts will be afterwards treated as immaterial and legally void, if the rule is held applicable. There is a preliminary question for the judge to decide as to the intent of the parties, and upon this he hears

¹ This intent must of course be judged by an external standard: *ante*, § 2413.

evidence on both sides;² his decision here, *pro* or *con*, concerns merely this question preliminary to the ruling of law. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely that *if* they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely that *if* they did, they are legally effective, and he then leaves to the jury the determination of fact whether they did take place. In this anomalous process, it merely happens that some of the conduct and other data which are at first resorted to *evidentially* on the question of intent are usually identical with the conduct that may subsequently be treated as legally *inoperative*; but this is a mere coincidence. The two vital differences are, first, that they are looked at for different purposes, and secondly, that they may be dealt with by different branches of the tribunal.

(3) In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the *particular element of the alleged extrinsic negotiation is dealt with at all* in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation. This test is the one used by the most careful judges,³ and is in contrast with the looser and incorrect inquiry (*post*, § 2431) whether the alleged extrinsic negotiation contradicts the terms of the writing.

§ 2431. **Same: Incorrect Tests; (a) "Varying the Terms of the Writing"; (b) "The Writing is the Sole Criterion"; (c) Fraud, in Pennsylvania.** (a) It is not uncommon to speak of the present rule as a rule against "*varying the terms of the writing*." No doubt that is precisely the effect of applying the rule. But it can never serve as a test to determine in the first instance whether the rule is applicable. The applicability and the effect of the rule are distinct things. To employ this phrase as a test is to reason in a circle; for it is to attempt to decide whether something conceded to be different from the writing ought to be excluded, by showing that it *is* different. All the

² Of course, not always in form; but he considers the data *pro* and *con*. Sometimes, but erroneously, the question of intent is left to the jury.

³ The following will serve as examples: 1815, *Yeats v. Pim*, Holt 95 (sale of bacon, warranted to be prime singed; a custom to claim a breach at the time of inspection or waive it, excluded; "by requiring a warranty, he is to be understood as excepting against all terms but such as are stipulated in the bargain"); 1819, *Bayley, J.*, in *Webb v. Plummer*, 2 B. & Ald. 746, 750 ("Where there is a written agreement between the parties, it is naturally to be expected that it will contain all the terms of their bargain. But if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to

that particular. If, however, it specifies any of those terms, we must then go by the lease alone"); 1851, *Maule, J.*, in *Dickson v. Zizina*, 10 C. B. 602, 610 ("We should not by inference insert in a contract implied provisions with respect to a subject which the contract has expressly provided for"); 1892, *Bretto v. Levine*, 50 Minn. 168, 52 N. W. 525 (deed of land and store, including "all the shelving in the building"; an agreement to sell part of the stock also, admitted; "if the clause had mentioned one or more articles of personal property, as chairs, of such a nature that there could be no doubt that they constituted a part of the realty so as to pass under a deed of the property, the result would probably be different").

phrases about transactions that "vary," or "contradict," or are "inconsistent," involve the same futility. The fundamental question is as to the intent of the parties to restrict the writing to specific elements or subjects of negotiation (*ante*, § 2431, par. 3); and if that intent existed, then the other subjects of negotiation can be established, even though they be (as they always are) different from the writing:

1854, Mr. (later Justice) *Blackburn*, arguing, in *Brown v. Byrne*, 3 E. & B. 703: "The parties may by express words or by implication agree to exclude the incident which the general law would annex if they were silent; and it is exactly the same where the incident is annexed by custom or local law. . . . Then the question is, not whether the custom if admitted will vary or be inconsistent with the contract as it would stand without the custom; but whether it is impliedly excluded by the tenor of the instrument. The other mode of enunciating the proposition has been used by high authorities, but evidently is inaccurate. No one ever did or ever will seek to annex an incident by proof of a custom except for the express purpose of varying the contract from what it would be if the custom were not proved." *Coleridge*, J. (for the Court): "Merely that it varies the apparent contract is not enough to exclude the evidence; for it is impossible to add any material incident to the written terms of a contract without altering its effect more or less."

1873, *Grove, J.*, in *Hutchinson v. Tatham*, L. R. 8 C. P. 482, 488: "In one sense the contract must always be varied by the admission of the evidence of custom, inasmuch as the effect of the contract would not be the same without the parol evidence, or else the parol evidence would itself be unnecessary."

(b) It has occasionally been laid down that, in ascertaining, in the first instance, the parties' intent to embody or not in the writing certain subjects of negotiation, "*the writing is the sole criterion*," i. e. no search for data of intent can be made outside the four corners of the document:

1892, *Depue, J.*, in *Naumberg v. Young*, 44 N. J. L. 331: "In what manner shall it be ascertained whether the parties intended to express the whole of their agreement in the written contract? . . . The only safe criterion of the completeness of a written contract as the full expression of the terms of the parties' agreement is the contract itself. . . . If the written contract purports to contain the whole agreement, and it is not apparent from the writing itself that something has been left out to be supplied by extrinsic evidence, parol evidence to vary or add to its terms is not admissible."¹

Such a proposition, however, is untenable, both on principle and in practice. Its fallacy is indicated by what has been already noticed (*ante*, § 2430). The problem being to ascertain whether the parties intended a certain writing to cover certain subjects, the relation between the writing and those subjects and their conduct is necessarily involved; and all these matters must be considered. When two parties are found playing a game of chess, it cannot be told whether this is the sole and decisive game, or merely one of

¹ So also, but less rigid in statement, the following exposition: 1901, *Potter v. Easton*, 82 Minn. 247, 84 N. W. 1011 (Start, C. J.: "In considering whether or not a particular writing is an incomplete contract, within the rule stated, the controlling question is whether it appears upon the face of the writing that the parties intended it to be the exclusive evidence of their

agreement. While the writing itself is the only criterion by which the intention of the parties is to be ascertained, yet it is not necessary that the incompleteness of the writing should appear on its face from a mere inspection of it, for it is to be construed in the light of its subject-matter and the circumstances under which and the purposes for which it was executed").

a series, by watching that particular game. Whether a piece of land which we see a surveyor marking out is the entirety of the owner's estate cannot be determined by looking merely at the boundaries of that piece; if we look far enough, we may find that it is only a part of a larger survey. Whether a certain box of cards represents the whole catalogue of a man's library cannot be determined by the mere contents, nor by the circumstance that they are all in one box, nor yet by the circumstance that they are arranged alphabetically and include titles from A to Z; for perhaps he has also a separate catalogue of French and German books, or perhaps he has separate catalogues for law books and for general literature, or possibly he has taken out all the cards for books sent to the bindery. The conception of a writing as wholly and intrinsically self-determinative of the parties' intent to make it the sole memorial of one or seven or twenty-seven subjects of negotiation is an impossible one. The odd feature of it is that it is never enforced in practice by its theoretical advocates.²

(c) In *Pennsylvania*, the application of the rule seems to be governed by a test so anomalous that it may almost be said to destroy the essence of the rule in that jurisdiction. That test is *fraud*; although it would seem that every attempt knowingly to invoke the letter of a writing against the actual oral understanding of the parties (however different from the written terms) could properly be considered as fraudulent:

1884, *Paxson, J.*, in *Phillips v. Meily*, 106 Pa. 536, 543: "The English rule that parol evidence is inadmissible to vary the terms of a written instrument does not exist in this State; . . . the cases in this State in which parol evidence has been allowed to contradict or vary written instruments may be classed under two heads: "1st, where there was fraud, accident, or mistake in the creation of the instrument itself; and 2d, where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed."³

The application of the general principle to various specific kinds of transactions and documents may now be examined.

§ 2432. **Receipts and Releases; Bills of Lading.** A receipt — *i. e.* a written acknowledgment, handed by one party to the other, of the manual custody of money or other personalty —, will in general fall without the line of the rule; *i. e.* it is not intended to be an exclusive memorial, and the facts may be shown irrespective of the terms of the receipt.¹ This is because usually a

² See a good illustration of this in *Naumberg v. Young*, the case quoted *supra*.

³ A clue to the numerous rulings in *Pennsylvania* may be found in the following cases: 1886, *Thomas v. Loose*, 114 Pa. 35, 45, 6 Atl. 326; 1902, *Sutch's Estate*, 201 id. 305, 50 Atl. 943; and cases cited *post*, § 2442, note 1. The development and present state of the *Pennsylvania* rule has been carefully examined in an article by Mr. Stanley Folz, "Oral Contemporaneous Inducing Promises to affect Written Instruments in Pennsylvania," 1904, *American Law Register*, LII, 601.

¹ *Eng.*: 1788, *Buller, J.*, in *Straton v. Rastall*, 2 T. R. 366, 371 ("Equity distinguishes between the persons who join in a receipt and him who actually receives the money; and the receipt is not conclusive against him [the defendant], as he was only a surety and in fact received no part of the consideration-money"); 1832, *Singleton v. Barrett*, 2 Cr. & J. 368; *U. S.*: 1898, *Gravlee v. Lamkin*, 120 Ala. 210, 24 So. 756; 1902, *Starkweather v. Maginnis*, 196 Ill. 274, 63 N. E. 692; 1897, *Mounce v. Kurtz*, 101 Ia. 192, 70 N. W. 119; 1896, *Missouri P. R. Co. v. Lovelace*, 57 Kan. 195, 45

receipt is merely a written admission of a transaction independently existing, and, like other admissions, is not conclusive (*ante*, § 1058). But where the writing is itself the very act, as where it grants a discharge or *release* of a claim, or embodies a new obligation, it obviously falls within the rule, and its terms cannot be overthrown:

1832, *Tenterden, C. J.*, in *Graves v. Key*, 3 B. & Ad. 313 (admitting the circumstances of payment of a bill, so as to show an indorsed receipt not to be a satisfaction): "A receipt is an admission only, and the general rule is that an admission, though evidence against the person who made it and those claiming under him, is not conclusive evidence (except as to the person who may have been induced by it to alter his condition). A receipt therefore may be contradicted or explained."

1836, *Cowen, J.*, in *M'Crear v. Purmort*, 16 Wend. 460, 473: "A release cannot be contradicted or explained by parol, because it extinguishes a preëxisting right. But no receipt can have the effect of destroying *per se* any subsisting right; it is only evidence of a fact. The payment of the money discharges or extinguishes the debt; a receipt for the payment does not extinguish the debt; it is only evidence that it has been paid. Not so of a written release; it is not only evidence of the extinguishment; but it is the extinguisher itself."

1897, *Buck, J.*, in *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591: "Whether a receipt possesses any contractual feature or not must often be determined from its entire language, and also, at times, from the language in connection with the circumstances under which it was given. If A, to whom B is indebted in the undisputed sum of \$200, is paid by the latter \$100, and signs a receipt for the sum of \$200, or, mentioning the sum paid, acknowledges payment in full of the debt, nevertheless A, in an action against B for the unpaid balance, without showing any fraud, mistake, or other excuse for having signed the receipt, can contradict it by extrinsic evidence, and show that only \$100 was paid. It would only be evidence of B's having paid the debt, just as an oral admission proved against A would be. If, however, B has been indebted to A on an account the amount of which has been in dispute between them, a receipt by A definitely specifying the entire account, and acknowledging a sum received as payment in full of the same, would possess a contractual feature; and, in order to contradict or vary the terms of it by extrinsic evidence in so far as it would be a contract, A would be required to observe the rules of law applicable to contracts, and could not treat it in evidence against him as if it were of no greater weight than a mere oral admission on his part."

Which of these characters a given document possesses must of course depend on the particular case; but it is well understood that a document which is a receipt may in some instances be indisputable as being also in effect a release or a contract.²

Pac. 590; 1897, *Equitable Secur. Co. v. Talbert*, 49 La. An. 1393, 22 So. 762 (even when acknowledged notarially); 1897, *Joslin v. Giese*, 59 N. J. L. 130, 36 Atl. 680; 1903, *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113; 1896, *Keaton v. Jones*, 119 N. C. 43, 25 S. E. 710 ("have this day settled all accounts"); 1830, *Keene v. Meade*, 3 Pet. 1, 7 (entry in a cash-book, acknowledging an advance of money, held not to exclude proof of the payment by parol); 1893, *Riddle v. Hudgins*, 7 C. C. A. 335, 58 Fed. 490, 19 U. S. App. 144, 150.

The following utterance may therefore be regarded as overruled: 1808, *Alner v. George*, 1 Camp. 392 (L. C. J. Ellenborough: "A receipt

in full, where the person who gave it was under no misapprehension and can complain of no fraud or imposition, is binding upon him").

² 1884, *Goss v. Ellison*, 136 Mass. 503 (a receipt for \$51 "as full payment, as per claim," held conclusive, because equivalent to a "settlement and satisfaction of the claim" for tort thus discharged); 1897, *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591 (quoted *supra*); 1880, *Goodwin v. Goodwin*, 59 N. H. 548 (a receipt for \$2,500, "in consideration of which I hereby waive all right to contest said will or the proof thereof and all claim I have or might have as heir of said deceased" was held to exclude the oral agreement concerning the precise claims re-

§ 2433. **Recital of Consideration in a Deed.** By an application of principle similar to the foregoing, a recital of consideration received, when it occurs in a deed of grant, is usually intended merely as a written acknowledgment of the distinct act of payment, being there inserted for convenience. Hence it is not an embodiment of an act *per se* written, and may be disputed like any other admission (*ante*, § 1058). But the statement of a consideration may, on the other hand, sometimes be itself an operative part of a contractual act, — as when in the same writing the parties set out their mutual promises as considerations for each other; here the word “consideration” signifies a term of the contract, and hence the writing alone can be examined:

1895, *Cooper, C. J.*, in *Baum v. Lynn*, 72 Miss. 932, 18 So. 428 (in a deed I. recited that, whereas L.'s guardian had loaned money to I., I., in consideration of a full release from such loans, and of ten dollars paid in hand, conveyed, etc.; the fact that a release of the guardian's liability to L. was also a part of the consideration was excluded): “Judge Robertson [in a case cited] illustrates his own views by noting the difference between the mere statement of a fact (*e. g.* the admission of the receipt of the purchase price) and the vesting, creating, or extinguishing a right (*e. g.* by the execution of a release), in the following language: ‘A party is estopped by his deed. He is not to be permitted to contradict it. So far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further. A deed is not conclusive evidence of everything it may contain. For instance, it is not the only evidence of the date of its execution, nor is its omission of a consideration conclusive evidence that none passed, nor is its acknowledgment of a particular consideration an objection to other proof of other and consistent considerations; and, by analogy, the acknowledgment in a deed is not conclusive of the fact. This is but a fact, and testing it by the rationality of the rule we have laid down, it may be explained or contradicted. It does not necessarily and undeniably prove the fact. It creates no right; it extinguishes none. A release cannot be contradicted or explained by proof, because it extinguishes a preëxisting right. But no receipt can have the effect of destroying *per se* any subsisting right. It is only evidence of a fact. The payment of the money discharges or extinguishes the debt. A receipt for the payment does not pay the debt. It is only evidence that it has been paid. Not so of a written release. It is not only evidence of the extinguishment, but is the extinguishment itself.’ The deed now under examination contains, as is clearly to be seen, no mere recital of a consideration paid or to be paid. Its recital is only of the facts necessary to be stated to intelligently apply the contract of the parties to the subject-matter. Having set out the relationship of debtor and creditor, and the history of the transaction from which it arose, the deed then proceeds to state what the parties agreed, contracted, and did in reference to the dissolution of the relationship. Mrs. Irving did something. She conveyed the land to Mrs. Lynn. Mrs. Lynn did something. She released the debt to Mrs. Irving. One transferred a right; the other released a right. If it be said that the release was a mere recited consideration for the conveyance, it may with equal accuracy be replied that the conveyance was a mere recited consideration for

leased thereby); 1898, *Jackson v. Ely*, 57 Oh. 450, 49 N. E. 792 (receipt for money, with statement of settlement in full, treated as a memorial not to be varied); 1898, *Cassilly v. Cassilly*, ib. 582, 49 N. E. 795 (receipt for money, including release of a claim in an estate, not variable by parol); 1897, *Allen v. Mill Co.*, 18 Wash. 216, 51 Pac. 372 (receipt, held not explainable on the facts). The *presumption of payment* arising from a receipt is another question (*post*, § 2518).

The application of the above doctrine to a *bill of lading* may be seen in the following cases: 1871, *The Delaware*, 14 Wall. 579; 1898, *Tallassee F. M. Co. v. R. Co.*, 117 Ala. 520, 23 So. 139; *McClain, Cases on Carriers*, 233-248. Its application to a *passenger ticket* may be seen in the following: 1893, *Mann B. C. Co. v. Dupre*, 4 C. C. A. 540, 54 Fed. 646; *Hutchinson, Carriers*, §§ 568 ff.; Professor J. H. Beale, *Tickets*, *Harvard Law Review*, I, 17.

the release; and therefore, if one of the terms of the contract may be varied by parol, because it is a consideration, so also may the other for the same reason, and by this process a solemn and executed written contract would be totally eaten away. The true rule is that a consideration recited to have been paid or contracted for may be varied by parol, while the terms of a contract may not be, though the contract they disclose may be the consideration on which the act or obligation of the other party rests."

In general, then, it may be said that a recital of consideration received is, like other admissions, disputable so far as concerns the thing actually received;¹ but that, so far as the terms of a contractual act are involved, the writing must control, whether it uses the term "consideration" or not.²

§ 2434. **Warranty in a Sale; Insurance Warranties.** When a document embodies terms of a sale, it is the more natural to suppose that the document would cover such warranties, if any, as accompanied the sale, because the warranty is certainly a part of the contract and not a separate obligation. But when obviously only some of the terms of the bargain are represented in the document, and there must have been others — such as the time of delivery — left unembodied in it, it is possible to regard a warranty as equally without its purview. The decision will thus depend almost entirely on the circumstances of each transaction; and generalizations can hardly be made. In most instances, however, Courts are found treating the writing of sale as

¹ Some of the rulings, of course, may be open to argument: 1789, *R. v. Scammonden*, 3 T. R. 474 (pauper settlement; the deed of purchase reciting a consideration of 287., it was allowed to show that 307. was in fact the amount received); 1896, *Hendon v. Morris*, 110 Ala. 106, 20 So. 27; 1892, *Guidery v. Green*, 95 Cal. 630, 635, 30 Pac. 786; 1881, *Feltz v. Walker*, 49 Conn. 93 (the plaintiff's assignor, B., buying land, had it conveyed to the defendant's name, and took a bond and mortgage from the defendant for \$3,250, the sole consideration for the bond being the land thus conveyed to the defendant for B.; held that the bond could be enforced only to the extent of appropriating the land in satisfaction); 1897, *Droop v. Ridenhour*, 11 D. C. App. 224, 238; 1895, *Reese v. Strickland*, 96 Ga. 784, 22 S. E. 323; 1897, *Thompson v. Cody*, 100 id. 771, 28 S. E. 669; 1895, *Stewart v. R. Co.*, 141 Ind. 55, 40 N. E. 67; 1893, *Hill v. Whidden*, 158 Mass. 267, 274, 33 N. E. 526; 1902, *Galvin v. R. Co.*, 180 id. 587, 62 N. E. 961 (release of claim for personal injury, reciting a money consideration; a promise of employment by the releasee, allowed to be proved); 1880, *Strohauer v. Voltz*, 42 Mich. 444, 4 N. W. 161; 1895, *Fitzpatrick v. Hoffman*, 104 id. 228, 62 N. W. 349; 1897, *Ford v. Savage*, 111 id. 144, 69 N. W. 240; 1895, *Squier v. Evans*, 127 Mo. 514, 30 S. W. 143; 1836, *M'Crea v. Purmort*, 16 Wend. 460, 467 (summing up the cases in England and the United States; pointing out that the acknowledgment of a consideration is merely a receipt); 1895, *Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222; 1898, *Marcom v. Adams*, 122 N. C. 222, 29 S. E. 333; 1892, *Velten v. Carmack*, 23 Or. 282, 289, 31 Pac. 658 (consid-

eration in a deed to a married woman, shown to have been a gift to her by the grantor); 1895, *Wheeler v. Campbell*, 68 Vt. 98, 34 Atl. 35; 1896, *Van Lehn v. Morse*, 16 Wash. 219, 47 Pac. 435; 1897, *Don Yook v. Milling Co.*, ib. 459, 47 Pac. 964.

² 1902, *Arnold v. Arnold*, 137 Cal. 291, 70 Pac. 23 (deeds of transfer by one partner to another, containing mutual covenants as a part of the consideration; other consideration excluded); 1895, *Sandage v. Mfg. Co.*, 142 Ind. 148, 41 N. E. 380 (rejecting the fact that for a supplementary contract dealing with a prior contract buying a patent the consideration was a release of the guaranty in the prior one); 1900, *Schrimer v. R. Co.*, — Ia. —, 82 N. W. 916; 1897, *Thompson v. Bryant*, 75 Miss. 12, 21 So. 655 (the assumption of the seller's share of his liability as partner for firm debts, excluded as contractual); 1887, *Parker v. Morrill*, 98 N. C. 232, 3 S. E. 511 (agreement of accounting between a ward P. and her guardian B., by which "in consideration of one dollar to us paid by B., the receipt of which is hereby acknowledged," the ward grants to B. the sum of money due, and "do forever release and discharge said B." from his bond, the money to be applied by B. to certain named uses; the plaintiff ward offered to show an oral agreement by which B. additionally promised to devise property to the ward, and to prove that "only upon this promise and agreement did the plaintiff agree to sign the written agreement"; excluded, as "a consideration not mentioned or referred to in it"); 1900, *Kahn v. Kahn*, 94 Tex. 114, 58 S. W. 825; 1881, *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620 (sale of land, in consideration of

the sole memorial of the transaction as to warranties;¹ occasionally, on the circumstances, they permit extrinsic warranties to be valid.² The enforcement of an *implied warranty* of fitness seems to involve a similar question.³

mortgage and bond; a further consideration of certain personalty, excluded).

Note that as between "good" and "valuable" consideration, on which the line of descent may depend, it is said that the nature of it cannot be determined by oral facts, though the amount of it may be: 1902, *Groves v. Groves*, 65 Oh. St. 442, 62 N. E. 1044.

¹ *Eng.*: 1805, *Hodges v. Drakeford*, 1 B. & P. N. R. 270 (action on a warranty that the trade of a shop bought by the plaintiff reached a certain amount; the writing of assignment held to control); 1810, *Powell v. Edmunds*, 12 East 6, 10 (sale of timber described by number and kind of trees; an oral warranty as to the weight excluded); 1813, *Pickering v. Dowson*, 4 Taunt. 779, 785 (warranty of a ship, excluded); 1814, *Meyer v. Everth*, 4 Camp. 22 (bought-note of a sugar sale, naming "50 hogsheds of H. sugar loaves, at 155 s. free on board of a British ship, acceptance at 70 days"; an oral warranty of quality like sample, excluded); 1815, *Gardiner v. Gray*, ib. 144 (similar); 1824, *Kain v. Old*, 2 B. & C. 627 (bill of sale of ship, containing warranties of title and of further assurance: a parol warranty of copper-bolting, excluded); 1831, *Bradshaw v. Bennett*, 5 C. & P. 48, 49 (sale of property held on three lives; the auctioneer's statement at the sale that one of the persons was dead, *semble*, not admissible); 1838, *Chanter v. Hopkins*, 4 M. & W. 399 (sale of a smoke-consuming furnace; oral warranty of suitability for a brewery, excluded); *Can.*: 1897, *Saults v. Baket*, 11 Man. 597 (warranty of a binder, excluded on the facts); *U. S.*: 1898, *Hills v. Farmington*, 70 Conn. 450, 39 Atl. 795 (building contract in great detail; oral warranty of the architect's plans, excluded); 1897, *Maxwell v. Willingham*, 101 Ga. 55, 28 S. E. 672 (agreement to buy a tract of "about 150 acres"; oral warranty by seller that it contained no more than 150, excluded); 1898, *Barrie v. Smith*, 105 id. 34, 31 S. E. 121 (oral warranty of the moral quality of Balzac's works, excluded); 1903, *Bulard v. Brewer*, — id. —, 45 S. E. 711 (sale of a horse); 1889, *Conant v. Bank*, 121 Ind. 324, 22 N. E. 250 ("We will furnish the following machinery for a 100-barrel mill, of 24 hours, set up in your mill building"; warranty of grade, excluded); 1898, *Younie v. Walrod*, 104 Ia. 475, 73 N. W. 1021 (written agreement to buy land, vendor to furnish abstract, etc.; oral agreement as to time of furnishing abstract, etc., excluded); 1902, *Ehrsam v. Brown*, 64 Kan. 466, 67 Pac. 867 (machinery; warranty excluded); 1894, *McCray E. & C. S. Co. v. Woods*, 99 Mich. 269, 58 N. W. 320 (refrigerator sale; oral warranty excluded; prior cases distinguished); 1895, *Zimmerman Mfg Co. v. Dolph*, 104 id. 281, 62 N. W. 339 (oral warranty, additional to the written warranty, excluded); 1885, *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1 (bill of sale of logs; warranty excluded); 1896, *Miller v. Elec-*

tric Co., 133 Mo. 205, 34 S. W. 585 (a contract for boilers of a certain horse-power; collateral oral agreement excluded); 1895, *Quinn v. Moss*, 45 Nebr. 614, 63 N. W. 931 (a guarantee that cigars sold should be "union made," excluded); 1882, *Naumberg v. Young*, 44 N. J. L. 331 (lease of a building for the purposes of a button factory, an engine and boiler passing as fixtures; oral guarantee that the engine and boiler were in thorough repair, excluded); 1890, *DeWitt v. Berry*, 134 U. S. 312, 10 Sup. 536 ("If a contract of sale is in writing and contains no warranty, parol evidence is not admissible to add a warranty"); 1891, *Seitz v. Refrig. Co.*, 141 id. 510, 12 Sup. 46 (sale of refrigerating machine, mentioning only size and price; warranty excluded); 1892, *Van Winkle v. Crowell*, 146 id. 42, 48, 13 Sup. 18 (machinery furnished; oral warranty excluded); 1893, *Wilcox v. Cate*, 65 Vt. 478, 26 Atl. 1105 (boiler-engine lease; oral warranty excluded); 1894, *Milwaukee B. Co. v. Duncan*, 87 Wis. 120, 125, 58 N. W. 232 (boiler-sales; oral warranty excluded); 1895, *Case Plow Works v. N. & S. Co.*, 90 id. 590, 63 N. W. 1013 (a written warranty as to quality of wheels; an oral warranty as to manner of securing spokes in hubs rejected); 1896, *Caldwell v. Perkins*, 93 id. 89, 67 N. W. 29 (contract to sell fixtures and stock of merchandise; agreement to include furniture and tools, excluded).

Where the written warranty, whose existence is disputed, is said to have been lost, the oral transaction may of course, on another principle (*ante*, § 102), be used as evidence of its existence and terms: 1898, *Ingram v. Music House*, 51 S. C. 281, 28 S. E. 396.

² *Can.*: 1895, *Gordon v. Waterous*, 36 U. C. Q. B. 321, 332 (oral warranty here admitted); 1884, *Ellis v. Abell*, 10 Ont. App. 226, 242, 246 (good opinion by Burton, J.; oral warranty here held admissible by a divided court); *U. S.*: 1879, *Chapin v. Dobson*, 78 N. Y. 74 (written sale of machinery described; oral guarantee that it should work satisfactorily and, if not, might be returned, admitted; "it is one thing to agree to sell or furnish machines of a specific kind, as of such a patent or of a particular designation, and another thing to undertake that they shall operate in a particular manner"); 1885, *Eighmie v. Taylor*, 98 id. 288 (transfer of lease of oil wells; warranty of capacity offered; "if upon inspection of the writing, read, it may be, in the light of surrounding circumstances in order to its proper understanding and interpretation, it appears to contain the engagement, . . . it constitutes the contract between them. . . . If Chapin v. Dobson be near the border line in the application of the exception to the facts, there can be no question of the soundness of the doctrine").

³ 1814, *Meyer v. Everth*, 4 Camp. 22 (cited *supra*, note 1); 1895, *Case Plow Works v. N. & S. Co.*, 90 Wis. 590, 63 N. W. 1013 (a written

The insurer's *oral waiver* of the *insured's written warranty* is also commonly determined upon the same principle.⁴

§ 2435. **Agreements not to Sue, or not to Enforce, or to hold Conditional only.** (a) Where an obligation is embodied in a single document, the very essence of the obligation is its validity and enforcement. Hence an agreement, alleged to have been a part of the transaction, that the obligation should *not be used as binding* or enforceable can never be permitted to be shown, for the writing necessarily determines that very subject to the contrary; in the ordinary phrase, it is necessarily inconsistent with the writing. But here some distinctions are necessary. (1) By the general principle of legal acts (*ante*, § 2406), *no legal obligation* is created by a document which concerns merely *transactions of friendship* or the like. Hence a difficulty to determine whether that or the present principle should control, *i. e.* whether the understanding not to enforce the document signifies that it never became a legal act at all, or that it was a legal act which is still not to be observed in its terms; the former sort of agreement can be established, the latter not.¹ (2) Where the obligation is a *negotiable instrument*, different considerations may control; these are separately examined (*post*, § 2443). (3) Where an agreement *not to sue* is made *subsequent to the original and written agreement*, it is of course an independent transaction and may be established (*post*, § 2441). But such an independent agreement could not in a common-law trial defeat the claim; it could only create a separate cause of action for its breach, to be pursued by a separate suit. If, however, the damages in such a separate suit would be precisely equivalent to the amount recovered in the present suit, a Court of chancery, to avoid circuity of action, would enjoin the present suit; and that situation would be presented when the agreement was to *refrain forever* from suit, but not when it was to refrain for a *limited time*. In the former instance, therefore, the independent subsequent agreement could be availed of in chancery for that purpose, or in the original suit at law wherever equitable defences are permissible in common-law actions.²

(b) An extrinsic agreement providing a *condition qualifying the operation* of a written obligation is of course equally ineffective; for an obligation

warranty of wheels "against defects in material and workmanship" excludes an implied warranty of suitability for the purposes intended; distinguishing *Merriam v. Field*, 24 Wis. 640).

⁴ 1872, *Deweese v. Ins. Co.* 35 N. J. L. 366 (stipulation in an insurance policy that the property shall not be used for any other purpose than that described; the insurer's knowledge of such actual use at the time of the contract, excluded); 1878, *Franklin Ins. Co. v. Martin*, 40 id. 568, 574 (same; leading case, dealing with the further question of reforming the policy in equity); 1895, *Knudson v. Grand Council*, 7 S. D. 214, 63 N. W. 911; 1903, *Maupin v. Scottish U. & N. I. Co.*, 53 W. Va. 557, 45 S. E. 1003.

¹ Examples are found in the following cases, which should be compared with the cases cited *ante*, § 2406: 1893, *Western Mfg. Co. v. Rogers*, 54 Nebr. 456, 74 N. W. 849 (sale of goods with

note; oral agreement that buyer took on commission only, excluded); 1897, *Ellison v. Gray*, 55 N. J. Eq. 581, 37 Atl. 1018 (a promise that a certain requirement in a contract was "all right," meaning that it would not be binding, excluded); 1857, *Towner v. Lucas*, 13 Gratt. 705 (oral agreement between obligee and surety of a bond, to abstain from enforcement of it and to give a written indemnity, excluded); 1896, *Lowenfeld v. Curtis*, — C. C., — 72 Fed. 105 (a clause in a theatrical contract as to the prior submission to the play-owner of the personnel of the cast; the fact that the submission was not intended to be required, excluded).

² *Harriman on Contracts*, 2d ed., § 508, citing *Ford v. Beech*, 11 Q. B. 852; *Guard v. Whitehouse*, 13 Ill. 7; *Chicago v. Babcock*, 143 id. 358, 32 N. E. 271.

absolute is plainly exclusive of a condition. So far as the present principle is concerned, there is no doubt. But by the general principle of delivery (*ante*, § 2410), no conduct becomes effective as a legal act if its consummation is suspended until the happening of a condition precedent; and hence such a condition, precedent to the existence of the obligation, may always be established, and has the effect of destroying the apparent obligation of the writing embodying the draft of the act. The difficulty is to distinguish whether, in a given case, the condition is such a precedent one, or whether it is a subsequent one such as the present principle forbids recognizing. Here some subtlety of construction may be required.³

§ 2436. **Agreements of Counter-Claim, Set-off, Renewal, or Mode of Payment.** For the same reason as in the foregoing class of cases, an agreement concerning the *mode* or *medium of payment* of an obligation cannot be established, where the document in any respect deals with that subject; but documents bear such variances of detail in those matters that no fixed rule can be laid down.¹ An agreement of *renewal*, though it might be construed as virtually affecting the length of term of an obligation,² seems really to concern a new and different obligation. An agreement of *counter-claim* or *set-off*, provided it is not in form or essence a mere qualification of the mode of payment specified in the document, may properly be established, for it concerns a separate obligation.³

§ 2437. **Agreement to hold a Deed Absolute as Security only; Agreement to hold in Trust.** When a document of transfer of property is absolute in its terms, may an extrinsic contemporary agreement to *hold the property as security only* be established? This question has generally been answered in the affirmative;¹ though in one or two jurisdictions the contrary view is

³ Compare with the following the cases cited *ante*, §§ 2408, 2410, especially the Illinois rulings: 1890, *Beard v. Boylan*, 59 Conn. 181, 22 Atl. 152 (action for a debt; the defendant setting up a composition agreement with creditors, signed by the plaintiff, the plaintiff was not allowed to show that the writing was signed on an agreement that "it should be void unless so signed by all the creditors etc.," this being treated by the Court as a condition subsequent); 1898, *Ryan v. Cooke*, 172 Ill. 302, 50 N. E. 213 (sealed contract to manufacture; oral agreement on delivery that it was to be binding only on condition that the promisor obtained a city contract, excluded); 1898, *Houck v. Wright*, — Miss. —, 23 So. 422 (written contract for a piano; oral condition that the order might be countermanded within 30 days in case of a flood, etc., excluded); 1896, *Nebraska Expos. Ass'n v. Townley*, 46 Nebr. 893, 65 N. W. 1062 (condition to liability on a stock-subscription contract, excluded); 1880, *Van Syckel v. Dalrymple*, 32 N. J. Eq. 233 (mortgage payable April 1, 1873; agreement that "the mortgage should not be due and payable during the mortgagor's life, provided the mortgagor kept the interest paid up and put the property in repair and kept it so," excluded); 1896, *Taylor v. Hunt*, 118 N. C.

168, 24 S. E. 359 (agreement that if a debt was not indulged a lease should be void, excluded); 1898, *Shea v. Leisy*, 85 Fed. 243 (bond and mortgage to pay in four years; agreement to cancel on a lesser payment upon conditions, excluded).

¹ 1819, *Campbell v. Hodgson*, Gow 74 (agreement between acceptor and payee that the latter should not demand payment if he should reimburse himself from the effects of J., excluded; otherwise, so far as the reimbursement amounts to payment). Compare also the cases cited *ante*, § 2435, and, for negotiable instruments, *post*, § 2443.

² 1902, *Armington v. Stelle*, — Mont. —, 69 Pac. 115 (agreement of renewal of a lease, excluded). For the renewal of negotiable instruments, see *post*, § 2443.

³ *Contra*: 1845, *St. Louis Perp. Ins. Co. v. Homer*, 9 Metc. 39 (agreement that a sum found to be due under an insurance policy should be set off and applied in satisfaction of a note, excluded); 1837, *Eaves v. Henderson*, 14 Wend. 190 (agreement that a book account and the purchase of goods should serve as a set-off to a note for \$28.84, excluded). For negotiable instruments, see *post*, § 2443.

¹ These cases apply their conclusion alike to transfers of realty and of personality: *Can. :*

maintained,² and though in any event the terms of a particular document may require the contrary result.³ But the theory upon which the prevailing view rests has varied decidedly. By some Courts it has been placed on the ground (*post*, § 2439) of fraud,⁴ by others on the doctrine (*ante*, § 2433) of consideration,⁵ or both of those;⁶ and again it is said to involve merely the "object" of the parties,⁷ — whatever that may signify. Still others suggest a distinction between chancery and law,⁸ and between a proceeding in ejectment and other remedies.⁹ But none of these theories seem to be adequate, — for one reason, to name no others, because the rule of exclusion may sometimes become applicable on the facts of a given case.¹⁰ The apparent obstacle, which invokes the rule, is the absolute terms of the transfer, together with the circumstance that the traditional form of mortgage at common law — a condition of defeasance — seems to be plainly at war with the terms of such a deed. But that traditional form is a form merely, not recognized in modern law as literally valid. The essence of a security is an

1852, *Le Targe v. De Tuyl*, 3 Grant U. C. 369 (best opinion, by Blake, C.); 1852, *Holmes v. Matthews*, ib. 379, 384; 1892, *McMicken v. Ontario Bank*, 20 Can. Sup. 548, 575; *U. S.* 1898, *Hieronimus v. Glass*, 120 Ala. 46, 23 So. 674; 1895, *Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482; 1903, *Clark v. Ducheneau*, — Colo. —, 72 Pac. 831 (that a note was given only as security for performance of another contract, allowed); 1893, *Shad v. Livingston*, 31 Fla. 89, 97, 12 So. 646; 1888, *Okuu v. Kaiakawaha*, 7 Haw. 34 (in a common-law court); 1894, *Helbreg v. Schumann*, 150 Ill. 12, 21, 37 N. E. 99; 1896, *Trogon v. Trogon*, 164 id. 144, 45 N. E. 575; 1895, *Bever v. Bever*, 144 Ind. 157, 41 N. E. 944 (a reservation of a life estate shown to have been intended as a mortgage); 1895, *Libby v. Clark*, 88 Me. 32, 33 Atl. 657; 1872, *Campbell v. Dearborn*, 109 Mass. 130; 1895, *Riley v. Bank*, 164 id. 482, 41 N. E. 679 (stock-shares); 1897, *Dixon v. Ins. Co.*, 168 id. 48, 46 N. E. 436 (insurance policy); 1868, *Bowker v. Johnson*, 17 Mich. 42; 1896, *Pinch v. Willard*, 108 id. 204, 66 N. W. 42; 1897, *Kellogg v. Northrup*, 115 id. 327, 73 N. W. 230; 1898, *Germain v. Lumber Co.*, 116 id. 245, 74 N. W. 644; 1893, *Winters v. Earl*, 52 N. J. Eq. 52, 588, 28 Atl. 15; 1898, *Vanderhoven v. Romaine*, 56 id. 1, 39 Atl. 129; 1891, *Barry v. Colville*, 129 N. Y. 302, 29 N. E. 307; 1896, *Stith v. Peckham*, 4 Okl. 254, 46 Pac. 664; 1898, *Weisham v. Hocker*, 7 id. 250, 54 Pac. 464; 1893, *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931; 1897, *Shank v. Groff*, 43 W. Va. 337, 27 S. E. 340; 1897, *Gettelman v. Assur. Co.*, 97 Wis. 237, 72 N. W. 627 (insurance policy).

² 1894, *Eckford v. Berry*, 87 Tex. 415, 28 S. W. 937; 1897, *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. 762. So, too, apparently, in Kentucky, after much vacillation: 1824, *Thompson v. Patton*, 5 Litt. 74; 1830, *Edrington v. Harper*, 3 J. J. M. 353; 1839, *Thomas v. McCormack*, 9 Dana 108; 1898, *Munford v.*

Green, 103 Ky. 140, 44 S. W. 419 (repudiating the remark in *Seiler v. Bank*, 86 id. 131).

³ 1891, *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961 (sale of logs; that the transfer was merely in satisfaction of a chattel mortgage and the vendee was to pay only what remained after the debt and expenses were deducted, excluded on the facts).

⁴ 1895, *Baird v. Baird*, 145 N. Y. 659, 40 N. E. 222 ("The rule which excludes evidence of parol negotiations or conditions, when offered to contradict or substantially vary the legal import of a written agreement, does not prevent a party to the agreement, in an action between the parties, from showing by way of defence the existence of a contemporaneous oral agreement, made at the time the writing was executed and delivered, which would render the use of the written instrument, for any purpose contrary to or inconsistent with the oral stipulation, dishonest or fraudulent").

⁵ 1888, *Colt v. McConnell*, 116 Ind. 249, 19 N. E. 106 (Elliott, J.: "The facts pleaded do not impeach the conveying qualities of the mortgage; they simply impeach its consideration"); 1886, *McMillan v. Bissell*, 63 Mich. 66, 70, 29 N. W. 737 ("The agreement for the defeasance, whether written or unwritten, is no more than one of the conditions upon which the deed was given, and therefore constitutes a part of the consideration for the conveyance").

⁶ 1851, *Russell v. Southard*, 12 How. U. S. 139, 148 (said by Curtis, J., to involve in effect "both fraud and a vice in the consideration").

⁷ 1878, *Brick v. Brick*, 98 U. S. 514 (transfer of shares of stock, shown to be a pledge only; "the rule does not forbid an inquiry into the object of parties in executing and receiving the instrument").

⁸ Considered in the following cases: 1865, *Newton v. Fay*, 10 All. 505, 507; 1896, *German Ins. Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490.

⁹ *German Ins. Co. v. Gibe*, Ill., *supra*.

¹⁰ *Thomas v. Scutt*, N. Y., *supra*.

agreement to deal with the property so as to extinguish a certain debt, and no otherwise. In other words, the act of transfer and the user of the property transferred are distinct legal ideas; or, put still differently, the kind of estate — according to the category of fee simple, life estate, and the like — is a different thing from the quality of the estate, *i. e.* trust or security. The simple question is, then, whether the parties, under all the circumstances, appear to have intended the document to cover merely the kind of estate transferred, or to cover all possible aspects of the transfer, including that of the quality of the estate, *i. e.* its subjection to an equity of redemption; in the latter case, no extrinsic agreement can be considered.

By the same reasoning is to be determined the question whether an extrinsic *agreement to hold in trust* can be established. So far as the present rule is concerned, there would seem to be no objection; and this would be so also for agreements equivalent to a trust, for example, an agreement to reconvey on demand.¹¹ But by the statute of frauds (*post*, § 2454) such an agreement not in writing may be unenforceable; and thus, for a different reason, the agreement may still be unavailable; unless the doctrine of resulting trusts be held to remove the objection of the statute of frauds.¹²

§ 2438. **Agreement to hold as Surety or Agent only.** (1) Where a document is executed by A and B, apparently as equal principals, B may of course establish, as against A, an extrinsic agreement that between themselves B should be *surety only*, because the document does not embody the transaction between A and B, but only the transaction between them and the obligee.¹ But may B avail himself of an extrinsic agreement between himself and the obligee to treat B as surety only? On the analogy of the foregoing doctrine (*ante*, § 2437), it would seem that he may.² It is true that the execution is general and not limited in form; yet it may be said that the agreement does not dispute the existence and tenor of the obligation, but merely affects the use to which it may be put by the holder.

(2) Where a document is executed by “A, *agent for B*,” or by “A, treasurer of B. Co.,” whether A or B shall be liable, and whether A may avail himself of an agreement not to hold him personally, seems to be essentially a question of the proper interpretation of the terms used.³

(3) Where, however, a document is executed by A without any indication of agency in the document, and it is desired to establish an agreement between A and B that B shall as *undisclosed principal* be a party, for the purpose either of charging or entitling B or of exonerating A, the applica-

¹¹ 1885, *Hutchins v. Hutchins*, 98 N. Y. 56, 63.

¹² The cases are cited in Ames' Cases on Trusts, 1st ed., pp. 291, 295-320.

¹ The cases are cited in Brandt, Suretyship, 2d ed., §§ 29, 30.

² The following case is opposed: 1897, *Hobbs v. Batory*, 86 Md. 68, 37 Atl. 713 (“J. B. has rented his farm . . . to the said T. A. H. and S. R. H. for one year”; an agreement that

S. R. H. was to be surety only, not admitted against the lessor).

The agreement must of course, on the principle of § 2415, *ante*, be one known to and shared by the party holding the obligation. Where the document is a negotiable instrument, special considerations apply: *post*, § 2443.

³ 1893, *Mathews v. Mattress Co.*, 87 Ia. 246, 54 N. W. 225; and cases collected in Wambaugh, Cases on Agency, 658-664, 723-728, and Cook, Corporations, 4th ed., 1898, § 722.

bility of the present rule is directly involved. Here several distinctions have been taken. (a) In the first place, where the unnamed principal is *unknown* to the obligee, it is proper to give force to the contract between principal and agent for the purpose of charging or entitling the principal, though not of exonerating the agent;⁴ unless in the particular case the document plainly was intended to deal otherwise with the transaction.⁵ (b) In the second place, where the unnamed principal was *known* to the obligee but nevertheless not named in the document, the rule *may* here equally permit the agreement to be available for the former purpose above mentioned; yet the ordinary inference will be that the named parties intended the document to be exclusive of all other parties, unless a contrary intention be made to appear. The general state of the law is sufficiently outlined in the following passage:

1896, *Wolverton, J., in Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378: "The question is here presented whether it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution. There are two opinions touching the question, among American authorities, — the one affirming, and the other denying; but the case is one of first impression here, and we feel constrained to adopt the rule which may seem the more compatible with the promotion of justice, and the exaction of honest and candid transactions between individuals. The English authorities are agreed that parol evidence is admissible to show that a written contract executed in the name of an agent is the contract of the principal, whether he was known or unknown; and the American authorities are a unit, so far as the rule is applied to an unknown principal, but disagree where he was known at the time the contract was executed or entered into by the parties. All the authorities, both English and American, concur in holding that, as applied to such contracts executed when the principal was unknown, parol evidence which shows that the agent who made the contract in his own name was acting for the principal does not contradict the writing, but simply explains the transaction; for the effect is not to show that the person appearing to be bound is not bound, but to show that some other person is bound also. And those authorities which deny the application of the rule where the principal was known do not assert or maintain that such parol testimony tends to vary or contradict the written contract, but find support upon the doctrine of estoppel; it being maintained that a party thus dealing with an agent of a known principal elects to rely solely upon the agent's responsibility, and is therefore estopped to proceed against the principal. The underlying principle, therefore, upon which the authorities seem to diverge, is the presumption created by the execution of the contract in the name of the agent, and the acceptance thereof by a party, where the principal is known. Is this presumption conclusive, or is it disputable? Without attempting to reconcile the decisions, we believe the better rule to be that the presump-

⁴ 1841, *Higgins v. Senior*, 8 M. & W. 834, 844 (Parke, B.: "[To allow an unnamed principal to be entitled or charged] in no way contradicts the written agreement; it does not deny that it is binding on those whom, on the face of it, it purports to bind, but shows that it binds also another, by reason that the act of the agent in signing the agreement in pursuance of his authority is in law the act of the principal. But, on the other hand, to allow evidence to be given that the party who appears on the face of the instrument to be personally contracting

party is not such, would be to allow parol evidence to contradict the written agreement").

⁵ 1848, *Humble v. Hunter*, 12 Q. B. 310 (rule not applicable to a charter-party wherein the alleged agent described himself as "owner" of the ship). The following further distinction seems sound: 1871, *Fleet v. Murton*, L. R. 7 Q. B. 126, 130 (broker's contract expressly as broker for undisclosed principal; custom to undertake personal liability in case the principal is not disclosed, admitted); 1873, *Hutchinson v. Tatham*, L. R. 8 C. P. 482, 486 (similar).

tion thus created is a disputable one, and that the intention of the party must be gathered from his words, and the various circumstances which surround the transaction, as its practical effect is to promote justice and fair dealing. — The principal may have recourse to the same doctrine to bind the party thus entering into contract with his agent. Parol evidence, however, is not admissible to discharge the agent, as the party with whom he has dealt has his election as to whether he will hold him or the principal responsible.”⁶

§ 2439. **Fraud.** The doctrine of extrinsic fraud as sufficient to make a legal act voidable has already been considered (*ante*, § 2423). But what is the bearing of the present rule? When a transaction has been reduced to a single document, how is it that fraud can be established extrinsically? A simple answer seems to be that since the present rule depends (*ante*, § 2430) on the intent of the parties to embody one or more subjects of transaction exclusively in the document, it is impossible to suppose that the subject of fraud was intended thus to be covered, since by hypothesis the party upon whom the fraud is practised does not know of it and therefore could not have had such an intent. But, if this be true, what becomes of that other application of the rule, well established for most transactions (*ante*, § 2434), that warranty-representations extrinsic to the document cannot be availed of? Fraud is always a matter of false representations; and how is it that extrinsic representations are as warranties to be ignored but as fraud to be admitted? The explanation seems to be that the vital additional element in fraud is the party's state of mind, which neither can be nor is intended to be embodied in the written document, and that hence the rule does not forbid considering it wherever it is the vital element of the claim. In other words, in an action of *deceit*, or in a proceeding of *rescission of contract* wherever this by the law depends upon the promisor's conscious falsity, the present rule interposes no obstacle; although in an action of contract upon an alleged warranty as a part of it, or in a proceeding of rescission for breach of warranty or innocent misrepresentation, the same representations could not be considered.¹

It may be added that the term “fraud” must here be understood in its legitimate narrow sense, *i. e.* a misrepresentation of a *present or past fact*; for, although a much looser significance has been occasionally intimated,² yet it is obvious that an intent not to perform a promise (*i. e.* a misrepresentation as to a future fact), or a subsequent failure knowingly to perform an extrinsic agreement not embodied in the writing, cannot in strictness be legally included in the term “fraud.” It seems to be a disregard of this distinction

⁶ The authorities are collected in Wambaugh, *Cases on Agency*, 627-657, 673-723. The distinction sometimes made between sealed contracts and simple contracts (*Briggs v. Partridge*, 1876, 64 N. Y. 357) ought to have no place here.

¹ 1814, *Meyer v. Everth*, 4 Camp. 22 (deceit); 1889, *State v. Cass*, 52 N. J. L. 77, 18 Atl. 972 (fraudulent representations as to speed, in the sale of a horse; “as an additional warranty, that is, an addition to the contract, the present representations were clearly inadmissible; so soon, however, as they displayed such features

as went to show that through them the contract had been fraudulently induced, and so was unenforceable for that reason at the election of the defrauded party, the rule excluding parol testimony to enlarge a written contract became inoperative”).

² 1840, *Story, J.*, in *Bottomley v. U. S.*, 1 Story 135, 152 (“I know of no case where parol evidence is not admissible to establish fraud, even in the most solemn transactions and conveyances”).

that is in part responsible for the anomalous attitude of the Pennsylvania Court (*ante*, § 2431) towards the general rule.³

§ 2440. **Trade Usage and Custom.** Where the parties have not intended to make the document embody the transaction upon a particular topic, its terms may be as well supplied by implied extrinsic agreement as by express extrinsic agreement. In other words, that *usage* or *custom of a trade or locality*, which would otherwise by implication form a part of the transaction, will equally form a part when the transaction has been embodied in a document, provided the document was not intended to cover the topic affected by the custom. The test is on principle the same as for express extrinsic agreements; except that in the case of the custom the ordinary presumption is in favor of its implication, because the topics covered by the writing will usually be those which do not concern some known and usual term but vary in each particular transaction:

1836, *Parke, B.*, in *Hutton v. Warren*, 1 M. & W. 466, 475: "[The inclusion of customs into written contracts] has been done upon the principle of presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."

1854, *Coleridge, J.*, in *Brown v. Byrne*, 3 E. & B. 703: "In all contracts, as to the subject-matter of which known usages prevail, parties are found to proceed with the tacit assumption of these usages; they commonly reduce into writing the special particulars of their agreement, but omit to specify these known usages, which are included however, as of course, by mutual understanding; evidence therefore of such incidents is receivable. The contract in truth is partly express and in writing, partly implied or understood and unwritten."

1837, *Story, J.*, in *The Schooner Reeside*, 2 Sumn. 567: "I own myself no friend to the almost indiscriminate habit, of late years, of setting up particular usages or customs, in almost all kinds of business and trade, to control, vary, or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long appeared to me, that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses, to outweigh the well-known and well-settled principles of law. And I rejoice to find, that, of late years, the Courts of law, both in England and in America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is, to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising, not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character. It may also be admitted to ascertain the true meaning of a particular word, or of particular words, in a given instrument, when the word or words have various senses, some common, some qualified, and some technical, according to the subject-matter to which they are applied. But I apprehend that it never can be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract, and, *a fortiori*, not in order to contradict them. An express contract of the parties is always admissible to supersede, or vary, or control a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts, but it would be

³ The unsoundness of that theory of fraud is well expounded in an opinion by Allen, P., in *Towner v. Lucas* (1857), 13 Gratt. 705, 716.

to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties."

The application of the rule in a given instance depends entirely on the nature of the transaction and the terms of the particular document, and precedents are of little service.¹

§ 2441. **Novation, Alteration, and Waiver; Subsequent Agreements.** The general rule now under consideration rests on the assumption that a specific

¹ The following will suffice as examples; distinguish the cases cited *post*, §§ 2462, 2464 (usage to interpret the words in a document): *Eng.* 1779, *Wigglesworth v. Dallison*, 1 Doug. 201 (lease for 21 years; custom for the tenant to take crops sown before expiration of the lease, admitted); 1800, *Ougier v. Jennings*, 1 Camp. 505, note (policy on a ship from Newfoundland to Portugal "beginning the adventure from the loading thereof"; usage admitted to include an intermediate loading before the voyage to Portugal); 1808, *Vallance v. Dewar*, 1 Camp. 503 (policy on a ship "at and from any port or ports in Newfoundland"; usage admitted to include an intermediate voyage after arrival in Newfoundland and before starting homeward); 1816, *Yates v. Pym*, 6 Taunt. 446 (written sale of bacon; trade usage requiring inspection of defects before a certain time, excluded); 1832, *Blackett v. Ins. Co.*, 2 Cr. & J. 244, 249 (policy on a ship, tackle, apparel, etc.; a usage of underwriters not to pay for boats hung outside the ship on the quarter, excluded, since the policy was "upon the face of it, upon the whole ship, on all her furniture, and all her apparel"); 1838, *Bottomley v. Forbes*, 5 Bing. N. C. 121 (a charter-party provided for the payment of freight on cotton, "cotton to be calculated at 50 cubic feet per ton"; cotton after unloading expands so that the cubic measurement at loading and unloading differ greatly; a usage to measure at the shipper's warehouse was admitted); 1843, *R. v. Stoke-upon-Trent*, 5 Q. B. 303 (contract to work "from the 11th day of November next until the 11th November 1817"; a custom in that branch of manufacturing "to allow holidays at certain fixed times of the year," on the ground that "its notoriety makes it virtually part of the contract"); 1848, *Syers v. Jonas*, 2 Exch. 111, 116 (usage in the tobacco trade that sales should be conditioned on correspondence with sample, admitted; "such usage is admissible whenever it is not expressly or impliedly excluded by the tenor of the written instrument"); 1854, *Brown v. Byrne*, 3 E. & B. 708 (bill of lading agreeing to pay "freight § d. per pound, with 5 per cent prime, and average accustomed," and saying nothing about time of payment or discount; a local custom to allow 3 mos. discount, admitted); 1859, *Martin, B.*, in *Langton v. Higgins*, 4 H. & N. 401, 408 (sale of goods in writing, and issue as to time of delivery to pass title; "they cannot add to the writing by showing that at the time the contract was made they had been accustomed to do something further"); *U. S.* 1903, *Withers v. Moore*, 140 Cal. 591, 71 Pac.

697 (custom as to alteration of coal prices, excluded); 1841, *Kilgore v. Bulkeley*, 14 Conn. 362, 391 (note falling due on a date which was Sunday; local usage admitted to show that in such cases the note was payable on the Saturday before; clear opinion by Storrs, J.); 1885, *Gilbert v. McGinnis*, 114 Ill. 28, 28 N. E. 382 (sale of corn, with an agreement by the buyer to make "advances" of money; a custom among grain merchants to make such an advance only upon a note by the seller for the amount advanced, excluded); 1890, *Scott v. Hartley*, 126 Ind. 239, 25 N. E. 826 (sale of grain at "50½ net"; a custom to deduct freight paid by the consignee, excluded); 1893, *Destrehan v. Lumber Co.*, 45 La. An. 920, 924, 13 So. 230 (custom of measuring, etc., allowed, to supply the contract on matters not covered by the writing); 1900, *Menage v. Rosenthal*, 175 Mass. 358, 56 N. E. 579 (salesman's contract to travel "throughout the New England States"; custom to stay and work in New York "whenever trade is in town," excluded); 1898, *Germain v. Lumber Co.*, 116 Mich. 245, 74 N. W. 644 (custom as to taking away logs, not admitted on the facts); 1895, *Fairly v. Wappoo Mills*, 44 S. C. 227, 22 S. E. 112, 114 ("sold 2000 tons, seller paying brokerage at 10 cents per ton"; evidence of a custom to pay brokerage on only the amount delivered, not the amount contracted for, was rejected); 1895, *Richards Co. v. Hildebeitel*, 92 Va. 91, 22 S. E. 806 (a contract specifying the prices for laying bricks; local usage admitted as to the method of ascertaining the quantities laid); 1897, *Hansbrough v. Neal*, 94 id. 722, 27 S. E. 593 (custom admitted to fix the value of services).

From the foregoing rule are to be distinguished three other classes of questions in which usage becomes material: (a) The question of *contract*, whether a particular usage may be implied into a contract, supposing it not to have been reduced to writing; and the doctrine that a local custom will not be added by implication alone to the terms of a contract, where a definite rule of law obtains to the contrary (*Barnard v. Kellogg*, 1870, 10 Wall. 383); (b) The question of *standard of interpretation*, whether a term used in a transaction, written or oral, is to be interpreted by a *usage not known to both parties* (*post*, § 2464); (c) The further question of *interpretation*, whether a usage adopted by both parties can be allowed to *displace the general meaning of a word* when contrary to the usage (*post*, § 2462); the cases involving this question are often apt to be confused with cases involving the rule here under consideration about varying the terms of a document.

transaction has been embodied exclusively in a single document. All distinct and separate transactions may therefore be established and availed of, whenever they are in themselves valid. Now a transaction *subsequent in time* must always be a separate transaction. The rule of exclusion can only apply to negotiations contemporaneous in time, or prior but incomplete. Where a document, for example, is executed on July 1, it may be held to embody the final and exclusive result of negotiations before and up to the time of execution; but a transaction on August 1 must be a separate one and therefore can never be excluded, so far as the effect of the document of July 1 is concerned. It may be that some rule of form (*post*, § 2454) will sometimes make the transaction of August 1 invalid in itself (as when a writing is required by the statute of frauds, or where a parol release will not discharge a sealed contract); but the present rule can interpose no obstacle. In particular, any subsequent agreement *altering, waiving, discharging, or otherwise novating* a prior transaction is not excluded by reason of the prior transaction having been reduced to writing:

1833, *Denman, C. J.*, in *Goss v. Lord Nugent*, 5 B. & Ad. 58: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract; but after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreements, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract; which is to be proved, partly by the written agreement, and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement. And if the present contract was not subject to the control of any act of Parliament, we think that it would have been competent for the parties, by word of mouth, to dispense with requiring a good title to be made to the lot in question, and that the action might be maintained. But the Statute of Frauds has made certain regulations as to contracts for the sale of lands."

The application of this principle varies in practice according to the nature of the particular legal right and the actual separation of the transactions in time.¹

§ 2442. **Miscellaneous Applications of the Rule to exclude or admit "Collateral" Agreements.** It does not seem possible to generalize further than on

¹ The following rulings will serve as examples: 1773, *Milton v. Edgworth*, 5 Bro. P. C. 313 (the rate of interest on a mortgage loan made in writing may be reduced by subsequent oral agreement); 1892, *Guidery v. Green*, 95 Cal. 630, 634, 30 Pac. 786 (oral agreement that another instrument should be substituted for the one in question, admitted); 1892, *Chicago B. & O. R. Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380 (agreement not to ride in stock-car; a practice of the railroad to permit it, admitted as a waiver); 1837, *Eaves v. Henderson*, 14 Wend. 190 (though a contemporary agreement to apply other claims in set-off of a note was excluded, a subsequent agreement to accept them

in payment was admitted); 1896, *Harris v. Murphy*, 119 N. C. 34, 25 S. E. 708 (contract for work and labor in raising a barge; a subsequent alteration admitted); 1896, *Dunklee v. Goodnough*, 68 Vt. 113, 34 Atl. 427 (subsequent agreement relating to the mode of payment; admitted); 1899, *Keating v. Pacific S. W. Co.*, 21 Wash. 415, 58 Pac. 224 (the plaintiff signed shipping-articles as seaman; on boarding the vessel, he found a sail unseaworthy; he had then the right to abandon the voyage, and a parol agreement by the ship not to use the defective sail was a new contract which could be availed of).

the preceding topics. The application of the rule, resting as it does upon the parties' intent, can be properly made only after a comparison of the kind of transaction, the terms of the document, and the circumstances of the parties. Even in the foregoing classes of transactions, it is rarely that the circumstances of a particular case cannot justify a special result contrary to the ordinary one. Such is the complexity of circumstance and the variety of documentary phraseology, and so minute the indicia of intent, that one ruling can seldom be of controlling authority or even of utility for a subsequent one. The opinions of judges are cumbered with citations of cases which serve no purpose there except to prove what is not disputed,—the general principle. Other than in relation to some of the foregoing topics which have broad and uniform bearings, individual rulings can have little value as precedents unless the entire detail of the documents and circumstances is set forth; and an abbreviation of them is therefore more likely to mislead than to profit. The application of the rule should in almost all instances be left (*ante*, § 16) to the trial judge's determination.¹

¹ The following citations may serve to illustrate the variety of application of the rule: *England*: 1769, *Preston v. Merceau*, 2 W. Bl. 1249 (in an action for rent on a house-lease "for 21 years at 26l. per annum," the lessor, who owned the house only, was not allowed to prove a further agreement by the defendant to pay the ground rent of 2l. 12s. 6d. a year); 1808, *Higginson v. Clowes*, 15 Ves. Jr. 516 (auction-sale in writing of lots of land, the purchaser "to take the timber at a fair valuation"; the auctioneer's oral statement at the sale that the timber of each lot was to be valued separately, excluded); 1838, *Ellis v. Thompson*, 3 M. & W. 445, 452 (sale of lead, "deliverable in the river Thames"; "the question of reasonable or not reasonable time is collateral to the contract"); 1845, *Eden v. Blake*, 13 id. 614 (at an auction sale the catalogue described an article as silver, but the auctioneer before selling announced publicly that it was only plated; the defendant bought but refused to accept; held, that the oral declaration of the auctioneer could be received, subject to the jury's finding that the catalogue was understood by the buyer not to be the exclusive basis of the purchase; "the sole question is, what were the terms upon which this article was sold? Are they in writing? . . . It is for the jury to say whether the contract existed in the printed particulars alone or partly in them and partly in parol"); 1871, *Morgan v. Griffith*, L. R. 6 Exch. 70 (lease of grass land; oral agreement by the landlord to destroy the rabbits, held "collateral to the lease"); 1875, *Angell v. Duke*, 32 Law T. Rep. N. s. 320 (lease of premises, with the furniture on the premises; an agreement by the lessor to put in more furniture, excluded); 1894, *Grimston v. Cunningham*, 1 Q. B. 125 (written agreement to employ an actor; oral agreement to give him certain parts, excluded); *United States*: *Ala.*: 1897, *Brewton v. Glass*, 116 Ala. 629, 22 So. 916 (written agreement to build waterworks, etc.; oral agreement to give bond for faithful

performance, excluded); *Ark.*: 1898, *Rector v. Bernaschina*, 64 Ark. 650, 44 S. W. 222 (written agreement to board "three persons"; oral agreement specifying the three, excluded); *Cal.*: 1897, *Bradford S. Co. v. Joost*, 117 Cal. 204, 48 Pac. 1083 (agreement as to the use of collateral security); 1897, *Wolters v. King*, 119 id. 172, 51 Pac. 35 (written agreement for commissions; oral agreement as to time of payment received); *Colo.*: 1896, *United States M. A. Ass'n v. Kittenring*, 22 Colo. 257, 44 Pac. 595 (oral agreement different from terms of policy; excluded); *Fla.*: 1897, *Chamberlain v. Lesley*, 39 Fla. 452, 22 So. 736 (papers not purporting to contain the whole agreement; other evidence admitted); *Ida.*: 1897, *First Nat'l Bank v. Bews*, 5 Ida. 678, 51 Pac. 777 (mortgage of building, etc.; oral agreement of mortgagees to insure for \$25,000, excluded); *Ind.*: 1855, *Noble v. Epperly*, 6 Ind. 468, 471 (replevin; written agreement between the parties affecting an alleged partnership; their true intent in making the agreement allowed to be shown, on the facts); 1859, *Draper v. Vanhorn*, 12 id. 352 (treated as similar); 1859, *Williams v. Dewitt*, 12 id. 309, 312 (writing containing terms of arbitration, held exclusive); 1896, *Smith v. McClain*, 146 id. 77, 45 N. E. 41 (the fact rejected that a quitclaim deed transferring the interest of heirs to an estate was intended merely as a partition, and therefore merely severed unity of possession without conferring additional title); 1898, *Lowry v. Downey*, 150 id. 364, 50 N. E. 79 (exchange of land by deeds; oral agreement by one party to pay off an incumbrance on the land conveyed, admitted); *Ida.*: 1894, *Lerch v. Times Co.*, 91 Ia. 750, 60 N. W. 611 (written lease; oral agreement to put in a steam-heating apparatus, excluded); 1897, *Beeson v. Green*, 103 id. 406, 72 N. W. 555 (deed containing assumption of mortgages; grantee not allowed to deny the agreement); *Kan.*: 1899, *Milich v. Packing Co.*, 60 Kan. 229, 56 Pac. 1 (contract between next of kin and one charged with

§ 2443. **Rule applied to Negotiable Instruments; General Principle.** The general principle of Integration (*ante*, § 2425)—in other words, the rule

deceased's death, the former releasing and agreeing to procure a release from another, the latter agreeing to pay; parol agreement by the latter to employ the former, excluded); *Ky.*: 1898, *Sutton v. Lumber Co.*, — *Ky.*, 44 S. W. 86 (written agreement for hauling lumber; agreement to furnish right of way, excluded); 1898, *Vansant v. Runyon*, — *id.*, 44 S. W. 949 (lumber-contract; agreement as to mode of advances, excluded); *Me.*: 1898, *Gould v. Excelsior Co.*, 91 Me. 214, 39 Atl. 555 (written agreement for cutting, peeling, and driving poplar timber; oral agreement as to who should scale it, received); *Md.*: 1900, *Hawley Down-Draft Furnace Co. v. Hooper*, 90 Md. 390, 45 Atl. 456 (defendant bought of plaintiff a furnace with the written guaranty that it "will save 12 per cent in cost of fuel over present method of making steam"; oral agreement that the "saving of 12 per cent" was to be determined by a comparative test "measured by the number of tons of coal consumed before the Hawley furnace was put in with the coal consumed after it was put in"; held admissible); *Mass.*: 1843, *Brockett v. Bartholomew*, 6 Metc. 396 (the understanding of all the parties to a lease, that the amounts payable included the price for the stock of goods agreed by the writing to be purchased, excluded); 1876, *Carr v. Dooley*, 119 Mass. 294 (deed of land; oral agreement by the vendor to pay for an adjacent sewer in the course of construction, admitted); 1887, *Graffam v. Pierce*, 143 id. 386, 9 N. E. 819 (deed of two houses and lease of a hall, by defendant to plaintiff; an oral agreement by defendant to put hard-pine flooring into the hall, admitted); 1888, *Ayer v. Mfg. Co.*, 147 id. 46, 16 N. E. 754 (sale of soap; vendor's agreement to advertise it, admitted); 1892, *Durkin v. Cobleigh*, 156 id. 108, 30 N. E. 474 (deed of land described as bounded on a street; the vendor's oral agreement to build the street, and to put in water connections, admitted as "an independent collateral agreement which need not be included in the deed"); 1896, *Rackemann v. Impr. Co.*, 167 id. 1, 44 N. E. 990 (agreement by a vendor of land not to sell adjoining lots at a less price, admitted); *Mich.*: 1894, *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774 (sale of land; agreement to return one third of the proceeds of the crop, excluded); 1895, *Hutchison Mfg. Co. v. Pinch*, 107 id. 12, 64 N. W. 729, 66 N. W. 340 (agreement to pay for machinery when the mill "gives good results"; parol condition as to the power of the machinery, excluded); 1896, *Harrison v. Howe*, 109 id. 476, 67 N. W. 527 (a lease allowed sub-leasing for "business purposes"; an agreement not to sub-lease for a saloon, excluded); 1897, *Patek v. Waples*, 114 id. 669, 72 N. W. 995 (written stipulation for discontinuance without costs; oral agreement to pay counsel fees, admitted); *Minn.*: 1896, *Hand v. Ryan Drug Co.*, 63 Minn. 539, 65 N. W. 1081 (a contract to give a credit on specified terms; agreement to give similar credits on other terms held admissible); *Miss.*:

1898, *Maxwell v. Chamberlin*, — *Miss.*, 23 So. 266 (written agreement conveying property subject to a lien; oral agreement by the grantee to assume the debt secured, excluded); *Nebr.*: 1898, *Sylvester v. Paper Co.*, 55 Nebr. 621, 75 N. W. 1092 (agreement concerning personal services in a printing establishment); *N. J.*: 1896, *McTague v. Finnegan*, 54 N. J. Eq. 454, 35 Atl. 542 (agreement as to inheritance and support); *N. Y.*: 1897, *Emmett v. Penoyer*, 151 N. Y. 564, 45 N. E. 1041 (a contract of sale of stock and fixtures contained nothing about the price, except the figures "\$2500"; extrinsic agreement as to the price, admitted); *Oh.*: 1895, *Tuttle v. Burgett*, 53 Oh. St. 498, 42 N. E. 427 (in a contract in covenant form to furnish support, an agreement that the promisee would live at a certain place was excluded); *S. D.*: 1896, *Roberts v. Machine Co.*, 8 S. D. 579, 67 N. W. 607 (commission-agent's contract); *Tenn.*: 1896, *Hines v. Wilcox*, 96 Tenn. 148, 33 S. W. 914 (memorandum of lease dealing only with the obligations of the tenant; oral promise of the landlord to put in repair, admitted); 1896, *Lewis v. Tumley*, 97 id. 197, 36 S. W. 872 (deed of sale; provision for the transfer of insurance policies, admitted); *Tex.*: 1895, *Jones v. Risley*, 91 Tex. 1, 32 S. W. 1027 (building contract; agreement as to powers of engineer, rejected); *U. S.*: 1895, *The Poconoket*, 67 Fed. 267 (agreement as to the vesting of title of a vessel, the construction-agreement being silent, admitted); 1895, *Harman v. Harman*, 17 C. C. A. 479, 70 Fed. 894, 896 (lease of land in writing; parol agreement by the lessor to devise the lands to the lessees on his death, on condition that they improved the land and paid an annual rent, admitted); 1897, *Godkin v. Monahan*, 27 id. 410, 83 Fed. 116 (written agreement to cut, bank, and deliver timber; oral agreement by the other party to furnish a place for banking, excluded); 1898, *Reid v. Diamond P. G. Co.*, 29 id. 110, 85 Fed. 193 (written agreement for sale at a certain price; oral agreement for reduction of price in case of a fall in the market, excluded); 1902, *Sun P. & P. Ass'n v. Edwards*, 51 id. 279, 113 Fed. 445 (contract of employment of a superintendent of printing, mentioning salary and powers, held to exclude an additional oral agreement by the appointee to furnish compositors and other employees); *Utah*: 1897, *Moyle v. Congreg. Soc.*, 16 Utah 69, 50 Pac. 806 (agreement as to the effect of an assignment of a contract, excluded); *Vt.*: 1897, *Pictorial League v. Nelson*, 69 Vt. 162, 37 Atl. 247 (contract to send cuts, etc.); *Va.*: 1895, *Witz v. Fite*, 91 Va. 446, 22 S. E. 171 (whether the giving of a higher security merges other securities); *W. Va.*: 1895, *Long v. Ferine*, 41 W. Va. 314, 23 S. E. 611 (sale of fruit-land; oral agreement to allow the buyer to take fruit from adjoining land of the seller till the trees bought should bear fruit, excluded); 1895, *Wilfong v. Johnson*, ib. 283, 23 S. E. 730 (agreement to furnish support, as a consideration for a conveyance); *Wis.*: 1897, *Oliver v. Hail*, 95

against "varying the terms" of a document — takes on an altogether peculiar aspect when applied to agreements collateral to a negotiable instrument.

The first characteristic feature of such a document, as being the embodiment of an obligation capable of transfer without hindrance, is, not merely that all the essential terms of the obligation — persons, amount, and time, — *must* be therein contained in writing (*post*, § 2451), but that certain others than these essential terms *must not* be. The advantages of unhindered transfer, due to the certainty and precision of its terms and the independence of a transferee's rights, can be attained only by limiting the scope of the obligation to a few elemental attributes. Its contents therefore are both predetermined and limited, if it is to possess the character of negotiability at all:

1789, *Eyre, L. C. B.*, in *Minet v. Gibson*, 2 H. Bl. 569: "Everything which is necessary to be known, in order that it may be seen whether a writing is a bill of exchange, and as such by the custom of merchants partakes of the nature of a specialty and creates a debt or duty by its own proper force (whether by the same custom it be assignable, and how it shall be assigned, and whether it has in fact been assigned agreeable to the custom) appears at once by the bare inspection of the writing; with the circumstance, in the case of a bill payable to bearer, of that bill being in the possession of him who claims title to it. The wit of man cannot devise anything better calculated for circulation. The value of the writing, the assignable quality of it, and the particular mode of assigning, are created and determined in the original frame and constitution of the instrument itself; and the party to whom such a bill of exchange is tendered has only to read it, need look no further, and has nothing to do with any private history that may belong to it. The policy which introduced this simple instrument demands that the simplicity of it should be protected, and that it should never be entangled in the infinitely complicated transactions of particular individuals into whose hands it may happen to come."

1846, *Gibson, C. J.*, in *Overton v. Tyler*, 3 Pa. St. 346: "A negotiable bill or note is a courier without luggage. It is a requisite that it be framed in the fewest possible words, and those importing the most certain and precise contract; and, though this requisite be a minor one, it is entitled to weight in determining a question of intention. To be within the statute, it must be free from contingencies or conditions that would embarrass it in its course; for a memorandum to control it, though indorsed on it, would be incorporated with it, and destroy it."

That it *must* contain some things is therefore not so important for the present purpose as that it *must not* contain other things.

The other important consideration, tending to affect the present principle, is that the largest part of the terms of the obligation of a negotiable instru-

Wis. 364, 70 N. W. 346 (time of payment, excluded); 1897, *Morgan v. S. M. L. V. Co.*, 97 id. 275, 72 N. W. 872 (conveyance subject to mortgage; grantee's agreement to pay mortgage, allowed to be shown).

The peculiar *Pennsylvania* rule (*ante*, § 2431) is illustrated in the following cases: 1895, *Dixon-Woods Co. v. Glass Co.*, 169 Pa. 167, 32 Atl. 432 (written contract to give the plaintiff possession of defendant's premises for the purpose of building; parol agreement at the time to provide certain room for storage, excluded); 1897, *Dickson v. Mfg. Co.*, 179 id. 343, 36 Atl. 246 (agreement as to time, the original contract of employment being silent, excluded); 1897,

Beaver v. Slear, 182 id. 213, 37 Atl. 991 (a note for one day not mentioning interest, but legally subject to interest after maturity; an agreement as to the payment of interest during life, admitted); 1898, *Myerstown Bank v. Roessler*, 186 id. 431, 40 Atl. 963 (agreement not to assign a mortgage in a certain way, admitted).

For proving a document's date erroneous, see *ante*, § 2410.

For proving the parties' "understanding" as to the terms of a contract, see *ante*, § 1971 (Opinion rule) and *post*, § 2465 (Interpretation).

For the use of an account stated, as embodying an agreement, see *ante*, § 1071.

ment is *annexed to it by the law*, without expression in the document. The rules of presentment and demand, of acceptance and dishonor, of transfer of title and obligations by indorsement, of primary and secondary liability — all of the terms, except the individually variant ones of person, amount, time, and perhaps place, are prescribed and annexed by the law. Moreover, they form a systematic whole, and are implied as a whole if at all.

What is the situation, then, of parties who wish to employ a negotiable instrument for the sake of some one or more specific attributes, but wish also to *modify for their own case some of the other generic consequences ordinarily implied* as a part of the whole? They cannot specify these modifications in the instrument without destroying all its negotiable qualities, including those which they desire to secure.¹ On the other hand, by making no specific modification, they will be fixed with consequences which they do not desire. For example, A is desirous of obtaining the use of B's credit in buying from C, but B owes nothing to A; if B draws a bill of exchange on A, payable to C, and A accepts it, this will secure the purpose of adding B's credit and liability to the obligation and C will consent to receive it; then if A fails to pay at maturity, and B is obliged to pay, the normal consequence, by implication of law, is that B recovers the amount from A. Here no modification of the law's annexed incidents is necessary for carrying out all parts of their desired transaction. But suppose that C will not consent to receive A as the primary obligor, but insists on having B in that relation; then this purpose can be accomplished by drafting the bill in A's name as drawer and B's name as drawee and acceptor, or by drafting a note in B's name as maker, with A's name as payee and indorser. But in these two cases, if B, the primary obligor, is compelled by C to pay, there remains to him, as acceptor or maker, no claim for reimbursement by A, or, if A is compelled to pay C, then A as indorser or drawer has a claim for reimbursement against B, — at least so far as the law's annexed incidents prescribe. Here, then, an agreement by A to reimburse or not to sue B must be made, and this agreement can find no place in the document, though it modifies the fixed implications of the instrument. Will the parol evidence rule refuse to recognize that agreement as enforceable? It is a platitude of the law that it will not; an accommodation bill or note is never allowed to be used against the accommodating party by the accommodated one.

The law, then, it is plain, has recognized the dilemma. It perceives that parties must constantly wish to employ a negotiable instrument for the sake of one or more of its special attributes while discarding others; it concedes that commercial transactions are variant in their exigencies, while the normal incidents of a negotiable instrument are fixed; and it does not force parties into the alternative of employing either all or none of them. It therefore

¹ The importance of this consideration is seen in an analogous situation under a statute requiring a certain document to cover named terms and no others: 1860, *Chapman v. Callis*, 2 F. & F. 161 (written bill of sale of a ship, under

the Merchant Shipping Act 1854, held not to displace a prior agreement to assume the vendor's liabilities; "the parties could not have put this term of their agreement in the bills of sale").

concedes that by special agreement the parties may discard or alter a specific implied incident, so far as its operation would affect themselves.

But the applicability of the present rule in a given case is always a question of the parties' intention (*ante*, § 2430). Now, while the extent of this agreement to discard or modify would thus ordinarily be a mere question of fact as to intention, still the parties' choice of a negotiable instrument necessarily signifies the adoption of *some* essential implied feature of such an instrument, — else they would have used some other form of document; hence, they cannot be allowed to avail themselves of an *agreement which would render that choice practically meaningless*. Moreover, the written tenor of the obligation — as to person, time, and amount — varies with each document as the parties choose; hence the writing is clearly the final embodiment of the obligation in these respects. For testing the application of the rule, therefore, the following two canons may be laid down:

(a) As regards the *variable*, or *expressed*, terms of the obligation in the document, no extrinsic agreement can be availed of to avoid their enforcement; but, (b) As regards the *fixed*, or *implied*, terms of the obligation, an extrinsic agreement can be availed of, if the transaction in hand is such, as a whole, that for one purpose of it the form of a negotiable instrument, or some particular feature of it, would be essential or peculiarly convenient, while for another and separate part of the transaction a different contract would be feasible and consistent.

These two canons may now be applied to the kinds of agreements most commonly arising, — the purpose here being not to consider the state of the law in detail,² but merely to illustrate the application of the general principle to this class of documents.

§ 2444. **Same:** (a) **Agreements affecting the Express Terms of the Document.** (1) An extrinsic agreement as to the *mode of payment*,¹ or the *amount* of payment,² must be, by the foregoing test, ineffective, since the parties have expressly dealt with those matters in the instrument; and although an agreement to concede a *credit* or *counter claim*, as offsetting the obligation of the instrument, would be a separate transaction and therefore valid, yet the distinction between the two may sometimes be hard to draw.³

(2) An extrinsic agreement as to the *time of payment* is for the same reason ineffectual,⁴ although an agreement of *renewal*, which may practically be

² See a note collecting the authorities, appended to *American Gas & V. M. Co. v. Wood*, (1897) 90 Me. 516, 38 Atl. 548, in 43 L. R. A. 449.

¹ 1896, *Stein v. Fogarty*, 4 Ida. 702, 43 Pac. 681 (agreement that a promissory note should be payable in labor, excluded); 1895, *Mumford v. Tolman*, 157 Ill. 258, 41 N. E. 617 (excluding a parol agreement that a note was payable only out of certain dividends).

² 1895, *Loudermilk v. Loudermilk*, 93 Ga. 443, 21 S. E. 77 (agreement not to collect more than a limited sum on a note, excluded).

³ 1897, *Phelps v. Abbott*, 114 Mich. 88, 72

N. W. 3 (agreement to credit on a note a sum to be found due the maker, excluded); 1902, *Roe v. Bank*, 167 Mo. 406, 67 S. W. 303 (agreement that any deposit made in the payee bank by the maker should be credited against the note, held admissible); 1896, *Bennett v. Tillmon*, 18 Mont. 28, 44 Pac. 80 (agreement that notes should be paid by an account-counterclaim, admitted).

⁴ 1819, *Woodbridge v. Spooner*, 3 B. & Ald. 233 (agreement between maker and payee that a note payable on demand should not be payable till the death of the maker, excluded); 1895, *Getto v. Binkert*, 55 Kan. 617, 40 Pac. 925

equivalent, is in theory an agreement for an independent transaction and should be recognized.⁵ An agreement subjecting the obligation of the instrument to any *condition* or contingency, whether in time or otherwise, is ineffective, because the terms of a negotiable instrument are expressly unconditional;⁶ if it be said that the law would not permit the condition to be inserted and that thus it must be extrinsic if at all, the answer is (according to the second canon above stated) that there would then have been no peculiar necessity for resorting to the form of a negotiable instrument.

(3) An agreement *not to enforce* or *sue upon the instrument at all* must be equally ineffective;⁷ the only doubt here arising from the necessity of dis-

(agreement fixing a different time of payment, excluded); 1894, *Van Etten v. Howell*, 40 Nebr. 850, 59 N. W. 389 (that a note due in a certain time should not be collected till a certain suit was decided, excluded); 1857, *Brown v. Wiley*, 20 How. 442, 447 (bill of exchange payable May 1, 1855; agreement between the parties that it should not be presented for acceptance until a certain other draft had been provided for, excluded). *Contra*: 1808, *Dow v. Tuttle*, 4 Mass. 414 (note payable one year from Feb. 16, 1804; an agreement that "payment should not be demanded until the expiration of five years," held to be "a collateral promise" and actionable, and said to be "in chancery a sufficient ground for injunction").

⁵ *Contra*: 1811, *Hoare v. Graham*, 3 Camp. 57 (agreement by indorsees with indorsers that the note should be renewed when due, excluded, as an "incongruous parol condition"); 1898, *New London Cred. Syndicate v. Neale*, 2 Q. B. 487 (agreement to renew a bill of exchange if not paid at maturity, excluded). Cases *pro* and *con* are cited in *Ames' Cases on Bills and Notes*, II, 124, note.

⁶ *Eng.*: 1817, *Free v. Hawkins*, Holt N. P. 550, 8 Taunt. 92 (agreement, between plaintiff as indorsee and defendant as indorser of a note indorsed as security for the maker, not to enforce payment till after the sale of the maker's effects, held not receivable); 1830, *Moseley v. Hanford*, 10 B. & C. 729 (note payable on demand; stipulation that the note should not be payable till the payee delivered possession of premises and rendered account, excluded); 1835, *Foster v. Jolly*, 1 C. M. & R. 703 (action by the payee against the maker, on a note payable 14 days after date; agreement that it should not be enforced in case the plaintiff's principal obtained a verdict against the defendant's brother-in-law, excluded; L. C. B. Abinger: "The maker of a note payable on a day certain cannot be allowed to say, 'I only meant to pay you upon a contingency'"); 1836, *Adams v. Wordley*, 1 M. & W. 374 (action by the drawer against the maker of bills payable in 6 and 12 months; agreement that until the plaintiff should recover on a certain note he should not require payment of the bills, excluded; Parke, B.: "You seek by a parol contemporaneous agreement to alter the absolute engagement entered into by the bills"); *U. S.*: 1858, *Harlow v. Boswell*, 15 Ill. 56 (note payable 12 months after date "or as soon as I can sell \$50 worth" of goods; an oral agree-

ment that the note should not become due until \$50 of goods were sold was excluded); 1896, *Murchie v. Peck*, 160 id. 175, 43 N. E. 356 (agreement that payment of a note be dependent upon the sale of property by the maker, excluded); 1895, *Northern Trust Co. v. Hiltgen*, 62 Minn. 361, 64 N. W. 909 (excluding an agreement that a note should not be valid if the maker performed a certain contract); 1894, *Wilson v. Wilson*, 26 Or. 251, 38 Pac. 185 (agreement that a note should not be paid except on a specified condition, excluded); 1902, *Levy & Cohn M. Co. v. Kauffman*, 52 C. C. A. 126, 114 Fed. 170 (oral agreement that an acceptance of a draft be on condition that the payee should advance other money to other parties, excluded); 1895, *Gurney v. Morrison*, 12 Wash. 456, 41 Pac. 192 (an agreement that notes given for the benefit of a corporation to be formed should not be binding after its formation, excluded). Other cases are cited in *Ames' Cases on Bills and Notes*, II, 133, note. *Contra*: 1899, *Quin v. Sexton*, 125 N. C. 447, 34 S. E. 542 (that a note for 12 months was not to be paid until a note of K. was paid, allowed to be shown).

The only doubt in these cases can arise from the occasional necessity of distinguishing the principle of § 2409, *ante*, which permits a condition precedent to the existence of the obligation, *i. e.* an *escrow*, to be valid.

Sometimes an agreement to hold the instrument as *security* (which by the principle of § 2437, *ante*, would be valid) presents in appearance an agreement resembling the present sort: 1897, *Clinch Co. v. Willing*, 180 Pa. 165, 36 Atl. 737 (notes given for the purchase of land; an agreement that the land held as security should first be sold and the proceeds applied before proceeding against the maker, enforced).

⁷ 1874, *Davis v. Randall*, 115 Mass. 547, 551 (agreement between an indorsee and an acceptor for accommodation that the indorsee would not enforce payment, excluded; "the acceptance of the defendant was an absolute promise to pay"); 1895, *First Nat'l Bank v. Foote*, 12 Utah 157, 42 Pac. 205 (that a note was signed on the assurance that it would not be enforced, excluded). *Contra*: 1858, *Norman v. Norman*, 11 Ind. 288 (agreement to hold merely as a receipt a note given by the defendant's son to his father's executrix for money received by the former as an advancement, admitted, as an agreement which would have "entitled in equity to a cancellation of the instruments"). This

tinguishing between this rule and another rule (*ante*, § 2406), which concedes that a document intended merely as a friendly memorandum is without legal effect. On the other hand, an agreement by an *accommodated party*, who appears on the face of the document as the obligee (*e. g.* the payee of a note), not to enforce it against the nominal obligor who accommodates him, is of course effective.⁸ The distinction between the two is apparent from what has been already said (*ante*, § 2443). In the former instance, there being no purpose of further negotiation of the obligation, the form of a negotiable instrument was wholly unnecessary, if the transaction had been what the defendant claims, for a receipt or some other memorandum would have served equally well. But in the latter instance, the essential purpose being to negotiate the obligor's credit with other parties, a negotiable instrument was indispensable, and the transaction between the original parties was necessarily extrinsic to that instrument. It may be added that the explanation, advanced by high authority, that the avoidance of circuitry of action is the ground of this distinction,⁹ seems not to suffice, for it serves only to determine whether a valid agreement which would secure an injunction in equity would suffice as an equitable defence in a common law suit, and it leaves undetermined the question whether the agreement can be recognized at all under the parol evidence rule, even in equity.

(4) An agreement between one *co-maker* and the *payee*, to hold the *former* as *surety* only, seems at first sight to be a mere condition qualifying the face of the instrument, and therefore ineffective; but, as in the case of accommodation paper, it may be that the negotiation of the instrument requires several parties having primary liability; hence the surety would have to appear as co-maker and not as a drawer, and the suretyship agreement would have to be extrinsic. Such an agreement is generally given effect.¹⁰

(5) The question whether one who signs as "*agent*"¹¹ or "*president*"¹² or "*guardian*"¹³ is personally liable seems to be mainly a question of interpretation; for if no such word had been inserted, the agreement would be in-

ruling, as well as a few similar ones cited in Ames' Cases on Bills and Notes, II, 99, note, are probably due to a misapplication of the distinction above-mentioned in the text.

⁸ 1836, *Thompson v. Clubley*, 1 M. & W. 212 (indorsee's accommodation; the agreement that "no claim or demand should at any time be made against the defendant" was objected to as "contradicting the written contract of acceptance, which purported to be an absolute engagement to pay the bill"; but it was held a "collateral agreement, and not part of the original contract").

⁹ Professor Ames, in his Cases on Bills and Notes, Summary, II, 804.

¹⁰ 1809, *Leeds v. Lancashire*, 2 Camp. 205 (as between the original parties, two signers of a promissory note were allowed to show that they signed merely as guarantors of the maker); 1849, *Bank v. Mumford*, 6 Ga. 44, 52, 61, 66 (*Nisbet, J., diss.*); 1863, *Ward v. Stout*, 32 Ill. 399, 409; 1870, *Rose v. Williams*, 5 Kan. 483, 489 ("It is simply pleading and proving a fact

outside and beyond the terms of the contract"); 1838, *Harris v. Brooks*, 21 Pick. 195 ("It is not to affect the terms of the contract, but to prove a collateral fact and rebut a presumption"); 1845, *Garrett v. Ferguson*, 9 Mo. 125; and cases cited in *Brandt, Suretyship*, 1891, 2d ed., §§ 29, 30. *Contra*: 1895, *McCollum v. Boughton*, 132 Mo. 601, 30 S. W. 1028, 33 S. W. 476, 34 S. W. 480 (a married woman pledged land to pay a note signed by her husband and others; the fact that they were agreed to be sureties only, and that she knew it, was excluded, on the ground of the pledgor being a married woman; three judges dissenting).

¹¹ 1850, *Hicks v. Hinde*, 9 Barb. 528; 1893, *Frankland v. Johnson*, 147 Ill. 520, 523, 35 N. E. 480, and cases cited in Ames' Cases on Bills and Notes, II, 224, note. Compare § 2438, *ante*.

¹² 1847, *Kean v. Davis*, 21 N. J. L. 683, 688; *Cook, Corporations*, 4th ed., 1891, § 722.

¹³ 1901, *Andrus v. Blazzard*, 23 Utah 233, 63 Pac. 888.

effectual, as totally destroying the validity of the instrument; while if the signature had been of the principal, ward, or company, "by" the representative, the representative would not have been liable; the question thus becomes one of the construction of the document.

It may be added that by the principle of novation (*ante*, § 2441), any of these agreements which when contemporaneous with the instrument's execution are ineffective, may of course be effective when *made subsequently*, as a separate transaction; and further, that by the nature of negotiable instruments, these extrinsic agreements, so far as recognized at all, are effective, naturally, against only the parties assenting to them, and not against *holders for value without notice* before maturity.

§ 2445. **Same: (b) Agreements affecting the Implied Terms of the Instrument.** The application of the rule to cases falling under the second class above-mentioned (§ 2443) may now be considered.

(1) An extrinsic agreement *not to transfer* an instrument payable "to order" cannot be effective;¹ for the term "to order" imports negotiability, and there is no purpose which the term could serve if that element were discarded.

(2) An extrinsic agreement, between drawer and payee, *not to enforce the drawer's secondary liability* on the bill, is plainly a discarding of the implied terms of a drawer's contract. Nevertheless, since there are several varieties of transactions for which such a form of draft would be peculiarly appropriate without involving the nominal drawer's liability — such as payment by a seller's agent to his principal, or payment by a buyer's agent to the seller, or assignment of a claim without guaranty of the amount collectible —, the agreement ought to be given effect.²

(3) For the same reason, an extrinsic agreement between *indorser* and *indorsee*, cutting down the indorser's implied liability, either by *denying recourse* altogether, or by placing both as co-sureties for a prior party, or by limiting liability to a *warranty of genuineness* of prior signatures, is effective;³ because the act of indorsement is necessary for the purpose of trans-

¹ 1903, *Black v. Bank*, 96 Md. 399, 54 Atl. 88 (agreement with a payee not to negotiate notes, excluded); 1895, *Waddle v. Owen*, 43 Nebr. 489, 61 N. W. 731 (agreement between drawer and payee of a bill to the payee's order that the payee should merely collect and not negotiate it, excluded; "having deliberately inserted words importing negotiability, the drawer cannot be heard to urge a contemporaneous oral agreement contrary to the plain terms of the bill").

² 1840, *Roberts v. Austin*, 5 Whart. 313 (payment by a buyer's agent to the seller); 1850, *Hicks v. Hinde*, 9 Barb. 528 (similar); 1896, *Montgomery v. Page*, 29 Or. 320, 44 Pac. 689 (agreement between maker and indorser to be co-sureties only). *Contra*: 1895, *Bryan v. Duff*, 12 Wash. 233, 48 Pac. 936 (the defendant being indebted to the plaintiff, and H. being indebted to the defendant, the latter drew a bill on H. to the plaintiff's order; an agreement between the

plaintiff and the defendant that the former would not hold the latter liable for the drawee's default, excluded; *Dunbar, J.*, diss., on the ground that this was virtually an agreement to take the bill in absolute payment of the plaintiff's claim). Other cases *pro* and *con* are cited in *Ames' Cases on Bills & Notes*, II, 218, 224, note.

³ 1828, *Pike v. Street*, M. & M. 226 (oral agreement that the indorsee should not sue the defendant as indorser, received); and cases *pro* and *con* cited in *Ames' Cases*, id., II, 135, note; 1870, *Denton v. Peters*, L. R. 5 Q. B. 475 (agreement by an indorsee to hold merely as agent for collection); and cases cited in *Ames' Cases*, id., II, 185, note; 1870, *Ross v. Espy*, 66 Pa. 481 (agreement between the plaintiff indorsee and the defendant indorser, that they should be merely sureties for the maker, admitted as a defence, the defendant having paid into Court one half of the amount; "the agreement . . . was a

ferring title, and yet the transfer of title may be only one feature of several transactions, the remaining features of which cannot be embodied in the instrument without impairing its credit,—such as a purchase of a claim on speculation as to the obligor's credit, or a transfer to an agent for collection. A distinction, however, is in some jurisdictions here taken between an indorsement in full and an *indorsement in blank*; and in the latter case the agreement, either when denying recourse,⁴ or when limiting the liability to that of guarantor,⁵ is treated as invalid; but it is difficult to see what ground there is on principle for this distinction.

(4) The extrinsic agreement made with an *anomalous indorser*—*i. e.* one who, not being the maker, drawer, drawee, or payee, writes his name upon the back of a negotiable note before delivery to the payee or before indorsement by him—should on the same principle be given effect; and this is generally conceded.⁶

§ 2446. **Rule binding upon the Parties to the Document only.** It is commonly said that the parol evidence rule, in the present aspect, is binding upon only those persons who are parties to the document. This form of statement suffices in most instances to reach correct results; but it is not sound on principle. The theory of the rule is that the parties have determined that a particular document shall be made the sole embodiment of their legal act for certain legal purposes (*ante*, § 2425). Hence, so far as that effect and those purposes are concerned, they must be found in that writing and nowhere else, no matter who may desire to avail himself of it. But so far as other effects and purposes are concerned, the writing has not superseded their other conduct, nor other persons' conduct, and it may still be resorted to for any other purpose for which it is material, either by other persons or by themselves. For example, where the issue is as to title by adverse possession of a right of way, and the deed has not reserved such a right, a conversation between grantor and grantee, the former conceding the way, would be available as affecting the permissive nature of the grantee's possession;¹ because the deed embodied only the title as constituted by grant, and did not cover the act of permissive user. So, too, a creditor, attacking a mortgage-deed as

flat bar to Espy's right to recover more than the one-half of the money"); and cases cited in Ames' Cases, id., II, 245, note.

The further question may then arise whether, on an indorsement *expressly made without recourse*, an extrinsic waiver even of the *implied warranty of genuineness* may be effective: 1902, Carroll v. Nodine, 41 Or. 412, 69 Pac. 51.

⁴ 1865, Harrison v. McKim, 18 Ia. 485 (leading opinion, by Wright, C. J.; Cole, J., diss.); 1895, Iowa V. S. Bank v. Sigstad, 96 id. 491, 65 N. W. 407 (rule applied to a blank indorsement of a note containing a full indorser's contract on the face of it); 1881, Martin v. Cole, 104 U. S. 30 (leading opinion, by Matthews, J.). *Contra*: 1895, True v. Bullard, 45 Nebr. 409, 63 N. W. 824.

⁵ 1872, Beattie v. Browne, 64 Ill. 360 ("It cannot be a parol contract where the payee in-

dorses a note in blank, for there is in legal contemplation written over his name the extent and character of his undertaking"); 1896, Hatley v. Pike, 162 id. 241, 44 N. E. 441 (indorsement in blank; oral agreement to sign as guarantor not admitted; explaining prior cases, and distinguishing the contrary rule for a stranger's indorsed signature); 1856, Prescott Bank v. Caverly, 7 Gray 217 (agreement by indorsee with indorser that the latter signed only as guarantor of identity, not received); and cases cited *pro* and *con* in Ames' Cases, id., II, 233, note.

⁶ 1875, Boynton v. Pierce, 79 Ill. 145; 1895, Richardson v. Foster, 73 Miss. 12, 18 So. 573; 1903, Elliott v. Moreland, — N. J. L. —, 54 Atl. 224; and cases cited in Ames' Cases on Bills and Notes, I, 269, note.

¹ 1855, Ashley v. Ashley, 4 Gray 197.

fraudulent, may establish the debtor's fraudulent extrinsic agreement with the mortgagee,² because the agreement is here invoked not as effecting a transfer but as constituting fraud; for a creditor claiming under the deed could not avail himself of the agreement to enlarge the terms of the transfer. Again, an oral promise by an employer to concede certain moneys to an employee could not be availed of to enlarge the employee's rights, where a written contract covered the subject; but in a prosecution for embezzlement, where the employee's criminal intent in taking the money is the issue, the extrinsic agreement of the employer may be availed of as affecting the employee's honest belief that he was entitled.³ Again, to overthrow the words of a will, the testator's extrinsic declarations of testamentary intent cannot be used, because here the object is to give testamentary effect to that which the will has superseded for that purpose; but if the object be merely to use these declarations evidentially as indication of the testator's plan, to prove the probable contents of a lost will, they may be used for this distinct purpose.⁴ The truth seems to be, then, that the rule will still apply to exclude extrinsic utterances, even as against other parties, provided it is sought to use those utterances for the very purpose for which the writing has superseded them as the legal act.

Nevertheless, owing to the inaccurate phrasing of the doctrine as commonly laid down — that the rule does not apply to others than the parties to the document — the precedents are often arbitrary and confused, and cannot be reconciled by any general distinctions.⁵

² 1894, *Jewett v. Sundback*, 5 S. D. 111, 119, 58 N. W. 20.

³ 1898, *Walker v. State*, 117 Ala. 42, 23 So. 149.

⁴ Cases cited *ante*, §§ 1735-1737.

⁵ 1848, *Re Clapton*, 3 Cox Cr. 126 (embezzlement of funds by a servant; the memorandum of agreement covering the nature of his duties, required to be produced); 1896, *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354 (agreement of sale; between assignees of buyer and seller, not claiming under them, an oral agreement admitted); 1895, *Roof v. Pulley Co.*, 36 Fla. 284, 18 So. 597 (assignee of property and note); 1900, *Dickey v. Grice*, 110 Ga. 315, 35 S. E. 291; 1901, *Central Coal & C. Co. v. Good*, — Ind. T. —, 64 S. W. 677 (breach of contract to pay for lumber furnished for a railroad; defendant claimed that plaintiff had failed to perform and had thus caused him damage; testimony by another contractor as to the part of the construction to be done by him, held admissible, irrespective of the terms of this contract); 1903, *Livingston v. Heck*, — Ia. —, 94 N. W. 1098 (action against the purchaser from T. of cattle sold to T. by the plaintiff, and mortgaged back to the plaintiff; the oral agreement between T. and the plaintiff, permitting a sale free from the mortgage, admitted); 1899, *Gould v. Leavitt*, 92 Me. 416, 43 Atl. 17 (mortgage from S. to defendant, expressly excluding intoxicating liquors, and an assignment of the mortgage by defendant to plaintiff; that the transaction in truth covered intoxicating liquors, allowed to

be shown); 1895, *Libby v. Land Co.*, 67 N. H. 587, 32 Atl. 772 (garnishor against a stock-subscriber as garnishee, whose parol agreement to pay 25% only of face value of stock was not received); 1893, *Plainfield F. N. Bank v. Dunn*, 58 N. J. L. 404, 27 Atl. 908 (action against indorser; oral agreement with J., not a party to the written agreement, to extend time of payment, admitted); 1897, *Hankinson v. Vantine*, 152 N. Y. 20, 46 N. E. 292 (mechanic's lien for labor done by the plaintiff upon a building owned by the defendant and leased by R.; the lease of R. containing a clause against alterations without the lessor's consent, on penalty of forfeiture, the defendant gave a written consent; held, that since the sole purpose of this writing was to avoid the lessee's forfeiture, it did not exclude the oral transactions at the time relative to the defendant's consent, for the purpose of determining whether the statutory consent to the plaintiff's labor had been given; a good example of the principle); 1902, *Pacific Biscuit Co. v. Dugger*, 42 Or. 513, 70 Pac. 523 (action for goods sold to defendant through her agent S., the issue being whether S., was general selling-agent or not; the plaintiff having introduced a bill of sale of the store from S. to defendant, in which defendant appointed S. to remain as general selling-agent, the defendant was allowed to show that the sale was a mortgage only, and thus S. remained owner; unsound, because the document was offered as creating the plaintiff's right; the Court erroneously saying that it was "not offered for the

§ 2447. **Burden of Proof; Who must Produce the Document.** If a document has by the parties' intent been made the sole embodiment of the transaction, then all proof of the transaction involves proof of the document (*ante*, § 2425); and proof of the document involves a production of the original document or an accounting for its absence (*ante*, § 1179). But obviously the latter requirement depends upon the assumption first above made, namely, that the parties *have* embodied the transaction in writing. The question then arises, On whom is the burden of proof to show that they have or have not done so? This question, in turn, has two branches.

(1) In an action on a contract, for example, *must the plaintiff show* that the contract is *not* a written one, or must the defendant rather show that it *is* a written one? The practical difference will be, when it is a written one, that the plaintiff must produce or account for it, in the former view; while in the latter view, the defendant must produce or account for it, in order to prove its terms, and this requirement may be difficult to fulfil. The correct solution here seems to favor the plaintiff. In other words, there is no presumption that the transaction was reduced to a single document; therefore if the plaintiff does not involuntarily disclose such a document as a part of his case, the opponent must raise the objection and establish the fact, if he wishes to invoke the operation of the rule. The practical justification for this is that, though some document may exist, it remains uncertain whether the documents covered the precise transaction in issue, and until the opponent, by production, has demonstrated that it does, it is fairer that no assumptions should be made:

1818, *Burrough, J.*, in *Stevens v. Pinney*, 3 B. & Ald. 349, 355 (action for work and labor): "The distinction in this case turns on the proof of the existence of the original agreement having been given by the defendant's witness instead of the plaintiff's. The latter had fully made out his case [by evidence of oral hiring], and nothing whatever was proved as to whether there had been such an agreement or not. It was therefore incumbent on the defendant to show that there had been a legal instrument of that description, or to give the plaintiff notice to produce it."¹

purpose of asserting any rights thereunder"); 1901, *Myers v. Taylor*, 107 Tenn. 364, 64 S. W. 719 (plaintiff claimed lumber under a sale from M., who claimed by purchase of it from defendant's land, and this purchase was denied by defendant; M. was not allowed to testify to his contract irrespective of the writing; this ruling seems unsound); 1896, *Johnson v. Portwood*, 82 Tex. 235, 34 S. W. 596, 787 (agreement of sale on terms; a third person claiming a lien on the vendee's interest was allowed to show other oral terms for the sale); 1901, *O'Shea v. R. Co.*, 44 C. C. A. 601, 105 Fed. 559 (the plaintiff was injured by the joint negligence of defendant and C., and executed an instrument to C. in form acknowledging satisfaction; held, that as against the defendant, though a joint tortfeasor, the plaintiff might show that the instrument was understood to be merely a covenant not to sue C.); 1903, *Carmack v. Drum*, 32 Wash. 236, 73 Pac. 377 (a landlord suing for rent was allowed to show, in spite of his deed transferring

the premises, an oral agreement with the grantee that the grantor should retain the right to the rents).

¹ *Eng.*: 1818, *Stevens v. Pinney*, 3 B. & Ald. 349, 8 Taunt. 327 (work and labor; on the defendant's side it appeared that there was a writing covering the subject; held, that it was for the defendant to prove; therefore, he should have given notice to produce, before proving the contents, *i. e.* before being able to invoke its controlling effect); 1827, *Littledale, J.*, in *Reed v. Deere*, 7 B. & C. 261 ("If indeed a plaintiff gets through his case without giving the defendant any opportunity of mentioning the written instrument, the latter must produce it"); 1840, *Magnay v. Knight*, 1 Man. & G. 944 (action for services; general rule applied; production required of the defendant, and the defendant held not to cure his position by having given notice; since the document being unstamped was unavailable); 1860, *Cox v. Couveless*, 2 F. & F. 139 (the cross-examination may be interposed,

(2) But may not this rule be modified where the fact of a writing *appears from the plaintiff's own witnesses*? In other words, if, even before the defendant has proved the precise terms of the writing, it appears that there was *some* writing connected with the transaction, may it not then be presumed against the plaintiff that this writing covered the transaction in issue, so as to shift to him the burden of showing, by production, that it does *not* cover the transaction? Here a distinction is to be taken between the direct and the cross-examination. It is generally conceded that, when the fact of writing appears on *direct examination*, the plaintiff must produce or account for it before he can go any further.² But whether the same rule will be applied where the same fact has been made to appear by the defendant on the *cross-examination* of the plaintiff's witness has been the subject of variant rulings and much controversy in English practice. The argument against applying the same rule has been thus stated:

1829, *Tindal, C. J.*, in *Fielder v. Ray*, 6 Bing. 332: "It has been argued that if it be shown that a contract is evidenced by writing, it is immaterial whether this appear on cross-examination of the plaintiff's witnesses or in the course of the defendant's evidence. But there is this difference in the case, — that if it appear by the [direct] testimony of the plaintiff's witness, the absence of the writing is an inherent defect in his cause which it is incumbent on him to get over; whereas if it appears from the defendant's witness, it is an objection which the defendant must substantiate by the production of the instrument in the regular way. Otherwise this inconvenience might follow, that the plaintiff might, on a mere assertion of the defendant, be non-suited for the non-production of a written instrument, which if it had been produced might turn out not to apply to the contract in question."

This reasoning does not seem adequate, although a few rulings have accepted it.³ To place the burden on the plaintiff equally in such cases seems

and, on denial of any writing, evidence of its existence may be offered by the opponent, to prevent the proponent from proving the transaction orally; *U. S.*: 1866, *Patterson v. Mining Co.*, 30 Cal. 360, 365 (allegation by the defendant of a sale; on the defendant's evidence, the sale appeared to be in writing; production by him required); 1867, *King v. Randlett*, 33 id. 318, 321 (same, the plaintiff alleging a sale); 1895, *St. Louis A. & T. H. R. Co. v. Bauer*, 156 Ill. 106, 40 N. E. 448 (testimony as to a railroad rule; the opponent was required to object and discover whether it was in writing, before the rule would be applied). *Contra*: 1823, *Allen v. Potter*, 2 McC. 322 (assumpsit for the value of articles bought but not delivered, etc.; in the defendant's evidence, it appeared that a bill of sale existed; production required from the plaintiff).

² *Eng.*: 1818, *Stevens v. Pinney*, 2 J. B. Moore 349 (action for work and labor; held, that if a writing had appeared, as a part of the plaintiff's case, to cover the matter, the plaintiff must produce it; but where he proved his case without involving it, then it was for the defendant to show its existence and give notice to produce it); 1824, *Sinclair v. Stevenson*, 1 C. & P. 582 (negotiations for a lease or sale); 1825, *Cot-*

terill v. Hobby, 4 B. & C. 465 (case, for injury to a reversioner's interest, the plaintiff's evidence of his interest referring to a written agreement; held, that he should produce it); 1842, *Parton v. Cole*, 6 Jur. 370 (but here the judge first looked at the document); *Can.*: 1855, *Doe v. Blanche*, 3 All. N. Br. 180 (written agreement for possession); *U. S.*: 1877, *Com. v. Goodwin*, 122 Mass. 19, 34 (whether a building was insured; production not required because no written contract was mentioned); 1867, *Hatch v. Pryor*, 42 N. Y. 441, 443 (agreement to pay a note); 1842, *Eubanks v. Harris*, 1 Speer 183, 192 (agreement as to a boundary).

³ 1810, *Doe v. Morris*, 12 East 237 (action of ejectment, turning upon whether the landlord had a right to end the lease; on cross-examination of the plaintiff's witness, it appeared that there was a lease in writing; held, that it was for the defendant to put it in, not the plaintiff); 1810, *Doe v. Pearson*, ib. 239, note (ejectment against a tenant, turning upon the time of notice to quit; the plaintiff's witness disclosed that there was a written agreement; held, that the plaintiff was not bound to produce it); 1829, *Reid v. Batte, M. & M.* 413 (assumpsit for an entablature put on the front of a house; on cross-examination it appeared that there was a

more satisfactory, because his own witness' testimony has sufficed to show that there was *some* writing, and because a distinction between the direct and the cross-examination would tend to increase petty manœuvring and the suppression of facts. Such was the view of the majority of English judges.⁴

Here certain questions may properly be distinguished: (a) When the document is *void for want of a legal stamp*, or does not fulfil the requirement of the *statute of frauds*, it may be ineffective as a legal act, and therefore the party who is bound to produce it if he relies upon it may fail (*post*, § 2456); and thus the incidents of the burden of proof may indirectly have other consequences. (b) Where the plaintiff desires to prove a *fact independent of the document* — as when he relies upon a person's acts and not upon his written appointment, to prove his agency or official incumbency⁵ —, there is of course no burden of producing the document; whether the purpose in hand is really the proof of the document or of the independent fact depends upon the principle of documentary originals, already examined (*ante*, §§ 1242-1250). (c) Where the parties have by mutual consent *waived the resort to the written transaction* and agreed to rest upon the oral facts, the question arises whether by stipulation or judicial admission a rule of substantive law or of evidence may be waived (*post*, § 2592).

3. Integration required by Law.

§ 2450. **At Common Law**; (1) **Judicial Records**. The integration of a transaction (*ante*, § 2425), *i. e.* its reduction to a single document, is either voluntary or compulsory. In the former instance it may or may not be made, as the party or parties to the act may choose; but when made, the legal consequences already noticed will follow, and the document supersedes all other utterances. In the latter instance — compulsory integration — the law insists, independently of the parties' choice, that the transaction be embodied in a single document, and when this is done, the same legal consequences attach.

written contract for the inside work on the house, but that the present claim was sued on as an extra; held that the plaintiff need not produce the contract).

⁴ *Eng.*: 1800, *Brewer v. Palmer*, 3 Esp. 213 (action for use and occupation; on cross-examination, it appeared that there had been an agreement in writing; Eldon, C. J., said that "the plaintiff was bound to show what that contract was; it might contain some clauses which might prevent the plaintiff from recovering, and others for the benefit of the defendant, which he had a right to have produced"); 1816, *Jeffery v. Walton*, 1 Stark. 267; 1828, *Vincent v. Cole*, M. & M. 257 (assumpit for building a party-wall; on cross-examination it appeared that there was a written contract for the building of the house but that the party-wall claim was sued on as extra; held, that the plaintiff must first produce the document, so that it could be seen whether it covered the claim in question); 1828, *R. v. Rawden*, 8 B. & C. 708 (in proving a tenancy, the cross-examination

showed a written instrument to have been made; the prover held bound to produce it); 1832, *R. v. Padstow*, 4 B. & Ad. 208; 1844, *Buxton v. Cornish*, 12 M. & W. 426 (Abinger, L. C. B. "The practice has prevailed in Westminster Hall ever since I have known it, and before every judge for the last quarter of a century"); *Ire.*: 1841, *Bridge v. Mc'Carthy*, 4 Ir. L. R. 157; 1845, *Thunder v. Warren*, 8 id. 181 (requiring the plaintiff to give notice to produce); *Can.*: 1873, *Betts v. Venning*, 14 N. Br. 267, 269 (on cross-examination, here); 1852, *Farley v. Graham*, 9 U. C. Q. B. 438; *U. S.*: 1826, *Boone v. Dyke*, 3 T. B. Monr. 530, 531; 1868, *Littlejohn v. Fowler*, 5 Coldw. 284, 286 (contract for cutting timber; the existence of a writing appearing on cross-examination of the plaintiff's witness, other testimony was excluded). The following ruling stands by itself: 1854, *Campbell v. Moore*, 3 Wis. 767 (peculiar facts; Court's discretion discussed).

⁵ For example: 1895, *Newby v. Security Co.*, 110 Ala. 663, 17 So. 940.

The instances of compulsory integration are few. At common law the only instances appear to be those of judicial records, corporate records, and negotiable instruments. By statute have been added testaments and a few miscellaneous documents.

(1) The theory of *judicial records* is that the judgment roll, as finally made up, embodies in itself alone the entirety of the controversy as adjudicated, and thus supersedes the miscellaneous mass of oral and written pleading, motions, and orders, which have gone to make up the proceedings. The history of this theory has already been examined (*ante*, § 2426). Its principle is to-day well established in the law :

1814, *Ellenborough, C. J.*, in *Ramsbottom v. Buckhurst*, 2 M. & S. 565, 567 : "The judgment roll imports incontrovertible verity as to all proceedings which it sets forth ; and so much so that a party cannot be admitted to plead that the things which it professes to state are not true. . . . Every part of the record, as long as it remains on the files of the Court, must be taken to speak absolute verity."

1842, *Hubbard, J.*, in *Sayles v. Briggs*, 4 Metc. 421, 423 (in an action for malicious prosecution, to show the acquittal in the previous proceeding, the plaintiff produced the written complaint only, and wished to show orally the issuance of warrant, the arrest, the arraignment, and the discharge ; no record or minutes had been made) : "A record is a memorial or history of the judicial proceedings in a case, commencing with the writ or complaint, and terminating with the judgment ; and the design is, not merely to settle the particular question in difference between the parties, or the government and the subject, but to furnish fixed and determinate rules and precedents for all future like cases. A record, therefore, must be precise and clear, containing proof within itself of every important fact on which the judgment rests ; and it cannot exist partly in writing and partly in parol. Its allegations and facts are not the subject of contradiction. They are received as the truth itself, and no averment can be made against them nor can they be varied by parol. . . . It is argued that this testimony should be received from necessity, as there is no way by which the plaintiff can obtain redress, and that this is the best evidence which now exists. But in my judgment it will be productive of far less mischief for an individual to suffer from the neglect or misfortune of an officer in not making a judicial record than to establish a precedent that the record itself or a part of it may be proved by parol, — that it may speak one language to-day and another to-morrow, depending on the different witnesses who are called or on their changing recollections. And without prescribing a rule for a case where a magistrate might by the act of God be deprived of the opportunity of making even any minutes of proceedings before him from which a record could be made (if such a case should ever occur), we are of opinion that the want of a judicial record cannot be supplied by parol evidence ; and that the rules which apply to the admission of testimony to prove the contents of a lost record, or to the introduction of minutes by which the record may be extended, have no real bearing on a case like the present, where no such loss ever took place and no such minutes ever were made. A party who is to be affected by the record will in the exercise of ordinary care see that it is correctly made up ; and if the officer should neglect or refuse to perform his duty, he can be compelled by mandamus to make a true record."

1854, *Merrick, J.*, in *Wells v. Stevens*, 2 Gray, 115, 119 : "It has been argued in behalf of the plaintiff [offering to show orally a claim of appeal not in the record] that the evidence offered by him should have been received, because otherwise he can obtain no redress for the loss of the right of which he complains that he has been unjustly deprived ; and also because a magistrate ought not to be allowed to shield himself from responsibility for an act of wrong or oppression by an additional violation of duty in neglecting or wilfully refusing truly to record the proceedings of a case tried before him. But the rejection of

such evidence is an obvious and inevitable consequence of the incontrovertible verity which the law, for reasons lying (as it has been said) at the foundation of all well-ordered jurisprudence, attaches to judicial records. Judges and magistrates are responsible to the government from which they derive their authority, but not to individuals, for the negligent performance or wilful violation of official duty."

It is not within the present purview to trace in detail the state of the law of records, involving as it does a separate body of law, contained in a mass of variant statutes and local differences of practice. But it is worth while to notice the logical consequences of this general principle as applied at common law.

(a) In the first place, the record being the sole embodiment of the judicial proceedings, no other materials or utterances, oral or written, can be set up in competition with it. In other words, but less correctly, the record is *conclusive*.¹ This is so even though the record has *not been made up*; ² for herein appears the compulsory nature of the rule, as distinguished from voluntary integration (*ante*, § 2430). It *must* be made up; and if it is not, then in legal theory there is yet no judgment or other proceeding; and it is always in the power of litigating parties to prevent hardship by compelling the proper officer to make up the record. Furthermore, if the record has been made up and is then lost or destroyed, the proof of the proceedings consists in proof of the contents of the record,³ — though if copies are unavailable, other materials may be resorted to.⁴ Finally, though the record is in the sole embodiment of the transaction, yet in an appropriate proceeding the Court may amend it so

¹ 1874, *Ex parte Gillebrand, re Sidebotham*, L. R. 10 Ch. App. 52 (when they "purport to contain a full record of what took place at the trial, they must be taken as the sole materials on which the Court of Appeal can proceed," unless by agreement); 1863, *Michener v. Lloyd*, 16 N. J. Eq. 38, 40 (order of a Court directing payment; oral evidence of "what passed at the time of making the order," excluded); 1841, *People v. Gray*, 25 Wend. 465 (minutes or other record of a criminal trial, not contradictable as to the plea entered); 1846, *Ward v. Saunders*, 6 Ired. 382, 385 (theoretically, the enrolled memorial of all the documents in a cause is the record, not the original documents themselves; here an objection to the originals' not having been enrolled was held waived by consent to use the originals); 1869, *Coyne v. Souther*, 61 Pa. 455, 457 (entry of satisfaction of judgment in docket by clerk, conclusive in favor of purchaser at sheriff's sale).

The principle that a *judgment* is conclusive upon the parties is a different thing (*ante*, § 1347). The present question is not what external facts are established by the judgment, but what were the actual terms of the judgment itself.

² 1842, *Kendall v. Powers*, 4 Metc. 553 (a record cannot be affected by parol; in an action for false imprisonment, the defendant justice was not allowed to show that a waiver of appeal, not in the record, had been made); 1842, *Sayles v. Briggs*, ib. 421, 423 (proceedings in a prosecution alleged as malicious; quoted *supra*);

1854, *Wells v. Stevens*, 2 Gray 115 (trespass against a magistrate for committing to prison without allowing an appeal; the plaintiff not allowed to show orally that he claimed an appeal, no claim being contained in the record of the magistrate; quoted *supra*); 1863, *Hackett v. King*, 6 All. 58, 60 (warrant and arrest, not provable by parol); 1866, *Fleming v. Clark*, 12 id. 191, 198 (whether a trial Court had refused to allow exceptions; an agreement of counsel, for a *habeas corpus* hearing, as to this fact, excluded; "the rulings of the Superior Court can appear only by its own records"); 1841, *People v. Gray*, 25 Wend. 465 (original minutes of a trial during session, not made up as required by statute, are not the record).

³ 1843, *Gore v. Elwell*, 9 Shepl. 442, 444 (lost writ and return are to be proved by evidence of the record's contents, not of the parol acts); 1894, *Burden v. Taylor*, 124 Mo. 12, 22, 27 S. W. 349 (tax-collector's testimony to supply want of recitals of proceedings in a tax-deed; only the record of the proceedings, or copies of them where destroyed, receivable); 1876, *Mandeville v. Reynolds*, 68 N. Y. 528, 533 (where a judgment roll is lost, the proof is to be of the contents of the lost roll, and *semble* not of anything but its contents).

⁴ 1859, *Conger v. Converse*, 9 Ia. 554, 557 (lost execution; docket-entries as preferred to oral evidence; question not decided); 1821, *Cook v. Wood*, 1 McC. 139 (on the loss of records of Court, its journals were received).

as to remove errors;⁵ and thus the theory is preserved while practical injustice is avoided.

(b) Of the various books kept in a court, which of them is *deemed to be this record*? Here the practice and the phraseology have come to vary so much in different jurisdictions that uniformity of ruling is not attainable. But on principle there is one final and comprehensive document, termed the *judgment-roll*, for each litigation; in this are set forth all the proceedings from beginning to end; and this is theoretically *the record*:

1768, Sir *William Blackstone*, *Commentaries on the Law of England*, III, 317: "The record is a history of the most material proceedings in the cause, entered on a parchment roll, and continued down to the present time; in which must be stated the original writ and summons, all the pleadings, the declaration, view oroyer prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever farther proceedings have been had, all entered *verbatim* on the roll, and also the issue or demurrer and joinder therein."⁶

This roll then is primarily the record, and supersedes all intermediate books of docket, minutes, entries, and the like, as well as the original papers containing the pleadings of the parties.⁷ If, however the time has not yet elapsed when the roll can be made up, the clerk's temporary *minutes and entries*, together with the original papers of the parties, constitute the *record ad interim*; ⁸ this relaxation being conceded to practical necessity. Moreover, in *inferior courts* — typically, that of a justice of the peace — in which by tradition (*ante*, § 2426) the doctrine of incontrovertible records never

⁵ The following cases exemplify the rules on this subject: 1856, *Weed v. Weed*, 25 Conn. 337, 343 (where the analogy with reformation of deeds in chancery is noted); 1862, *Frink v. Frink*, 43 N. H. 508, 514; 1897, *Jacks v. Adamson*, 56 Oh. 397, 47 N. E. 48 ("all sources of information that are competent under general rules"; here the testimony of the ex-judge of probate to the fact of an order of sale); 1897, *State v. Fiester*, 32 Or. 254, 50 Pac. 561; 1873, *Ex parte Lange*, 18 Wall. 163, 167.

⁶ Examples of records set out in full are given in the *Commentaries*, Appendix to Book III.

⁷ 1807, *Ayrey v. Davenport*, 2 B. & P. N. R. 474 (the book of entries of judgments is not evidence of a judgment); 1805, *Lee v. Meacock*, 5 Esp. 177 (a day-book from the judgment-office, containing copies of the entries of judgments, etc., not admitted; "an office copy of the judgment ought to be produced," if not the docket itself); 1901, *Baxter v. Pritchard*, 113 Ia. 422, 85 N. W. 633 (record book, not judgment docket, is the judicial record).

But this strictness of the common law is not always observed; compare the following opinions: 1897, *Simmons v. Threshour*, 118 Cal. 100, 50 Pac. 312 (whether the judgment-book suffices instead of the judgment-roll); 1849, *Browning v. Flanagan*, 22 N. J. L. 567, 573 (clerk's "sealing-docket"; its nature well explained); 1902, *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37 (whether a judgment-docket suffices to establish a judgment, instead of the record book).

⁸ 1839, *Pruden v. Alden*, 23 Pick. 184, 187 (the clerk first records the doings briefly "in a minute-book, called the docket, from which a full, extended, and intelligible record is afterwards to be made up; but until they can be made up, these short notes must stand as the record"); 1848, *Read v. Sutton*, 2 Cush. 115, 123 ("The docket is the record until the record is fully extended, and the same rules of presumed verity apply to it as to the record"; excluding testimony of the clerk and the judge as to the non-making of an order of judgment); 1861, *McGrath v. Seagrave*, 2 All. 443 ("minutes may be introduced when the record has not been drawn out *in extenso*, as containing the elements of a record, and in truth for the time being constituting the record itself"; here a docket entry, together with the original papers, was received where "every essential fact appears . . . without resorting to parol proof").

How much depends on local custom may be seen by the following case: 1850, *Willard v. Harvey*, 24 N. H. 344, 348 (the custom in this State had been not to extend the record of a judgment from the minutes and original papers until a resort to the judgment in another proceeding was needed, and then the clerk made a copy "of the record supposed to exist in legal intentment, and certified as such [copy], without the labor of first making an original"; so that "the record thus extended is deemed by the Court an original record," and is conclusive; corrections can be made only by process of amendment).

obtained, the final enrolment was never customary at common law. Hence the justice's docket or minutes, with the original papers, represent in the first instance the proceedings;⁹ and though the legal theory persevered that these courts do not possess records at all, in the strict sense,¹⁰ yet the practical features of a record are usually attributed to these books, so as to exclude proof of oral transactions.¹¹

(c) What are the *transactions* which in legal theory form part of the record? Obviously many things are said and done, and many documents used, not only out of court but in court, which do not in strictness form a part of the proceedings in the controversy, and hence do not need to appear in the record,—hence may be established without regard to the contents of the record. This involves the whole theory of trials and appeals. It is enough to note that the application of the present principle is dependent on that theory;¹² for example, whether the date of a writ or declaration is disputable depends on the theory of terms of court and times of filing of pleadings,¹³ and further to note that so far as the purpose is not to rely on the judicial proceeding and therefore on the record, but to prove the parties' conduct in other aspects, the record is not involved and therefore does not control.¹⁴

It remains to distinguish some other principles often invoked in the proof

⁹ 1860, *State v. Bartlett*, 47 Me. 396, 401 (original complaint and warrant with return, admitted); 1882, *Folsom v. Cressey*, 73 id. 270 (citation and return, etc., in poor-debtor's Court; "such inferior Courts are not required to make up full and formal records, and their doings may be shown by their minutes and the original papers, or certified copies"); 1825, *Com. v. Bolkom*, 3 Pick. 281, 282 (a Court of Sessions licensing innholders does not act judicially; its minutes are therefore admissible); 1836, *Davidson v. Slocomb*, 18 id. 464, 466 ("the minutes of the justice [of the peace] are not technically a record; but they contain all the material parts which the record would comprise if it were made up at large and in the usual form"; here used because the justice had died before extending them); 1897, *State v. Rice*, 49 S. C. 418, 27 S. E. 452 (conviction of a crime; the trial justice's book admitted as the record).

¹⁰ 1824, *Dyson v. Wood*, 3 B. & C. 449 (for a court not of record, the judgment must be pleaded or denied as a fact, and not the memorandum or docket that may have been kept; while for a court of record, though the record itself is pleaded or denied, it merely "imports," or not, a judgment).

¹¹ 1772, *Fisher v. Lane*, 2 W. Bl. 834 (minute-book of the Mayor's Court of London; in proving its judgment on foreign attachment, in defence to an action, the omission in the minutes of a record of summonses, etc., held fatal, and seemle not to be supplied by parol); 1833, *Boomer v. Lane*, 10 Wend. 525 (parol evidence of a justice's judgment, not admissible).

¹² The following rulings will show the scope of the inquiry: 1878, *Williams v. Goodell*, 60 Ga. 482 (that a notice had not been served; the

opponent's testimony excluded, the record of proceedings being the proper source); 1897, *Pritchett v. Davis*, 101 id. 236, 28 S. E. 666 ("homestead papers," not the record in the Court, are the original, in proving the setting-apart); 1831, *Frost v. Shapleigh*, 7 Greenl. 236 (writ of attachment never returned and thus not matter of record; the attachment proved orally); 1824, *Cranford v. State*, 6 H. & J. 231, 234 (a bond filed in the Orphan's Court; non-delivery allowed to be shown); 1893, *Munro v. Meech*, 94 Mich. 596, 54 N. W. 290 (that the former suit was not tried on its merits, admitted); 1825, *Judge of Probate v. Briggs*, 3 N. H. 309 (Probate Court; record held conclusive as to the filing of a claim); 1850, *Brackett v. Hoitt*, 20 id. 257, 260 (the case made by the presiding judge for determination on appeal is a part of the record); 1826, *Wolfe v. Washburn*, 6 Cow. 261, 265 (minutes of a justice as to a claim of set-off, held no part of the records and therefore contradicable).

¹³ 1761, *Morris v. Pugh*, 3 Burr. 1242 (whether a writ in trover was dated before the demand and refusal; the *nisi prius* record spoke of it as "of Easter term"; held, that the presumption that it was filed on the first day of the term could be rebutted by the writ itself); 1826, *Granger v. George*, 5 B. & C. 149 (the declaration's statement of the time of action begun is disputable); 1828, *Lester v. Jenkins*, 8 id. 339 (so also for a writ); 1826, *Johnston v. Darrah*, 8 N. J. L. 282, 285 (the time of recording an execution may be shown).

¹⁴ 1832, *Loury v. Cady*, 4 Vt. 504, 505 (the fact of attachment may be proved, between sheriff and receipters, by the receipt; the attachment-writ itself not required).

of records, — genuinely principles of evidence. (1) The doctrine about *producing the original* of a document, or accounting for its absence, permits copies to be used when the original is not obtainable; the application of this to the production of the original judicial record is elsewhere dealt with (*ante*, §§ 1215–1217). (2) The copy thus used must be verified by a witness; but the hearsay verification of the official custodian, in the shape of a *certified copy*, may be used, under an exception to the Hearsay rule, without calling the officer to the stand in person (*ante*, §§ 1677–1681). (3) The doctrine of the completeness requires in many cases that the *whole of a document* be produced (*ante*, § 2110). (4) The rules of authentication often have a special application in the proof of *genuineness* of a judicial record (*ante*, §§ 2158–2164). (5) The conclusiveness or admissibility of a *sheriff's return* involves sometimes the present principle and sometimes certain distinct ones (*ante*, §§ 1347, 1664).

§ 2451. **Same:** (2) **Corporate Acts and Records**; (3) **Negotiable Instruments**. (2) Whether the *acts of a corporation* must at common law be integrated in a written record is a question which has given rise to a great variety of opinions and of practice,¹ though the modern tendency is to apply no different rule to corporate than to natural persons.² Whether the *proceedings* of a corporate meeting are subject to the same rule is a distinct question, and the analogy of judicial records here makes for preserving the same compulsory rule;³ but again the modern tendency is to leave the transaction without legal restriction.⁴ Where such a record is made, the principle of voluntary integration (*ante*, § 2430) may of course be applied, and the record made to control.⁵

It may be added that for corporate records analogous subordinate questions arise as for judicial records, — for example, concerning the particular book or

¹ 1827, *Bank v. Dandridge*, 12 Wheat. 64, 67, 69 (Story, J.: "In ancient times it was held that corporations aggregate could do nothing but by deed under their common seal; but . . . the rule has been broken in upon in a vast variety of cases, in modern times, and cannot now as a general proposition be supported; . . . we do not admit as a general proposition that the acts of a corporation, although in all other respects rightly transacted, are invalid merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensable as evidence or to give them an obligatory force"; Marshall, C. J., dissents at 91).

² Cases cited in Cook, *Corporations*, 1898, 4th ed., §§ 721, 725.

³ 1824, *Taylor v. Henry*, 2 Pick. 397, 401 (an unrecorded adjournment, not provable orally; "if a fact of this kind can be proved by parol evidence, it is difficult to see why the election of officers may not be proved in the same manner; this goes to the foundation of our system of civil society"); 1827, *Manning v. Fifth Parish*, 6 id. 6, 16 (agreement as to church property; a vote of a parish corporation, not provable in parol); 1896, *Dennis v. Mfg. Co.*, 19 R. I. 666, 36 Atl.

129 (parol proceedings not admissible; but an exception to the rule is conceded). For a learned opinion to the contrary, see that of Story, J., in *Bank v. Dandridge*, *supra*, 12 Wheat. 64, 82; Marshall, C. J., dissents at 113.

⁴ 1896, *Boggs v. Ass'n*, 111 Cal. 354, 43 Pac. 1106 (if no record is kept, the parol proceedings suffice); 1897, *Zalesky v. Ins. Co.*, 102 Ia. 512, 70 N. W. 187, 71 N. W. 433 (similar); 1901, *Green v. Lancaster Co.*, 61 Nebr. 473, 85 N. W. 439 (county board's administrative acts — here, an accord and satisfaction of a claim — need not be by written record) 1892, *Winnepesaukee C. M. Ass. v. Gordon*, 67 N. H. 98, 29 Atl. 412 (religious camp-meeting: acts provable by parol, no charter, rule, or vote to record them being shown); and cases cited in Cook, *Corporations*, § 714.

⁵ 1897, *State v. Main*, 69 Conn. 123, 37 Atl. 80 (destruction of trees having a contagious disease; to show that certain alleged regulations of the State Board of Agriculture had not been adopted, evidence that the record of their adoption had been subsequently interlined was rejected); 1894, *Roland v. District*, 161 Pa. 102, 106, 28 Atl. 995, 1007 (school-directors; the record must be used, if there is one).

paper which constitutes the record,⁶ and the correction of records *nunc pro tunc* by special proceeding.⁷

(3) A *negotiable instrument* is by common-law custom required to be integrated into a single document. The only feature in which this appears to have been left doubtful at common law was the acceptance, which (even though distinguished from a promise to accept) was by some thought to be effective though not contained in the bill; but this anomaly was cured by statute.⁸ The peculiarity of the general rule in its application to negotiable instruments is that it not only requires the essential features of the negotiable obligation to be included, but also requires the exclusion of other terms of the transaction. Hence the peculiar aspect of the rule of voluntary integration when applied to the remaining parts of the transaction, as already examined (*ante*, §§ 2443-2445). Whether, as a matter of theory, those consequences should be deemed to belong under the present head, as due to the element of compulsory integration, may be open to argument.

§ 2452. **Under Statutes:** (1) **Wills**; (2) **Ballots**; (3) **Insurance Policies**.

(1) By the statute of Henry VIII (*post*, § 2454), a *will* of land was required to be in writing, and by the statute of frauds of Charles II a will of personalty was practically (through the restrictions of section 19 on nuncupative wills) required also to be in writing. But under neither of these provisions was any integration required, *i. e.* any reduction of the testamentary acts into a single document. Hence, wills of land, from 1540 to 1678, and wills of personalty, down to 1837 in England, might be contained in several writings, more or less fragmentary and inconsistent, and yet valid as written testamentary utterances taking effect as a single will upon the testator's death. In the practice of the ecclesiastical Courts up to the last moment of this régime might be found frequent instances of the lack of any rule of integration.¹

Nor was the change effected by any express legislative statement. But the formality of attestation, indirectly but practically, produced an equivalent result. By the statute of frauds (in 1678) wills of land, and by the statute of wills (in 1837) all kinds of wills, were required to be executed with the formality of attestation. This formality ousted the earlier loose practices, and in effect compelled testators to place all their testamentary provisions in a single document:

1866, *Wilde, P. J.*, in *Guardhouse v. Blackburn*, L. R. 1 P. & D. 109: "The Wills Act [of 1837, requiring signature and attestation] has worked a great change in the testamen-

⁶ 1876, *Fraser v. Charleston*, 8 S. C. 318, 337 (transfer-book of a corporation is secondary to the share-certificate, in showing the fact of a transfer); 1869, *Iowa & M. R. Co. v. Perkins*, 28 Ia. 281, 283 (corporation subscription-book, not the memoranda containing the actual signatures, treated as the original contract, the officer being the agent to prepare it).

⁷ 1897, *Everett v. Deal*, 148 Ind. 90, 47 N. E. 219 (town board's records).

⁸ Cases cited in Ames' Cases on Bills and

Notes, I, 168, 186, notes; 1704, St. 3 & 4 Anne, c. 9, §§ 4, 5; 1821, St. 1 & 2 Geo. IV, c. 78, § 2; 1878, St. 41 & 42 Vict. c. 13, § 1; Crawford, *Negotiable Instruments Law*, §§ 220-233; 1875, *Scudder v. Union Nat'l Bank*, 91 U. S. 406, 410.

¹ 1783, *Blackwood v. Damer*, 3 Phillim. Eccl. 458, note; 1830, *Taylor v. D'Egville*, 3 Hagg. Eccl. 202; 1830, *Bragge v. Dyer*, ib. 207; 1830, *King's Proctor v. Daines*, ib. 218, 231 (showing the looseness of practice then obtaining in the ecclesiastical Court).

tary law, as administered by the ecclesiastical Courts on this head. Under that [prior] law, a testamentary paper needed not to have been signed, provided it was in the testator's writing; and all papers of a testamentary purport, if in his writing, commanded the equal attention of the Court, save so far as one, from its date or form, might be manifestly intended to supersede or revoke another, as a will superseding instructions, or a subsequent will revoking a former." ²

Under this requirement, to be sure, the document containing testamentary act need not be a *physically single* and undivided paper; but the physically separate pieces must at least form a single grammatical or literary structure.³ Nevertheless, it remains true in theory that no statute compels the testator to integrate in a single document; if the formality of attestation is observed, he may have any number of documents. The only aspect in which the theory can have any practical consequence is in the difference between a will and a codicil. In effect, a codicil is a document, separate perhaps in existence and time, which is made appurtenant to a will, and goes to modify it and to make up with it one entire testamentary act. A will, on the other hand, is an independent document complete in itself, superseding and integrating all other testamentary acts.⁴ Hence, for example, a document which is strictly a will must be held to revoke by implication all parts of a prior will, though a codicil would revoke only such parts as were inconsistent with it. Possibly, however, this aspect of the distinction may better be explained by denominating each codicil a separate testamentary act, altering or novating the prior act, — as contracts are novated (*ante*, § 2441), and this would leave it practically true in every aspect that the formality of attestation has in effect compelled the integration of testamentary acts.

(2) By statute an electoral *ballot* is now almost universally required to be integrated into a single document; although even under the system of the common law there was seldom any opportunity of casting a written vote in any other way.⁵

(3) By statute in several jurisdictions all parts of a transaction of *insur-*

² So also in this country: 1895, *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831 (under modern statutes, "the true inquiry is not as to the completeness of the paper, but as to the finality of the intent and purpose of the testatrix, manifested by the observance of the formalities of execution required by the statute").

³ 1801, *Smart v. Prujean*, 6 Ves. Jr. 560, 565 (L. C. Eldon: "The rule of law is that an instrument properly attested, in order to incorporate another instrument not attested, must describe it so as to be a manifestation of what the paper is which is meant to be incorporated, in such a way that the Court can be under no mistake. . . . The true question is, if these papers were found in the bureau with the will, can I say, from the contents of the will, these two papers are the papers referred to?"); 1830, *Dillon v. Harris*, 4 Bligh. n. s. 321, 358 (will devising property to a son so long as he keeps a certain "solemn engagement, . . . which engagement signed by him I have put into the hands of my said trustees"; a certain engage-

ment not admitted, because not sufficiently identified); 1858, *Allen v. Maddock*, 11 Moore P. C. 427; 1881, *Gould v. Lakes*, L. R. 6 P. D. 1; 1894, *Garnett's Goods*, Prob. 90; 1895, *Barnewall v. Murrell*, 108 Ala. 366, 18 So. 831 ("The validity of the instrument as a will is unaffected because of the fact that it is composed of or written on several separate sheets, if they are connected and coherent in sense and by an adaptation of the several parts"). Compare *Burge v. Hamilton*, 1884, 76 Ga. 568, 619.

⁴ 1799, *Arden, M. R.*, in *Crosbie v. Macdonald*, 4 Ves. Jr. 10 ("There is a great distinction between wills and codicils in this respect. If there are two separate papers, both called wills, inconsistent with each other, it is not the rule to prove both, in the Ecclesiastical Court; the last is the will; from the nature of the instrument it revokes the other. . . . But if it does purport to be coupled with another instrument, it is as much a part of that instrument as if it was written upon the same paper").

⁵ Compare §§ 1967, 2421, *ante*.

ance must be embodied in a single document;⁶ and the construction of this type of statute illustrates neatly the distinction between the doctrine of Integration (*ante*, § 2425) and that of Written Formality (*post*, § 2454); because even written parts of the transaction not embodied in the policy will by this rule be ignored.⁷ It is also to be noted that these statutes go further than any other application of the rule, in that they require a physical, and not merely (as for wills) a grammatical or literary integration.

§ 2453. **Conclusive Certificates, distinguished.** The principle of Integration, by which the document becomes the very embodiment of the transaction, must be distinguished from the principle of Conclusive Testimony (*ante*, §§ 1345-1353), by which a particular person's written report is taken as conclusive and no contrary testimony is allowed to overthrow it. The common result of both principles, though by different reasonings, is that the terms of the writing are decisive. But the practical difference between the two principles appears when the writing itself is lost and cannot be produced; for here, by the former principle, the terms of the writing must nevertheless be proved (*ante*, § 2450) because it is the sole embodiment of the transaction; while by the latter principle the conclusive testimony is merely preferred to others, and therefore when it becomes unavailable the preference ceases, and other testimony may be used (*ante*, § 1346).

There are but few genuine instances, of the principle of conclusive testimony, and these not universally conceded; the chief of these are a *magistrate's report of testimony* at a preliminary examination (*ante*, § 1349), the *enrolled copy of a legislative act* (*ante*, § 1350), and the *election-judges' certificate of votes* (*ante*, § 1351). There are a few other instances (*ante*, § 1352) in which the principle is involved in appearance only; for example, the conclusiveness (in some jurisdictions) of a notary's certificate of a *married woman's voluntary acknowledgment* of a deed at a privy examination is in reality an instance of the binding effect of a judicial proceeding, and depends upon the law of judgments. In all the foregoing cases, the difference between the rule of conclusiveness of testimony and the rule of judicial records is seen in this feature, that the judicial record represents and is in legal theory the transaction itself of the Court, while in the former instances the certificate is the officer's report of somebody else's doing or of some external happening. Obviously, in such instances the theory of integration cannot apply, because the writing of the officer cannot be the embodiment of the act of some other person, but can only be testimony about it. In the case of a deposition, on the other hand (*ante*, § 802), the written deposition signed by the deponent *is* the embodiment of his testimony, while the caption-certificate is the officer's report of what happened in his presence.

⁶ Mass. St. 1894, c. 522, § 73 (every insurance policy must have the application attached thereto, "and unless so attached the same shall not be considered a part of the policy or received in evidence"); 1897, Joyce, Insurance, I, §§ 186-187, 190 (citing other statutes).

⁷ 1896, *Considine v. Ins. Co.*, 165 Mass. 462, 43 N. E. 201 (both the unattached application and the insured's oral utterances, excluded); 1902, *Albro v. Ins. Co.*, C. C., 119 Fed. 629 (*Considine v. Ins. Co.* followed).

Further to be distinguished are statutory rules of substantive law which, in the guise of rules of conclusive evidence, practically declare certain facts legally immaterial,—for example, the rule that a tax-officer's recitals, in his deed, of the due performance of certain prior proceedings shall be conclusive evidence of these facts (*ante*, § 1353). Such a rule, so far as constitutionally valid, is no rule of evidence, but merely a rule declaring certain facts legally immaterial to avoid or produce a certain result.

C. SOLEMNIZATION OF LEGAL ACTS.

§ 2454. **Writing as a Formality; Statute of Frauds.** When it is required that a transaction, to have legal effect, must be in writing, the requirement is one of *form* or solemnity. The principle of solemnization differs from the two preceding ones in that it does not inquire whether the act was done at all, nor whether it was embodied in a single utterance, but merely whether its form of utterance was sufficient. Stamp, seal, attestation, writing,—all these are different varieties of formality; but the fundamental and most common one, in all modern systems of law, is writing.

That the rule of Written Formality is independent of the rule of Integration, just examined, is plain. For example, a will of land, during the century after it was first required to be in writing (*ante*, § 2452), was in all that time not required to be in a single document. So, too, of insurance applications under modern statutes (*ante*, § 2452). On the other hand, when the parties have reduced their transaction to a single writing, the rule of Integration applies (*ante*, § 2425), although the transaction might have been valid without any writing. Whenever, then, the question is whether a transaction, to be valid, must be in writing, not merely oral, it is a question of Written Formality. This question is presented when the parties have used no writing, and is a distinct one from that which arises after the transaction has been done in writing, *i. e.* from the question of “varying the writing” already dealt with.

What transactions, then, are required by law to be done in writing, as a condition of legal validity? At common law, none, it would seem. The historical surroundings of the common law in its origins were unfavorable to such a requirement (*ante*, § 2426). Even for dealings with land, livery of seisin persisted for centuries as a sufficient formality; and only where livery was impossible, namely, for incorporeal rights, was the requirement of a written deed of grant developed, and even here some sort of symbolic seisin, in the way of attornment or view or the like, was needed to complete the title.¹ Judicial records, another example of the modern necessity of writing, began as the mere recollection of the judge (*ante*, § 2426); and negotiable instruments, the one full and indubitable instance of compulsory writing, were a distinct borrowing from international mercantile custom. In modern times, numerous local statutes have insisted on the formality of writing for

¹ Pollock and Maitland, *History of the English Law*, II, 82, 93, 139.

specific miscellaneous transactions.² Yet it may be said that, in general, apart from statutes, and apart from one special doctrine (*post*, § 2455), no legal act was required to be in writing.³

Even among statutes, there are few of wide scope. These date back to the innovating provisions of the 1500s, by which bargains and sales,⁴ as well as wills,⁵ of land must be in writing. The next and greatest measure of this kind was the statute of frauds and perjuries, in 1678, which extended the formality of writing to the remaining most important transactions in land and to many classes of contracts and of dealings with personalty.⁶ This is

² The following will serve as examples: 1800, *White v. Wilson*, 2 B. & P. 116, 119 (the statute requiring agreements for wages of crews to be in writing, and the articles in this case having noted the wages of the mate at 6l. a month, a further oral agreement that the mate should have the average price of a negro slave sold on the ship's account was excluded, because the statute required writing); 1814, St. 54 Geo. III, c. 144, §§ 3-5 (contracts of marine insurance to be in writing); 1851, *Greeley v. Quimby*, 22 N. H. 335, 338 ("As the law required that the return of the selectmen laying out the road should be in writing, no other proof can be substituted for it, so long as it is in existence and within the power of the party to produce"); 1826, *Fox v. Lambson*, 8 N. J. L. 275, 276 (manumission being required to be done in writing, etc., other evidence of manumission was excluded).

³ 1900, *Johnson v. Griswold*, 177 Mass. 34, 58 N. E. 157 (where no statute controls, an official resignation may be oral); and cases cited *ante*, § 2427. The case of corporate records (*ante*, § 2451) was perhaps an exception.

⁴ 1535, St. 27 H. VIII, c. 16 ("no manors, lands, tenements, or other hereditaments, shall pass, alter, or change from one to another, . . . by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed, and inrolled in one of the king's courts of record . . .").

⁵ 1540, St. 32 H. VIII, c. 1, § 1 (gives liberty to devise all lands "as well by his last will and testament in writing, or otherwise by any act or acts lawfully executed in his life"); 1603, *Molineux v. Molineux*, Cro. Jac. 144 ("a will cannot refer to words only, without writing; but it ought to be a will in writing for all").

⁶ 1678, St. 29 Car. II, c. 3, § 1 ("all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by *parol*, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect . . ."); § 3 ("no leases, estates, or interests . . . [in land] shall . . . be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning . . ."); § 4 ("no action

shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, or to charge any person upon any agreement made upon consideration of marriage, or upon any contract of sale of lands, tenements, or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized"); § 5 ("all devises and bequests of any lands or tenements . . . shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect"); § 7 ("all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party . . . or else they shall be utterly void and of none effect"); § 9 ("all grants and assignments of any trust or confidence shall likewise be in writing signed by the party granting or assigning . . . or else shall likewise be utterly void and of none effect"); § 17 ("no contract for the sale of any goods . . . shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized"); § 19 ("no nuncupative will shall be good . . . that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same did bid the persons present, or some of them, bear witness that such was his will, or to that effect"); § 20 ("after six months passed from the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will").

not the place to follow out in detail the requirements of this statute and those which have adopted its provisions in the United States. But it is necessary here to examine its provisions so far as they bear on the theory of the parol evidence rule, and to discriminate its relation to the principles already considered.

The provisions of the statute fall into two classes, — those of Sections 1, 3, 5, 7, and 9, and those of Sections 4 and 17. (a) The terms of the first group deal plainly with the *formality* of the act. It must be “put in writing,” and otherwise it “shall be utterly void.” Such a transaction, then, if not in writing, is of no legal effect. The writing is constitutive, not merely evidential. But if it *is* put in writing, according to the statute, is the writing the exclusive memorial of the transaction, — in other words, is there compulsory integration, under the principle already considered (*ante*, §§ 2450–2452)? Not necessarily, — that is, not in consequence of the statute. The requirement of signature, in all those five sections, will tend to induce parties to reduce their transaction in its entirety into a single document, but this is only an indirect consequence of the statute, — as already noticed in the case of wills (*ante*, § 2452). The embodiment in a single writing is voluntary, not compulsory. For example, if the owner of a farm by a single negotiation makes leases and crop-contracts of various parts of it,⁷ the statute would be apparently satisfied by a series of signed letters between the parties.⁸ Furthermore, if the transaction covered matters both within and without the statute, such as a lease of land and a sale of tools, and the former was embodied in a single writing, there is nothing in the statute to render the latter part of the transaction invalid; and if a Court should refuse to give effect to the oral part, it would be solely because of the principle of voluntary integration, leading the Court to believe that by the intent of the parties the document was the sole memorial of the entire transaction.⁹ Thus, so far as the Sections 1, 3, 5, 7, and 9, of the statute are concerned, the question whether the transaction satisfies the statute by being “in writing” is essentially distinct from the further question whether by the other rule (of integration) the transaction has been so embodied in a single document as to exclude other writings or oral utterances which passed in the course of the negotiations.

(b) The terms of the second group — Sections 4 and 17 — differ radically in theory of formality, but their relation to the principle of integration is the same. They differ, in theory of formality, from Sections 1, 3, 5, 7, and 9, because they require only a “note or memorandum in writing” of the “agreement” or “bargain.” In other words, the writing *is not* the contract, but is distinct from it and is merely the party’s admission that such a contract was

⁷ The case of a transfer of freehold estates would be different, because a sealed deed is there required: Browne, Statute of Frauds, 5th ed., § 6.

⁸ This point does not appear to have been decided, so far as the citations in Browne, *ubi supra*, show.

⁹ A good example of this is seen in *Bretto*

v. Levine, 50 Minn. 168, 52 N. W. 525 (1892), cited *ante*, § 2430. Compare also *Lowrey v. Downey, Ind.*, *Brockett v. Bartholomew*, *Carr v. Dooley*, *Durkin v. Cobleigh*, *Mass.*, *Harman v. Harman*, *U. S.*, *Long v. Ferine*, *W. Va.*, cited *ante*, § 2442.

made. This difference is plain, and is generally conceded,¹⁰ and shows its practical results in various ways. For example, the written admission may be made subsequently to the contract;¹¹ it may even in terms attempt to repudiate the contract;¹² it may be a letter to a third person.¹³ Practically, to be sure, the effect is the same, so far as the necessity of a writing is concerned; for it must mention and cover all the essential terms, if not all the terms whatever, of that part of the transaction covered by the statutory requirement;¹⁴ and these terms so written, of course, cannot be overthrown or varied by other written or oral utterances;¹⁵ so that the parties are in this respect in the same plight practically as under Sections 1, 3, 5, 7, and 9, in spite of the difference of theory. But what of the rule of integration? Is there any difference in that respect? By no means. For example, under Sections 4 and 17, a series of letters or other documents will suffice to satisfy the statute, and yet the terms of the transaction may be scattered through the negotiation and not embodied in a single document.¹⁶ Again, if a transaction includes matters both within and without the statute, the satisfaction of the statute for the former may be made, and then the remainder though not in writing may be enforced.¹⁷ In short, the parties may satisfy the statute without embodying their entire transaction in a single writing, or with embodying the statutory part of it in writing and the remainder orally. Thus the question whether any particular writing is the sole embodiment of their transaction is a distinct one, and depends upon the intent of the parties. Here, then, as under the other Sections of the statute, the principle of Integration is found to be independent of the principle of Written Formality.

§ 2455. **Same: Discharge and Alteration of Specialties, etc.** (1) Although writing was in general at common law no necessary formality to any transaction (*ante*, § 2454), yet in one respect it was made necessary by the application of a peculiar doctrine, whose Roman origin and mediæval vogue have been already noticed (*ante*, § 2426), namely, the doctrine that an *act of a higher "nature" cannot be altered* or annulled by anything of an *"inferior nature."* The result of this was that where the parties had chosen to adopt the "higher" form in their original transaction, a form equally "high" could alone suffice to dispose of it. This notion was seen in the rules that a sealed covenant could not be discharged by a transaction *in pais*,¹ and that an assumpsit was dischargeable by parol, unless broken, and then only by sealed deed,² and in the controversies whether payment before maturity could dis-

¹⁰ Browne, *ubi supra*, §§ 115 a, 135, 136, 344; 1852, *Leroux v. Brown*, 12 C. B. 801, 824 (oral contract made in France, and there valid, not enforced in England, since the 4th section did not make contracts void, but only affected the remedy by requiring a specific kind of evidence); 1883, *Maddison v. Alderson*, L. R. 8 App. Cas. 467, 474; 1902, *Vaughan Williams, L. J.*, in *Re Holland*, 2 Ch. 360, 375 ("The statute of frauds does not deal with the validity of the agreement; it deals only with the evidence to prove the agreement"); 1875, *Townsend v. Hargreaves*, 118 Mass. 325, 334.

¹¹ Browne, *ubi supra*, § 352 a.

¹² *Ib.* § 354 a.

¹³ *Ib.* § 354 a.

¹⁴ 1804, *Wain v. Warlters*, 5 East 10, 19; 1878, *Grafton v. Cummings*, 99 U. S. 100; Browne, *ubi supra*, §§ 331 ff.

¹⁵ Browne, *ubi supra*, §§ 417, 418.

¹⁶ *Ib.*, § 348. Compare the cases cited in Ames' Cases on Trusts, 2d ed., p. 179, note.

¹⁷ *Ib.* §§ 117, 117 a.

¹ 1606, *Blake's Case*, 6 Co. Rep. 43 b.

² 1676, *Milward v. Ingram*, 2 Mod. 43.

charge a bond,³ and whether a parol extension of time to the principal of a bond would discharge the surety.⁴ Most of these questions are now governed by a rational policy irrespective of the scholastic technicality of the traditional maxim.⁵ It is enough here to note the place they hold in the general theory of legal acts.

(2) Under the statute of frauds, a not dissimilar question arises, when a transaction covered by the statute is duly made in writing and then an *oral alteration* is afterwards made. This oral alteration makes a new transaction together with the terms of the original transaction. Yet the result is, that the new transaction as a whole is no longer in writing as required by the statute, but is partly oral and partly written; and thus, although the mere alteration is in itself not expressly required to be in writing, yet the transaction as a whole is now unenforceable.⁶

Neither of the foregoing doctrines involves the rule of Integration. By that rule, as already noticed (*ante*, § 2441), the reduction of a transaction to a single document makes it exclusive and controlling for that transaction only, and hence any subsequent transaction of discharge, novation, or alteration may be availed of to vary the original document.⁷ Whatever there is, therefore, to prevent the parties from availing themselves of the subsequent transaction is the result of one of these rules of Written Formality, and not of the rule of Integration.

§ 2456. **Other Formalities than Writing; Signature; Seal; Attestation; Registration; Stamp.** It remains here to note, for the sake of completeness, the remaining formalities receiving the sanction of modern law.¹ These formalities, so far as required, take their place with the rule for writing, in some of the sections of the statute of frauds, as an inherent element of form in the validity of the transaction. Like all other requirements of form, they are arbitrary, in the sense that the act may be sufficient in its terms (for example, to constitute a contract or a release), and may be fully proved by evidence, and yet remains legally ineffective. Nevertheless, they are not arbitrary, to the extent that they rest on a conscious policy of avoiding certain general dangers or abuses, and that they enforce a rigid rule merely for the sake of this policy.

(1) A *signature* is required by the statute of frauds, for all of the transactions in which writing is required; and obviously the signature is a formal requirement over and above that of writing alone.² A signature, however, was not required at common law for a deed.³

³ 1790, *Sturdy v. Arnaud*, 3 T. R. 599.

⁴ 1821, *Davey v. Prendergass*, 5 B. & Ald. 187.

⁵ Compare the cases cited in Professor Ames' *Cases on Trusts*, 2d ed., p. 128, note, and his article on Specialty Contracts in the *Harvard Law Review*, IX, 49, 55 (1895), and in Professor Williston's article on Discharge of Contracts, in the *Columbia Law Review*, IV, 455 (1904).

⁶ 1833, *Goss v. Lord Nugent*, 5 B. & Ad. 58; 1840, *Marshall v. Lynn*, 6 M. & W. 109, 114;

1895, Browne, *Statute of Frauds*, 5th ed., §§ 410 ff.

⁷ *Goss v. Lord Nugent*, quoted *ante*, § 2441.

¹ An interesting exposition of the development of formalism in primitive and modern Germanic law will be found in Heusler, *Institutionen des deutschen Rechts*, I, 68 ff.

² 1895, Browne, *Statute of Frauds*, §§ 10, 106, 355.

³ 1698, *Cromwell v. Grunsden*, 2 Salk. 462; 1845, *Parks v. Hazelrigg*, 7 Blackf. 536.

(2) A *seal* was essential at common law for the chief sorts of documents.⁴ The origin of the significance of the seal, in its relation to the use of writings, has already been noticed (*ante*, § 2426). What the form of a seal should be was long a subject of elaborate discussion.⁵

(3) The *attestation* of a document was originally not a formality to the validity of the document, but merely a precaution desirable for securing testimony to the transaction (*ante*, § 2426); the noting of the names of the witnesses on the document was thus only a memorandum for future usefulness. But the statute of frauds (*ante*, § 2454) introduced, for wills, the act of attestation as a formality. This formality includes two things, first, the presence of the witnesses at the act of signature by the testator, and, secondly, the signature of the document by the witnesses. The two together thus constitute an intrinsic element in the validity of the document.⁶ It may be noted that whatever questions are thus raised — for example, whether the document must bear a written recital of the witnesses' presence, or whether, if their signatures are borne, the fact of presence may be otherwise established⁷ — do not involve the principle of integration (*ante*, § 2425), but only the principle of formality.

(4) The *registration* of a document may be made an essential formality of its validity, apart from and additionally to its service as a constructive notice of the document's validity. But this quality is seldom attributed to it unless by express statutory declaration.⁸ Under the modern (or Torrens) system of registration of title, no doubt this is the actual result.⁹ It may be noted that by this modern system the document of title would seem also to furnish one of the rare instances (*ante*, § 2452) of a compulsory integration.

(5) A *stamp* has by some legislation been made formally necessary to the validity of a document; the policy of such laws being to compel indirectly the payment of a tax. So far as a rule of evidence may be involved, the subject has been elsewhere briefly examined (*ante*, § 2184). It may be here noted that in one respect the rule of integration is affected by the stamp-requirement; for, though a transaction has been embodied in writing, yet the writing if unstamped cannot be given any legal effect, either as superseding the oral transaction or as altering a previous written one, and consequently the party on whom lies the burden of proof of integration (*ante*, § 2447) must fail in the establishment of that part of his case.¹⁰

⁴ Pollock and Maitland, History of the English Law, II, 218-222.

⁵ *Eng.*: 1871, *Re Sandilands*, L. R. 6 C. P. 411; 1886, *National Provincial Bank v. Jackson*, L. R. 33 Ch. D. 1; *U. S.*: 1810, *Warren v. Lynch*, 5 John. 239, Kent, C. J. 1851, *Pillow v. Roberts*, 13 How. 472; 1845, *Corrigan v. Trenton D. F. Co.*, 1 Halst. Ch. 52; 1865, *Bates v. R. Co.*, 10 All. 251; and a note in *Gray's Cases on Real Property*, III, 644.

⁶ See *ante*, §§ 1287, 1292, for its relation to the rule of evidence requiring the calling of an attesting witness.

⁷ 1846, *Pollock v. Glassell*, 2 Gratt. 439, 463 (examining the cases upon wills and powers).

⁸ 1835, *Doe v. Ford*, 3 A. & E. 649 (annuity deeds on premises of less than a certain value being by statute void unless registered, the defendant was allowed to plead the non-registration in avoidance, although a covenant in the deed declared the premises to be of a value sufficient to satisfy the statute); *Jones, Real Property*, § 1382.

⁹ See the treatises of Olmstead, Niblack, and Sheldon, and articles in the *Harvard Law Review*, VI, 302, 369, 410; VII, 24.

¹⁰ 1818, *Stevens v. Pinney*, 8 Taunt. 327 (Dallas, J.: "It turned out to be unstamped, and therefore inadmissible in evidence, and consequently not amounting to an agreement";

D. INTERPRETATION OF LEGAL ACTS.

§ 2458. **General Nature of Interpretation; Standard and Sources of Interpretation.** The process of Interpretation is a part of the procedure of *realizing a person's act in the external world*. It is, in a sense, the completion of the act; for without it the utterance, whether written or oral, must remain vain words. If a person could be content with proclaiming his contracts at the top of a mountain, or nailing his deeds to the garden gate, he would not need to be concerned with the process of interpretation. But deeds and contracts and wills, if they are not to remain empty manifestoes, must be enforced. They must be applied to external objects. Somewhere possession must be yielded, or goods delivered, or money transferred; and in order that the law may enforce these changes in external objects, the relation between the terms of the legal act and certain specific external objects must be determined, as an indispensable part of the process. In short, the interpretation of the terms of a legal act is an essential part of the act considered as capable of legal realization and enforcement.¹ The only difference is that the actor alone creates the terms of his act, while the interpretation of it, being a part of the enforcement, comes into the hands of the law.

The process of interpretation, then, though it is commonly simple and often unobserved, is always present, being inherently indispensable.² The method of it consists in *ascertaining the actor's associations or connections between the terms of the act and the various possible objects of the external world*. Those terms may be dramatic or verbal. The lantern of Paul Revere, and the twenty-one guns of a warship's salute, are as much the subject of interpretation as the words of a will. In all cases, the process is that of applying the symbol or word to external objects. Since men cannot go forth and instantaneously transform, with the *presto* of a magician, the existing to the desired state of things, they must embody their desire in marks which will serve to point out the effects desired, and then wait for the law, or for some one's voluntary obedience to it, to produce the realization of the effects thus pointed out in advance. The process of interpretation may be compared to a wireless telegraph station. A vessel approaches the coast and

Park, J.: "It was not in fact an existing agreement"); 1829, *Fielder v. Ray*, 6 Bing. 332 (action for work and labor in printing; the defendant offered to show that there was an agreement in writing, but as it was unstamped, it could not be used, and the objection was held to fail). *Contra*: 1827, *Reed v. Deere*, 7 B. & C. 261 (the plaintiff sued on a written agreement to arbitrate; when it appeared that a later agreement had been made, held that the fact that it put an end to the first could be considered, though it was itself not admissible to sue upon because unstamped).

¹ 1789, Answer of the Judges to the House of Lords, 22 How. St. Tr. 301 ("Your lordships ask us, 'whether the sense of the letter be matter of law or matter of fact?' We find a difficulty in separating the sense of the letter from the letter. The paper without the sense is not a letter").

² Such remarks as the following illustrate the occasional perversity on this subject: *Hartford I. M. Co. v. Cambria M. Co.*, 80 Mich. 491, 499, 45 N. W. 351 (1890): "There should be interpretation only when it is needed."

perceives the station-pole standing straight above the cliffs. Until the current can be intercepted, it is but a dumb rod of metal ; it sends no message and accomplishes no purpose. It may have any one of various attunements ; and it will tell nothing until a similar attunement be established by the vessel. To ascertain that attunement, the particular country where it is fixed must be known, and then the authorized records of its methods and signals must be consulted. Not until then can the station's message be made actual to the vessel.

Such is the process of interpretation. The analogy of the telegraph-station illustrates the important distinction between the two great divisions of the process. The first question must always be, What is the *standard* of interpretation ? The second question is, In what *sources* is the tenor of that standard to be ascertained ? Sometimes one or the other of these questions may interpose no difficulty ; but both must always be settled.

(1) The *standard* of interpretation, as involved in legal acts, is the personality whose utterances are to be interpreted. There are practically four different available standards. First, there is the standard of the normal users of the language of the forum, the *community at large*, represented by the ordinary meaning of words. Next, there is the standard of a *special class of persons* within the community, — the followers of a particular trade or occupation, the members of a particular religious sect, the aliens of a particular tongue, the natives of a particular dialect, who use certain words in a sense common to the entire class, but different from that of the community at large. Thirdly, there is the standard of the *specific parties* coöperating in a *bilateral act*, who may use words in a sense common to themselves and unknown to any others. Finally, there is the standard of an *individual actor*, who may use words in a sense wholly peculiar to himself ; and here the question will naturally arise whether he may insist on his individual standard in the interpretation of the words of a contract, or even of a unilateral act such as a will. The first inquiry in interpretation, then, is to determine which of these standards is the proper one for the particular act to be interpreted ; and for this purpose certain working rules have to be formulated.

(2) The *sources* for ascertaining the tenor of the standard form the second object of inquiry. Since interpretation consists in ascertaining the associations between the specific terms used and certain external objects, and since these associations must be somehow knowable in order to proceed, the question is where they are to be looked for. So far as the standard of interpretation is solely the normal one of the community, the inquiry is a simple one ; the usage of the community (as represented in dictionaries and elsewhere) is the source of information. But that standard (as will be seen) is rarely the exclusive one. The mutual standard of parties to a bilateral act, and for wills the individual standard of the testator, is constantly conceded to control ; and it then becomes necessary to search among the prior and subsequent utterances of the party or parties to ascertain their usage, or fixed associations with the terms employed. In resorting to these data, the question then

arises whether there is any prohibitive rule of law which limits the scope of search and forbids the use of certain data. These rules, if any, form the second part of the law of interpretation.

Before proceeding, however, to these two parts of the subject in their order, it is necessary to fix upon a terminology and to avoid misunderstanding in the use of words. When we seek to ascertain the standard and sources of interpretation, and thereby to discover the actor's association of words with external objects, what is the term, in one word, which describes the object of the search? Is it the person's "meaning"? Or is it his "intention"? Over this difference of phraseology has persisted an endless controversy, which, like that of the two knights and the shield at the cross-roads, is after all resolvable mainly into a difference of epithets only.³

§ 2459. **Same: "Intention" and "Meaning," distinguished.** The distinction between "intention" and "meaning" is vital. The distinction is independent of any question over the relative propriety of these names; for there exist two things, which must be kept apart, yet never can be unless different terms are used. The words "will" and "sense" may be taken as sufficiently indicative of these two things and free from the ambiguity of the other terms.

Will and Sense, then, are distinct. Interpretation as a legal process is concerned with the Sense of the word used, and not with the Will to use that particular word. The contrast is between that Will, or volition to utter,¹ which, as the subjective element of an act, makes a person responsible for a particular utterance as his, and that Sense or meaning which involves the fixed association between the uttered word and some external object. It has already been seen (*ante*, § 2413) that by the general canon of legal acts, the person's actual will or intent to utter a given word can seldom be considered for legal purposes. If he has exercised a volition to utter something, then he is responsible for such utterance as is in external appearance the utterance he intended, — whether or not he actually intended it. On the other hand, the sense of his word as thus uttered — his fixed association between that symbol and some external object — may usually be given full effect, if it can be ascertained. The rules for the two things may be different. The law has thus constantly to emphasize the contrast between the prohibitive rule applicable to the creation of an act (*ante*, § 2413), and the present permissive rule applicable to its interpretation. Judges are desirous, when investigating the sense of the words as uttered by the person, of emphasizing that they do not violate the rule against inquiring whether he

³ The word "meaning" has been favored by Mr. Nichols, in his article on Extrinsic Evidence in the Interpretation of Wills (Juridical Society Papers, II, 352), and before him by V. C. Wigram, in his treatise on Extrinsic Evidence in Aid of the Interpretation of Wills (who however often uses the words interchangeably). The word "intention" has been favored by Mr. Hawkins, in his article on Principles of Legal Interpretation (Jurid. Soc. Pap. II, 298, re-

printed in Thayer, Prelim. Treat. on Evidence, App. C.), who declares the opposite usage to involve "a fallacy of no small importance." Mr. Phipson has compared the views of these and other writers in the Law Quarterly Review for July, 1904. Professor Thayer's treatment of the subject is found in his Preliminary Treatise, pp. 412, 480.

¹ Examined *ante*, § 2413.

actually intended to utter those words. Hence the reiteration of the contrast between "intention" and "meaning":

1789, *Kenyon*, L. C. J., in *Hay v. Coventry*, 3 T. R. 83, 86: "We must collect the meaning of the testator from those words which he has used, and cannot add words which he has not used."

1833, *Parke*, J., in *Doe v. Gwillim*, 5 B. & Ad. 122, 129: "In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he used."

1833, *Denman*, L. C. J., in *Rickman v. Carstairs*, 5 B. & Ad. 663: "The question . . . is not what was the intention of the parties, but what is the meaning of the words they have used."

The common terminology of these judicial explanations is unfortunate, because "meaning" has a suggestion of the state of the person's mind as fixed on certain objects, and "intention" bears the same suggestion. The constant exclusion of the state of the person's mind in one aspect, and yet its consideration in another aspect, are thus apparently contradictory and irreconcilable. But the terms "will," or "volition," and "sense," serve to avoid this ambiguity. They emphasize the distinction that the will to utter a specific word is one thing, and the fixed association of that word is another thing. Thus the Creation of the act and its Interpretation as created are kept distinct.

The analogy of other symbols than words will best illustrate how common and fundamental is this difference in other affairs, and how instinctively it is appreciated and applied. Suppose a foreign vessel to be coasting the shore and entering various harbors where the Government maintains a uniform system of harbor-buoys in various colors and shapes, indicating respectively channels, sandbars, sunken rocks, and safe anchorages; here the significance of each kind of buoy is known to be the same in every harbor under Government control. But suppose the vessel to enter a harbor or inlet under the control of an individual or a city having a peculiar and different code of usage for the buoys; here it is immaterial whether a red buoy under the Government system signifies a channel or a sandbar; the vital question for the vessel now is what a red buoy signifies under the code of the local authority, and all other systems of meaning are thrown aside as useless. This illustrates that though, in interpreting a person's (for example, a testator's) words, we are concerned with *his* individual meaning, as distinguished from the customary sense of words, still we are not dealing with his state of mind as to volition, but with the associations affixed by him to an expressed symbol as indicating to others an external object. That is to say, the local harbor authorities may have "intended" to put a green buoy instead of a red buoy, or to have put the red buoy at another spot; they may have made a "mistake," just as the testator may have intended to use other words; but in both cases the state of mind as to volition, or mistake, is a wholly different thing from the fixed association, according to that individual's standard, between the expressed symbol and some external object. To illustrate

another aspect of the subject, suppose a game of chess to be played by B with his guest A. If the two are of the same nation, their standards of interpretation — for example, as to the character of each chessman, the allowable moves, and the effect of a move — will be the same. But some nations differ from others in one or more of these respects; so that if, for example, B's national rules allowed a rook to threaten diagonally on the board, A as guest would accept and accommodate himself, as best he might, to this standard of operation. But, though this much might be conceded to B as host, in the adoption of his standards for giving meaning to his acts of moving the chessmen, yet it would remain true that his private intent or volition, as distinguished from the significance of his acts of moving, would be immaterial; so that, for example, his intent to have touched and moved a different piece, or to have placed the piece on a different square, would not be taken into consideration. So, again, if A and B engage in a shooting match, with two targets of 100 yards' and 500 yards' distance, it may be that, after the shooting, A and B will discover that they have not agreed which prize is to be associated with which target, or whether the victory at the 500-yard target is to count for more than the victory at the 100-yard target, and they may have to repeat the match after coming to a common understanding. But in no case would A think of claiming that B, who has hit the 100-yard bull's-eye, could not win because he was really aiming at the 500-yard target and hit the other by mistake only; nor could A have a second trial, on missing the 500-yard target, because by mistake he shot at the 100-yard target.

A person, then, who wills to utter words is like a man placing a buoy, or moving a chessman, or shooting at a target. His will or intent or volition as to the terms of the particular utterance is one thing; his sense or meaning attached to the terms actually uttered is a different thing. Whatever may be the rules for the former element of his act, the rules for the latter element are independent of them.

1. Standard of Interpretation.

§ 2461. **General Principle; Four Standards, — Popular, Local, Mutual, Individual.** The standard of interpretation, which forms the first part of the inquiry (*ante*, § 2458), is the association between words and objects considered with reference to the persons fixing that association. It has already been noted (*ante*, § 2458), that the possible standards fall roughly into four classes, — the standard of the community, or *popular* standard, meaning the common and normal sense of words; the *local* standard, including the special usages of a religious sect, a body of traders, an alien population, or a local dialect; the *mutual* standard, covering those meanings which are peculiar to both or all the parties to a transaction, but shared in common by them; and the *individual* standard of one party to an act, as different from that of the other party or parties, if any. These standards, from the

first-mentioned to the fourth, increase in intension (as the logicians have it), while they decrease in extension. The possible meanings are more and more; for the local and the mutual and the individual standards each add to the one or a few normal meanings; while the number of persons involved in each standard becomes fewer.

The main question is, of course, whether one or more of these standards is exclusive of the others, or whether they are all available at the same time. The answer is, first, that, in general, they are all available coincidentally; and, secondly, that where the transaction involves more than one party, the standard must be common to all.

In the first place, then, *all the standards are provisional only*, and therefore *each may in turn be resorted to* for help. The search is for the sense of a word or phrase as used, and the object is therefore to find the standard actually employed by the party. Now, as a member of the community, he presumably uses words in the normal sense of the community; this standard will therefore be *prima facie* accepted. But if it appears that, as a resident of a special village, he used the sense of that village, then this local standard may be substituted for the other. Still further, if it appears that the parties to a specific contract have a special mutual sense, or that a testator has a special individual sense, the mutual or the individual standard may replace the normal or the local standard. Thus for any particular word or phrase one standard, provisionally applicable, may be finally replaced by another; and for a given document, its various parts may be interpreted by different standards. The single condition is that before the standard *prima facie* applicable can be replaced, *it must be made to appear probable that the party was actually using the other standard*. No one standard, then, is absolute and essential.

In the second place, *no person taking part in a transaction can invoke a standard which is not at least common to all parties*.¹ For example, the contract of a person dealing with a wheat broker and using words in the normal sense cannot be judged by the usage of the wheat trade, unless that standard appears to have been adopted by him as well as by the other party. Or a person issuing a negotiable instrument, and understanding its terms in a mutual sense with the payee, cannot expect to enforce it against a holder for value without notice. So, too, in a purely bilateral transaction, the private sense of one party cannot be imposed upon the other party. The standard, then, must at least be common to all parties to the transaction, and here the nature of the transaction in the substantive law will control.

Before following the application of this general principle, however, it is necessary to dispose of a supposed rule which, if valid, would seriously qualify the first part of the principle above stated; namely, the rule against "disturbing a clear meaning,"—in other words, a rule which forbids de-

¹ Compare the theory as stated by Mr. Justice Holmes, in *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 ("Each party to a contract has notice that the other will

understand his words according to the usage of the normal speaker of English under the circumstances and therefore cannot complain if his words are taken in that sense").

parting from the normal standard even where it can be proved to have been not the standard actually employed.

§ 2462. Rule against "Disturbing a Clear Meaning," or, Forbidding Explanation except of Ambiguities; History and General Principle. The history of the law of interpretation is the history of a progress from a stiff and superstitious formalism to a flexible rationalism. The marked features of primitive formalism have been already noticed in other aspects (*ante*, § 2405). The word of a man is in itself almost a magic formula. The wrong word produces its evil effects in spite of the good will of the party; without the right word, nothing will move, however plainly he seek to express himself.¹ When the brother of Ali Baba forgot the word "sesame," he was powerless to open the door of safety. This inherent potency of words was for primitive minds, as it now is for children, no mere fairy tale, but a reality of life. These notions come down into Coke's time shorn of their first crudeness. But they explain nevertheless the scholastic technicality of those later days. A word was still a fixed symbol. Its meaning was something inherent and objective, not subjective and personal. A man who wrote a document dealt with words as he might deal with a blunderbuss or a carpenter's tool. They had their uses; and he must understand and choose the proper word for the purpose in hand, just as he must take the risk of not handling the gun or the adze in the proper fashion. "*Rerum enim vocabula immutabilia sunt, homines mutabilia*," sufficiently illustrates the attitude of the times.²

This attitude was of course, from the point of view of intellectual development, bound to change gradually. But progress was retarded, in the English judicial world, by three circumstances (with others) particular to that sphere. One of these was the prejudice (for such it may be termed) in favor of the legal heir, — an instinct naturally strong in a nation whose greatest and most explanatory fact was its dependence upon landed wealth and a system of primogeniture. When a will was to be construed, its effective interpretation was no great matter of concern to the judges, for they would rather than not that its provisions should fail. Until the middle of the 1500s, there was not even liberty to alienate land at all by will;³ and, for long after this period, the will, as an instrument of disinherison, continued to be judicially disparaged.⁴ Thus in one way, through the lack of a liberal and sympathetic search for testators' meanings, the spirit of rational interpretation was hindered. Another circumstance was the tendency of the judges to keep the construction of writings out of the jury's hands and reserve it for themselves; for, though as a practice this dated far enough back, still it came to be justified consciously, and was thought to be a safeguard against the

¹ Compare the passages in Brunner and Heusler, cited *ante*, §§ 2426, 2456.

² This is from Dig. XXXIII, 10, 7, § 2, *de sup. leg.*; but appears transmogrified by Coke as "*nomina sunt mutabilia, res autem immobiles*" (6 Co. Rep. 65 a).

³ St. 32 H. VIII, quoted *ante*, § 2454.

⁴ 1599, Wild's Case, 6 Co. Rep. 16 b; 1814,

Doe v. Dring, 2 M. & S. 448, 454 (L. C. J. Ellenborough, construing "all my effects" to signify only personalty: "The rule of law is peremptory that the heir shall not be disinherited, unless by plain and cogent inference arising from the words of the will"; though "such a decision may and perhaps will disappoint" the testator's intention).

fate of a deed with the jury, "who might construe or refine upon it at pleasure."⁵ Still a third consideration was the practice and the interests of conveyancers. This branch of the profession had accumulated a store of esoteric learning, which labelled each word and phrase with its traditional meaning. This learning would lose half of its mystery and its value if the rigidity of these terms should disappear. The instinct was to treasure the shibboleths of conveyancing; and the pressure of this body of practitioners against any liberality of interpretation must have been heavy.⁶

At the period of the end of the 1700s, then, there is found in the law a settled tradition, bolstered up in artificial survival by considerations such as the above, that the words of a legal document inherently possess a fixed and unalterable meaning. The law had prescribed it. No man, in a document, could think himself entitled to mean what he pleased. Some of the judicial utterances seem now obstinate enough in their blindness:

1554, *Brook, J.*, in *Throckmerton v. Tracy*, Plowd. 160 (after hearing Saunders lay down three rules for deeds, of which the third was: "The words shall be construed according to the intent of the parties, and not otherwise," he proceeds to repudiate this heresy in the following ingenuous utterance): "The party ought to direct his meaning according to the law, and not the law according to his meaning; for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence. For if a man was assured that whatever words he made use of, his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and uncertainty to explain what was his meaning."

This notion was barely beginning to give way by the end of the 1700s. Interpretation by local usage, for example, to-day the plainest case of legitimate deviation from the normal standard, was still but making its way.⁷ The individual usage of a testator was in the eyes even of Hardwicke and Thurlow, and of course of Kenyon and Eldon (those reactionaries and mainstays

⁵ *Ante*, § 2426; and the following, said in 1736, of parol evidence to construe deeds and wills: "A distinction has been taken between evidence that may be offered (1) to a jury and (2) to inform the conscience of the Court [of equity], namely that in the first case no such evidence should be admitted, because the jury might be inveigled thereby, but that in the second it could do no hurt" (Bacon's Abridgment, II, 309).

⁶ 1821, L. C. Eldon, in *Smith v. Doe*, 2 B. & B. 473, 599 ("The greatest men who have sat in Westminster Hall, I am persuaded, in many instances, if matters had been *res integra*, would have pronounced decisions very different from those which they thought proper to adopt, if they had not taken notice of the practice of conveyancers as authority"); Lord Redesdale, *ib.* 612 ("I do conceive it is of the utmost importance that your lordships should guide your judgment by that criterion, whenever it can be applied; for otherwise, my lords, all property must be in hazard").

⁷ 1592, *Wing v. Earle*, Cro. El. 267 ("If one sells land and is obliged that it contain 20 acres, this shall be according to the law, and not according to the custom of the country"); 1692, *Lethulier's Case*, 2 Salk. 443 ("warranted to depart with convoy" must be construed according to the usage among merchants"; but Holt, C. J., was *contra*, for "we take notice of the laws of merchants that are general, not of those that are particular usages"). In 1795, in *Withnell v. Gartman*, 6 T. R. 388, 395, 397, it was argued, though unsuccessfully, that "no usage can be let in to explain a private deed"; but in the same year it was laid down by Lawrence, J., in *St. Cross v. Walden*, 6 T. R. 338, 344, interpreting the term "quarters of wheat," that "when a word is used having a legal meaning, it must be understood to be used in its legal acceptation"; here a bushel was by statute prescribed to contain 8 gallons, but a local measure contained 9 gallons.

of conservatism), heretical enough.⁸ One of the judicial contemporaries of the great Tory Chancellor was strongly of opinion that to seek a testator's actual meaning would be "a very dangerous rule to go by, because it would be to say that the same words should vary in construction."⁹ As late as 1821 the Chief Justice of the Common Pleas conceded frankly that "if not in a majority of wills, yet certainly in a great number, the construction is contrary to the probable intent."¹⁰ And yet to give effect to a more flexible principle was to threaten the "landmarks of property," as the Bar was repeatedly warned.¹¹

But the law of England was merely passing through the same stages as the law of Rome.¹² It was impossible that it could remain perpetually immovable in the old ruts. And so it emerged into the 1800s with a growing spirit of liberality which could not help conceding something, yet was hampered by the stern tradition. It now conceded that the sense of words is not fixed by rules of law; that the extreme of the old rule had disappeared. But it insisted that when the meaning is "plain" — that is, plain by the standard of the community and of the ordinary reader —, no deviation can be permitted. That is, it preserved the old theory to the extent of legally fixing the meaning for the party, however wrongly, unless the wrongness was glaringly plain on the face of the case:

1833-43, *Tindal, C. J.*, in *Attorney-General v. Shore*, 11 Sim. 592, 615: "The general rule I take to be, that where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words to claimants under the instrument, or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument, for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument, is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the

⁸ *Ante* 1726, Gilbert, Evidence, 80 ("for the operation and effect of a contract cannot be determined but by the rules of law; . . . and without such stated rules in every society, no man could be certain of any property, for then the sense of the contract must be at the mercy of the judge or jury, who might construe or refine upon it at pleasure"); 1749, L. C. Hardwicke, in *Goodinge v. Goodinge*, 1 Ves. Sr. 231 ("though it has been allowed to ascertain the person or thing, as where two were of the same name, yet not to show that the testator meant to use general words in this or that particular sense"); 1784, L. C. Thurlow, in *Shelburne v. Inchinquin*, 1 Bro. P. C. 338, 342 ("If the words themselves are intelligible, there is no instance where parol evidence has been admitted to explain them into a more vulgar sense. . . . If words have in themselves a positive precise sense, I have no idea of its being possible to change them"); 1795, L. C. J. Kenyon, in *Lane*

v. Stanhope, 6 T. R. 345, 354 ("Where certain words have obtained a precise technical meaning, we ought not to give them a different meaning; that would be, as Lord King and other judges have said, removing landmarks").

⁹ Le Blanc, J., in *Doe v. Dring*, 2 M. & S. 448, 455 (1814).

¹⁰ Dallas, C. J., in *Pocock v. Lincoln*, 3 B. & B. 27, 46. "On one occasion the counsel asserted that it was the duty of the Court to find out the meaning of the testator. 'My duty, sir, to find out his meaning!' exclaimed Lord Alvanley, 'Suppose the will had contained only these words, "*Fustum funnidos tantaraboo*"; am I to find out the meaning of his gibberish?' " (Law and Lawyers, II, 74).

¹¹ Le Blanc, J., in *Doe v. Lyford*, 4 M. & S. 550, 556 (1816); Kenyon, L. C. J., in *Lane v. Stanhope*, *supra*.

¹² The same controversy is seen in Dig. XXXIII, 10, 7, § 12, *de sup. leg.*

instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or, perhaps, to speak more precisely, not so much an exception from, as a corollary to, the general rule above stated, that, where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree, that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does, of necessity, take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments where, by the lapse of time and change of manners, the words have acquired, in the present age, a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts, which, in many instances, use a peculiar language, employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired, by custom or otherwise, a well-known peculiar, idiomatic meaning, in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. . . . But I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed."

1862, Lord *Chelmsford*, in *Beacon L. & F. Ass. Co.*, 1 Moore P. C. N. s. 73, 98: "In order to construe a term in a written instrument where it is used in a sense differing from its ordinary meaning, evidence is admissible to prove the peculiar sense in which the parties understood the word; but it is not admissible to contradict or vary what is plain."

1871, *Malins*, V. C., in *Kilvert's Trusts*, L. R. 12 Eq. 183, 186: "There is one rule without exception in construing a will, — which is that wherever a bequest, whether made to a person or a charity, is perfect and unequivocal in all its parts, no parol evidence is admissible to explain it."

1839, *Catron*, J., in *Bradley v. Steam Packet Co.*, 13 Pet. 89, 105: "To control an instrument's construction by oral proof of the objects of the contracting parties and the purposes of the contract would lead to the dangerous result of construing every writing not by its face, not by the language employed, but by matters extrinsic, variant in each case, as human testimony should make it."

1891, *Holmes*, J., in *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228: "You cannot prove a mere private convention between the two parties to give language a different meaning from its common one. It would open too great risks, if evidence were admissible to show that when they said five hundred feet they agreed it should mean one hundred inches, or that Bunker Hill Monument should signify the Old South Church. An artificial construction cannot be given to plain words by express agreement." 18

Such is the rule still surviving to us, in many Courts, from the old formalism, namely, the rule that you cannot *disturb a plain meaning*.

As to this position, the answer, of course, must consider both theory and policy. (1) That the *theory* of it is unsound, ought not to be doubted. There can be, in the nature of things, no absoluteness of standard in interpretation. An advanced communism might conceivably bring men to such a level of intellectual uniformity that their thoughts would be expressed in invariably identical symbols. But till that day comes, the varieties of indi-

¹³ The learned justice later repeated his Law Review 417, 420 (The Theory of Legal view, in 1899, in an acute essay, in 12 Harvard Interpretation).

vidual expression and sense must be unquenchable. So long as men are allowed to grant and contract freely, and so long as the law undertakes to carry out those acts by enforcement, just so long must the standard of interpretation continue to be mobile, subjective, and individual. Mr. Justice Brook once thought it "barbarous" that a man should be "assured that whatever words he made use of, his meaning only should be considered." But as the law of to-day has broken with his premise, so it must break with his conclusion. The ordinary standard, or "plain meaning," is simply the meaning of the people who did *not* write the document. The fallacy consists in assuming that there is or ever can be some one real or absolute meaning. In truth, there can be only *some person's* meaning; and that person, whose meaning the law is seeking, is the writer of the document:

1696, *John Locke*, Letter to the Bishop of Worcester (Works, IV, 85): "Your lordship says, 'Peter, James, and John are all true and real men.' Answer: Without doubt, *supposing* them to be 'men,' they are true and real men, *i. e.* supposing the name of that species belongs to them. And so three bobaques are all true and real bobaques, supposing the name of that species of animals belongs to them. For I beseech your lordship to consider, whether in your way of arguing, by naming them Peter, James, and John, names familiar to us, as appropriated to individuals of the species 'man,' your lordship does not at first *suppose* them 'men' and then very safely ask, whether they be not all true and real 'men'? But if I should ask your lordship, whether Weweena, Chuckerey, and Cousheda, were true and real men or no? your lordship would not be able to tell me, until I have pointed out to your lordship the individuals called by those names. . . . Your lordship, in your fore-cited words, says, 'here lies the true idea of a person'; and in the foregoing discourse speaks of 'nature,' as if it were some steady, established being, to which one certain precise idea necessarily belongs to make it a true idea: whereas, my lord, in the way of ideas, I begin at the other end, and think that the word 'person' in itself signifies nothing; and so, no idea belonging to it, nothing can be said to be the true idea of it. But as soon as the common use of any language has appropriated it to any idea, then that *is* the true idea of a 'person,' and so of 'nature.' But because the propriety of language, *i. e.* the precise idea that every word stands for, is not always exactly known, but is often disputed, there is no other way for him that uses a word that is in dispute, but to define what *he* signifies by it; and then the dispute can be no longer verbal, but must necessarily be about the idea which he tells us he puts it for."

1827, *Jeremy Bentham*, Rationale of Judicial Evidence, b. IX, pt. VI, c. IV (Bowring's ed., vol. VII, p. 556, note): "The refusal to put upon the words used by a man in penning a deed or a will the meaning which it is all the while acknowledged he put upon them himself, is an enormity, an act of barefaced injustice, unknown everywhere but in English jurisprudence. It is, in fact, making for a man a will that he never made; a practice exactly upon a par (impunity excepted) with forgery. Lawyers putting upon it their own sense? Yes, *their* own sense. But which of all possible senses is *their* own sense? They are as far from agreeing with one another, or each with himself, as with the body of the people. In evident reason and common justice, no one will ought to be taken as a rule for any other; no more than the evidence in one cause is a rule for the evidence to different facts in another cause."

(2) As to the argument of *policy*, the case is somewhat different. There is much to be said for the traditional rule, — though not all that is said is sound. For example, Chief Justice Tindal, in his apprehensions that under any other rule "no lawyer would be safe in advising upon the construction of

a written instrument, nor any party in taking under it,"¹⁴ apparently assumes that under the traditional rule an ideal facility and certainty of interpretation can be had. He retires (in Professor Thayer's words) "into that lawyer's Paradise, where all words have a fixed, precisely ascertained meaning, and where, if the writer has been careful, a lawyer having a document referred to him may sit in his chair, inspect the text, and answer all questions without raising his eyes. Men have dreamed of attaining for their solemn muni-ments of title such an absolute security." But it is a dream of the impossible; and the dominance of either the old or the new rule will make little practical difference in the certainty of a given instrument. In the very case of Lady Hewley's Charities, for which Chief Justice Tindal laid down his rule of exclusion, even the admitted data were so voluminous and complex that the excluded material was comparatively a trifle. The real strength of the argument is rather found in the practical statement of Mr. Justice Holmes¹⁴ that "it would open too great risks [*i. e.* of incredible pretences] if evidence were admissible to show that when they said 'five hundred feet' they agreed that it should mean one hundred inches, or that 'Bunker Hill Monument' should signify the Old South Church." Now the interesting feature of this illustration is that in important instances the very opposite fact is daily and hourly illustrated, — in the private cipher-codes of commercial houses. By these agreements words *are* employed in a sense totally alien, and sometimes exactly opposite, to the ordinary meaning. In one of the printed cable codes now in use, for example, "Innovate" is made to mean "Do this only as a last resort"; and "Invective" is made to mean "We all unite in sending you our heartiest congratulations"! No doubt some brokers who are particularly apprehensive of the interception of their messages are accustomed to agree that "buy" shall mean "do *not* buy." There are, then, abundant instances in which not only there is no "great risk," but there is an absolute necessity, of accepting proof of these private conventions; and these instances shatter the whole argument for the rule as a rule. The fallacy of the person who declared that "He was open to conviction, but he would like to meet the person who could convince him," is here reversed; for the judicial attitude thus illustrated is that "We are not open to conviction, because we are afraid that somebody will sometimes convince us." The truth is that whatever virtue and strength lies in the argument for the antique rule leads not to a fixed rule of law, but only to a general maxim of prudent discretion. In the felicitous alliteration of that great judge, Lord Justice Bowen, it is "not so much a canon of construction as a counsel of caution."¹⁵ The distinguished Master of the Rolls, Sir George Jessel, once declared to counsel that "nobody could convince him that black [selvedge] was white"; and yet the Court of Appeals reversed his judgment because they were after all convinced of that precise proposition.¹⁶ To say that it

¹⁴ Quoted *supra*.¹⁵ 1890, *Re Jodrell*, L. R. 44 Ch. D. 590; quoted *infra*.¹⁶ 1880, *Mitchell v. Henry*, cited *post*, § 2463.

would be difficult to convince him, and upon the evidence to fail to be convinced, would have been a rational attitude. But that is very different from an arbitrary rule declaring *a priori* that the judicial mind is legally not open to conviction.

There is, then, neither in theory nor in policy any basis for an absolute rule declaring that when a word has a "plain meaning," *i. e.* by the popular standard, neither the local nor the mutual nor the individual standard can be substituted. Such a rule is still maintained by many utterances like those above quoted. But its vogue is disappearing. Before examining the state of the decisions on the subject, it is worth while to notice the utterances of judges who have plainly championed the modern and more liberal rule:

1854, *Coleridge, J.*, in *Brown v. Byrne*, 3 E. & B. 703: "Neither, in the construction of a contract among merchants, tradesmen, or others, will the evidence [of a local usage] be excluded because the words are in their ordinary meaning unambiguous; for the principle of admission is that words perfectly unambiguous in their ordinary meaning *are* used by the contractors in a different sense from that. What words more plain than 'a thousand,' 'a week,' 'a day'? Yet the cases are familiar in which 'a thousand' has been held to mean 'twelve hundred,' 'a week' 'a week only during the theatrical season,' 'a day' 'a working day.'"

1860, *Blackburn, J.*, in *Myers v. Sarl*, 3 E. & E. 306 (admitting trade usage): "I do not think that it is necessary, in order to render such evidence admissible, that there should be any ambiguity on the face of the phrase which has to be construed. . . . I take to be the true rule of law upon the subject that when it is shown that a term or phrase in a written contract bears a peculiar meaning in the trade or business to which the instrument relates, that meaning is *prima facie* to be attributed to it; unless upon the construction of the whole contract enough appears, either from express words or by necessary implication, to show that the parties did not intend that meaning to prevail. The consequence is that every individual case must be decided on its own grounds."

1890, *Lindley, L. J.*, in *Re Jodrell*, L. R. 44 Ch. D. 590, 609, 614: "I do not propose to deal with decided cases at all. It may be that there were expressions in the documents then before the Court which made the judges come to conclusions which I cannot arrive at when I come to look at the will and codicils with which I have to deal. I do not consider that a decision which is more or less at variance with other cases is wrong because it is so at variance. Cases of construction are useful when they lay down canons or rules of construction, and they are useful when they put an interpretation on common forms — whether in deeds, wills, or mercantile documents. They may be valuable guides; but when I am told that because something occurs in one will I am to give a precisely similar effect to a similar expression occurring in another will dealing with a different property and in another context, I object altogether to do it. The only principle that I know of is that which has been expressed before. Look at the words, avail yourself of such evidence as is legitimately admissible, and see what the testator has said, and expound it as best you can with reference to what is legitimately before you." *Bowen, L. J.*: "It seems to me that the only weight one can give to such language [as the so-called rule against disturbing a clear meaning] is to treat it not so much as a canon of construction as a counsel of caution, to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed. You require no more counsellors to assist you; and after once arriving at the journey's end, to pause in giving effect to the true interpretation because,

forsooth, the language has not been framed according to some measure or standard of correct expression, which is supposed to be imposed by judges out of regard for social or other reasons, appears to me to be using the language of such learned judges, not as laying down canons for construing a will, but as justifications for misconstruing it. As soon as you once arrive at your journey's end, you have no more to do than to give effect to the true construction as you see it." ¹⁷

1880, *Doe, C. J.*, in *Tilton v. American Bible Society*, 60 N. H. 377, 382 (dealing with a bequest to "the Bible Society"): "The question is not whether a plea of misnomer of a party is sustained by proof, nor whether there is a variance between the evidence and the name of a third person set forth in pleading. The question is not by what name any Bible society was known to others, but which one of several Bible societies was intended by the testator. . . . Evidence showing what name was given to a Bible society in its charter, what name it used or recognized as its own, and by what name or names it was known to others, tends to prove a name by which the legatee *might* have been known to the testator, and a name which he *might* have used in his will to express his intention. But the society intended by him, and identified by competent evidence, is the legatee, by whatever name described in the will, and notwithstanding any other name or names by which it may have been invariably or usually known to others. . . . A person known to a testator as A. B., and to all others as C. D., may take a legacy given to A. B."

§ 2463. **Same: Application of the Rule to Wills, Deeds, Contracts, etc.** The traditional rule is found in application almost side by side with the liberal rule. The former is nowadays perhaps less frequently enforced in England. In the United States it is often invoked under the guise that no peculiar and individual meaning can be shown unless there is an "ambiguity." There are nevertheless abundant instances of the liberal rule's recognition.

(1) In *wills*, the traditional rule has found application chiefly to proper names of places and persons and to such terms as "estate" and "money." ¹

¹⁷ 1902, *Miles v. Wilson*, 1 Ch. 138, 142 (approving the similar language of L. C. Halsbury in *Re Jodrell*).

¹ *England*: 1816, *Doe v. Chichester*, 4 Dow 65, 93 (devise of "my estate of Ashton," Ashton being a parish; the testator had inherited from his mother and his father different properties, that from his mother lying chiefly in Ashton parish and also in others, and that from his father in Youlston; the testimony of his steward and others that the testator "used in speaking of his property which he had derived from his father to call it his Youlston estate, and that in describing the estate derived by him from his mother he used to designate that by the general name of his Ashton estate," and certain accounts tendered to him, entitled "J. Cleave's account for Ashton estate," including properties in other parishes than Ashton, were excluded); 1820, *Cholmondeley v. Clinton*, 2 Jac. & W. 1, 76, 81, 111 (limitation "to the use of the right heirs of S. R. forever"; held to be ambiguous, as applicable equally to right heirs at the time of the remainder created or at the time of its taking effect, and therefore to permit resort to other indications, in the deed or the circumstances, of the grantor's meaning; careful opinion by Plumer, M. R.); 1847, *Reynolds v. Whelan*, 16 L. J. Ch. 434 (bequest to "W. R.,

one of my farming men"; there were two persons named W. R., one an ordinary farming servant, recently employed, the other a man of all work, forty years in the testator's service; K. Bruce, V. C., held that the latter could be accurately described as a "farming man" and took the bequest; otherwise, if he could not be so described); 1854, *Mostyn v. Mostyn*, 5 H. L. C. 154 (there were five children, R. H. M., J. H. M., S. J. M., T. M., and M. M. D.; after bequests to "R. M.," and "J. H. M.," there was a bequest over to "S. M., J. M., and M. D., all of them late of Calcott Hall"; held that the name "J. M." could not be applied to the fourth child T. M.; no clear principle stated); *United States*: 1877, *Dunham v. Averill*, 45 Conn. 61 (bequest to the "American and Foreign Bible Society"; there was a society so named and also an American Bible Society; declarations of intent to give to the former, which was called by him by the name in the will, excluded); 1843, *Tucker v. Seaman's Aid Society*, 7 Metc. 188 (bequest to "the Seaman's Aid Society"; in fact there was in Boston a "Seaman's Aid Society" and a "Seaman's Friend Society"; the circumstances that the testator was well acquainted with the latter and was ignorant of the former, and that he had used the term "Seaman's Aid Society"

A special form of it occurs for words having in the law of inheritance a precise meaning, such as "child" or "son." In Coke's day, the rule had been that a devise to a "son" named could be taken by a bastard, if the person had been reputed by that name.² Later, the rule seemed to form that whenever a word of relationship was used, the law's meaning could be overthrown when a different sense clearly appeared from the will and when there were no persons who corresponded exactly to the law's meaning. The individual opinions of Lord Justice Bowen and others have in later times practically repudiated these two qualifications; but the English decisions cannot be said to have fully accepted this result; they must at any rate be viewed as a developing series, and not as a consistent whole.³

on the honest representation of one B., the draftsman, who knew only of the former and who gave its name to the testator on the erroneous supposition that the testator had the former society in mind, were held insufficient to give the bequest to the latter; the Seaman's Friend Society "cannot take, because the name and description are not those by which they have ever acted or been known or designated; and because the Seaman's Aid Society is the one precisely named and described in the will"; this ruling is erroneous, but may be accounted for by the apparent reliance of the Friend Society claimant on the declarations of intention, which were as such clearly inadmissible); 1864, *American Bible Society v. Pratt*, 9 All. 109 (bequest of deposit in the "Dedham Bank"; there existed a Dedham Bank and a Dedham Institution for Savings, the latter commonly known as the Dedham Savings Bank; that the testator had a deposit in the latter, excluded; the ruling markedly illustrates the impropriety of the supposed rule); 1814, *Mann v. Mann*, 1 John. Ch. 231, 236 (bequest of all the rest of the "moneys," held to mean cash only, and not notes, bonds, and mortgages).

² 1607, *Sir Moyle Finch's Case*, 6 Co. Rep. 65 a ("If a grant be made to a bastard by the surname of him who, as is supposed, begot him, it is good, if he be known by such name; so if a remainder be limited 'Rich. filio Rich. Marwood,' it is good although he be a bastard, if in vulgar reputation and knowledge he be known by such a name"); 1737, *Rivers' Case*, 1 Atk. 410 (devise to "his two sons Charles and James R."; though illegitimate, they were given the estate; "anything that amounts to a *designatio personarum* is sufficient").

³ *England*: 1778, *Green v. Howard*, 1 Bro. C. C. 31 (L. C. Thurlow, refusing to apply a bequest to "my own relations" to include second cousins: "The sense of the words, as fixed by legal authority, is not to be altered by the language held on any occasion by the testator, or by his behavior"); 1800, *Cartwright v. Vaudry*, 5 Ves. 530 (a testator had four daughters; one of them was illegitimate, but at the time this was known to none but himself; L. C. Loughborough declined to include her under a devise to "children," though he had "no doubt of the intention"; the special circumstances made this ruling an outrage on the name of

justice); 1812, *Wilkinson v. Adam*, 1 Ves. & B. 422, 457; 1816, *Beachcroft v. Beachcroft*, 1 Madd. Ch. 430 (good opinion by V. C. Plumer); 1831, *Fraser v. Pigott*, 1 Younge 354; 1836, *Blackwell v. Bull*, 1 Keen 176, 181 (Langdale, M. R.: "The word 'family' is capable of so many applications that if any one particular construction were attributed to it in wills, the intention of testators would be more frequently defeated than carried into effect"); 1870, *Grant v. Grant*, L. R. 5 C. P. 727 (devise to "my nephew, J. G.;" there were two relations of that name, one the son of a brother, the other of a wife's brother, and the term "nephew" was held not to be necessarily restricted to the former class of persons); 1873, *Hill v. Crook*, L. R. 6 E. & I. App. 265, 282 (general principle approved; the gift was here applied to illegitimate children, because the terms of the will were held to describe them as such; the absurdity of the doubt in this case was that the parties had been formally married, but the wife was a deceased wife's sister and the union technically illegal); 1875, *Dorin v. Dorin*, L. R. 7 E. & I. App. 569 (power to a woman to dispose of property "amongst our children"; the testator had two illegitimate children by her, then married her, made this will the day after the marriage, had no other children, and treated these two as his; held, that "children" was to be interpreted as "legitimate children" and could not be applied to the above children; a ruling which shames common sense, and, to the perversity of the English law denying legitimation by subsequent marriage, adds the harshness of preventing the parent from supplying by will the deficiencies of the law); 1878, *Ellis v. Houstoun*, L. R. 10 Ch. D. 236, 240 (Malins, V. C., applied the rule, summing up the authorities; only where no legitimate children appear can illegitimate ones take under the term "children"; as to *Dorin v. Dorin*, *supra*, he admitted that "in common with most persons, it is a result which anybody may regret"); 1887, *Re Horner*, L. R. 37 id. 695 (bequest to "my sister Charlotte, the wife of Thomas Horner," and after her death "amongst her children"; C. was only cohabiting with T. H., as the testator knew; held that "children" signified the illegitimate children of C.; "you are to ascertain the sense in which the testator used the words which you find there"); 1890, *Re Jodrell*, L. R. 44 id. 590

The liberal rule, on the other hand, has been applied even to the extreme of principle, and the results show how practical and just it can be.⁴ Moreover, in its application to words of relationship, it would seem to be the commoner one to-day in the United States.⁵

(bequest to "relatives," held to include "all those the testator had before treated as relatives," whether legitimate or not; "you may put yourself as much as you can into his position, and diving so into the mind of the person who has made the instrument"; quoted *ante*, § 1362); 1894, *Re Fish*, 2 Ch. 83 (gift to his "niece Eliza Waterhouse"; there was no niece E. W., but there was a legitimate and an illegitimate grandniece, each named E. W.; no evidence to show testator's meaning was admitted, and the clause was applied to the legitimate E. W. as the one nearest described; the opinion shows insufficient acquaintance with the precedents and is wholly unsound); 1902, *Miles v. Wilson*, 1 Ch. 138, 142 (cited *ante*, § 2462). *Canada*: 1849, *Doe v. Taylor*, 1 All. 525, 534 ("my grandson"); *United States*: 1829, *Gardner v. Heyer*, 2 Paige 11 (bequests to the testator's children; he had only illegitimate children; held that, there being no legitimate children, the term could be applied under the circumstances to the illegitimate ones); 1895, *Flora v. Anderson*, 67 Fed. 182, 188 ("issue," not allowed to be interpreted to include illegitimate issue).

⁴ *England*: 1791, *Parsons v. Parsons*, 1 Ves. Jr. 266 (annuity to a brother "Edward P.," and then to his children; at the date of the will, a brother Samuel P. alone survived, with children, but a brother Edward P. had already died without children; since the "testator had been in the habit of calling his brother Samuel by the name of 'Edward' and 'Ned,'" the annuity was given to Samuel); 1801, *Druce v. Denison*, 6 Ves. Jr. 385 (bequest of "my personal estate"; a paper drawn up by him at the time, indicating that he included in that term certain choses in action of his wife, was admitted by L. C. Eldon); 1825, *Doe v. Jersey*, 3 B. & C. 870 (devise of "all that my Briton Ferry estate"; held that these words "denote a property or estate known to the testatrix by the name of her B. F. estate, and not an estate locally situate in a parish or township of B. F.," and that for determining its scope the stewards' accounts, rendered to the testatrix, of the lands therein entered as "B. F. estate" should be considered); 1841-1848, *Blundell v. Gladstone*, 11 Sim. 467; on appeal, 1 H. L. C. 778, 1 Phillips 279 (to "the second son of Edward Weld, of Lulworth"; there was no such person as E. W. of L., but J. W. was in possession of L., and there had been a brother E. W.; J. W. had two sons, E. J. W., commonly called E. W., and T. W.; held, that on the evidence the description should be applied to the second son of J. W. and not the second son of E. J. W.; *Patteson, J.*: "It was contended . . . that where one person, and one only, fully and accurately answers the whole description, the Court is bound to apply the will to that person. Such may be conceded to be a general rule of law and of construction, . . . but it has exceptions"); 1844, *Lee v. Pain*,

4 Hare 201, 251 (1. a bequest to "Mrs. and Miss Bowden, of H., widow and daughter of the late Rev. Mr. Bowden"; there were no such persons as ordinarily known; but there were Mrs. Washbourne, formerly Miss Bowden, and her daughter, Miss Washburne, and the testatrix "had been repeatedly known, when speaking of the claimants, to call them by the name of Bowden, and on the mistake being pointed out, she acknowledged it"; the legacy was given to Mrs. and Miss W.; 2. a bequest to "Miss Sarah Jameson, of Clapham Common"; there was a Mrs. S. J. of that place, and also a daughter named Frances Anne J., who after the testatrix's death married Mr. Winter; the testatrix knew both mother and daughter; the legacy was given to the daughter); 1847, *Ryall v. Hannum*, 16 Beav. 536 (bequest to "Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of G., single woman, and who formerly lived in my service"; this was given to the natural son John of a certain Elizabeth Abbott, who had by marriage another name at the time of the will, on proof that the father of the child was reputed to be the testator's son, that the testator had not heard that it was a daughter, and that he had shown an interest in it); *United States*: 1883, *Smith v. Kimball*, 62 N. H. 606 (bequest to the "Meredith Institution" given to the Kimball Union Academy of Meriden, on proof that the testator's relatives had gone to that school, that he had shown great interest, and that he had said, at the time of execution, that the Meredith Institution was at Meriden; see the quotation *ante*, § 2462); 1820, *Thomas v. Stevens*, 4 John. Ch. 607 (bequest to "Cornelia Thompson" given to "Caroline Thomas," on proof that the claimant was a favorite of the testatrix, and "was the person intended," and that no person named Cornelia Thompson had made claim); 1790, *Powell v. Biddle*, 2 Dall. 70 (bequest to a friend "Samuel Powell (son of Samuel Powell, of the city of Philadelphia, carpenter)"; on proof that a person named William Powell was the son of the testator's deceased daughter by one Samuel Powell a carpenter, that he was well known to the testator, and that "the testator usually, by mistake or by way of nickname, called him Samuel," the bequest was given to William, though the same carpenter had also a son named Samuel, the son of a second wife and not acquainted with the testator).

⁵ 1902, *Kohl v. Frederick*, 115 Ia. 517, 88 N. W. 1055 ("inherit," shown to be used in a non-legal sense); 1891, *Robb's Estate*, 37 S. C. 19, 28, 39, 16 S. E. 241 (devise to "such persons as shall be entitled under the law"; illegitimacy prevented the inheritance by certain related persons; declarations of the testator, speaking of sisters and nieces, received, as showing his usage of the terms in the will).

(2) In *deeds and contracts*, the traditional rule finds constant and dominant application in excluding the mutual standard, *i. e.* the agreement of the *parties themselves* upon a special sense for their words.⁶ It has been, sometimes, in early cases, allowed to exclude even the local standard, *i. e.* the *usage of a trade or locality*.⁷

The liberal rule, on the other hand, is to-day conceded, practically everywhere, to permit resort in any case to the *usage of a trade or locality*, no matter how plain the apparent sense of the word to the ordinary reader; and

⁶ *England*: 1827, *Taylor v. Briggs*, 2 C. & P. 525 (the question being whether "cotton in bales" meant an ordinary bag or a cubical compass, the local usage was admitted, but not "what was said at the time" between the parties; *Abbott, C. J.*: "That sort of evidence is of too dangerous a nature to be relied on"); 1847, *Caine v. Horsfall*, 2 C. & K. 349 (contract between a merchant and a captain in the African trade to pay the latter "6 per cent on the net proceeds of the homeward cargo"; the plaintiff claiming that the defendant should not deduct bad debts in reckoning net proceeds, *Rolfe, B.*, ruled that "evidence might be admissible to prove their meaning, not in this particular contract, but in all mercantile dealings or to show that they have a different meaning when used in the African trade"); *Canada*: 1893, *Troop v. Union Ins. Co.*, 32 N. Br. 135, 140 (marine policy); *United States*: 1895, *Balfour v. Fresno C. & I. Co.*, 109 Cal. 221, 41 Pac. 876 (general principle applied to a contract); 1900, *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247 ("new and useful improvements," in a patent contract, not allowed to be shown by mutual understanding to include later inventions); 1897, *Harrison v. Tate*, 100 Ga. 383, 28 S. E. 227 (notes for title to land; the parties' construction excluded, because no ambiguity appeared); 1901, *Ralya v. Atkins*, 157 Ind. 331, 61 N. E. 726 (contract for the sale of a patent; collecting the authorities; the parties' construction is admissible if the terms are ambiguous); 1895, *Hamill v. Woods*, 94 Ia. 246, 62 N. W. 735 ("When the language of a guarantee is not so clear as to indicate its meaning conclusively, parol evidence is admissible to show the circumstances . . . to the end that the intent of the parties to it may prevail"; collecting the authorities); 1891, *Goode v. Riley*, 153 Mass. 585, 28 N. E. 228 (quoted *ante*, § 2462); 1893, *Reynolds v. Boston Rubber Co.*, 160 id. 240, 245, 35 N. E. 677 ("When the description of granted premises is clear, extrinsic evidence is not admissible to control it; but when it is uncertain, such evidence may be resorted to, and the acts of adjoining owners showing a practical construction adopted and acted upon are of great weight"); 1899, *Violette v. Rice*, 173 id. 82, 53 N. E. 144 (evidence of a particular sense of words by particular parties, not admitted, to determine the sense of the word "services" in a theatrical contract); 1900, *Menage v. Rosenthal*, 175 id. 358, 56 N. E. 579 (parties' conduct or admissions, receivable only when the meaning of the contract is doubtful); 1890, *Hartford I. M. Co. v. Cambria M. Co.*, 80 Mich. 491, 45

N. W. 351 (mining location involving the "east half" and "west half" of a lot; "the circumstances of the case held not to alter the regular meaning of "half" from its signification of quantity merely, there being "no possible ambiguity about these descriptions"); 1897, *Brown v. Schiappacasse*, 115 id. 47, 72 N. W. 1096 (lease with license; circumstances not received to show that the lease was incidental only to the license); 1895, *Armstrong v. Granite Co.*, 147 N. Y. 495, 42 N. E. 186 (that the parties used the term "minerals and ores" in a limited sense, not admitted, except for the purpose of reforming the instrument); 1902, *Uihlein v. Matthews*, 172 id. 154, 64 N. E. 792 (intention of the parties to a quit-claim deed not to release a party-wall restriction established by a prior deed, not allowed to be shown; *Bartlett, J.*, diss.); 1900, *Abraham v. R. Co.*, 37 Or. 495, 60 Pac. 899 (conveyance "for all legitimate railroad purposes"; parties' understanding that this included the purpose of a hotel or eating-house, excluded); 1898, *First National Bank of Nashville v. R. Co.*, — Tenn. —, 46 S. W. 312 (promise to use bonds to pay "for the floating debt secured by pledge of income bonds"; that the promisor used these words as applying to certain holders of the debt, excluding others, not admitted); 1897, *Barber v. R. Co.*, 166 U. S. 83, 17 Sup. 488 (circumstances may be consulted "to explain ambiguities of description," but not "to control the construction or extent of devices therein"); 1902, *Dennis v. Slyfield*, 54 C. C. A. 520, 117 Fed. 474 (an option to ship "any or all of this lumber," not allowed to be made an obligation to ship all of it, by the parties' understanding); 1903, *Ocean S. S. Co. v. Aetna Ins. Co.*, 121 Fed. 882 (applied to marine insurance contracts); 1896, *Owen v. Henderson*, 16 Wash. 39, 47 Pac. 215 (the "west half" of a lot; a special alignment, as shown by former transactions of the parties, excluded). Compare the cases cited *post*, § 2465.

⁷ 1856, *Sigsworth v. McIntyre*, 18 Ill. 126, 129; 1834, *Allen v. Kingsbury*, 16 Pick. 238 (deed calling for a boundary "to an oak-tree marked, thence on the heirs of J. K. to another oak-tree marked"; the commissioners' practice to follow a curved line conforming to the contour of the land and marked by monuments, excluded; "evidence of usage is never to be received to overturn the clear words of a deed"; 1807, *Winthrop v. Ins. Co.*, 2 Wash. C. C. 7, 10 ("usage can only be resorted to where the law is doubtful and unsettled"); and the early English cases cited *ante*, § 2462.

some of the extreme instances are persuasive to demonstrate the fallacy of ignoring the purely relative meaning of words and the injustice of attempting to enforce a supposed rigid standard.⁸ Furthermore, the notion, so frequently observed in the interpretation of wills, that the ordinary legal definition of a word cannot be superseded, is seldom insisted upon in the face of commercial usage.⁹ Yet the liberal rule is seldom so far conceded as to allow the *parties' special mutual sense* to be considered;¹⁰ perhaps the

⁸ *England*: 1832, *Smith v. Wilson*, 3 B. & Ad. 728 (covenant in a lease of a rabbit warren, "that at the expiration of the term they the plaintiffs would leave on the warren 10,000 rabbits or conies, the defendant paying 60 l. per thousand for the same, and for any more than that number at that rate, the number to be estimated by two indifferent persons"; breach, that the plaintiff left 19,200 rabbits, but the defendant would not pay for them; it appeared that the appraiser's estimate was 1600 dozen, and the defendant was allowed to prove that by the customary meaning of the locality, "the term 'thousand,' as applied to rabbits, meant '100 dozen'"); 1836, *Bold v. Rayner*, 1 M. & W. 346 (sale of goods on shipboard; the sale notes interchanged by the parties read, the one "from the Speedy or Charlotte," the other "ex Speedy and Charlotte"; the Speedy was lost, but the Charlotte arrived; a usage that, where two vessels are named, the goods may be delivered from either at seller's option was admitted; counsel objected that by the sold note both must arrive; Parke, B.: "Yes, if you read it strictly *and*; but the evidence was that custom reads it *or*"; L. C. B. Abinger: "The Court must look at each contract, and say whether in its whole spirit and meaning *and* did not mean *or* in the understanding of the parties"); 1846, *Grant v. Maddox*, 15 id. 737 (theatrical engagement for "three years at a salary of 5, 6, and 7 pounds per week in those years respectively"; the professional usage that "actors were never paid during the time of vacation," admitted as interpreting the term "years"); 1860, *Myers v. Sarl*, 3 E. & E. 306 (building contract, providing for a "weekly account of the work done"; trade usage admitted to show that "weekly account" was restricted to a particular part of the work, even though "the words have a plain general meaning"; quoted *ante*, § 2462); 1880, *Mitchell v. Henry*, L. R. 15 Ch. D. 181, 24 Sol. J. 690 (trademark infringement; the plaintiff's registered description named a worsted having a "white selvaige"; part of the warp being a "dark gray or black mohair," the goods had a dark appearance, and Jessel, M. R., declaring "that is a black selvaige and not a white selvaige," and that "no amount of evidence would convince him that black was white," declined to give effect to the plaintiff's testimony that the plaintiff's selvaige "was what was perfectly well known in the trade as a white selvaige"; on appeal, this was reversed, on the ground that "the question is not whether the selvaige is white, but whether it is *what the trade know* as a white selvaige"); *United States*: 1895, *Leavitt v. Kennicott*, 157 Ill. 235, 41 N. E. 737 (a theat-

rical contract employing "at a weekly salary of \$40 per week"; usage admitted to show that "per week" signified the weeks of the theatrical season only, not of the calendar year); 1898, *McChesney v. Chicago*, 173 id. 75, 50 N. E. 191 ("Sec. 23, §38, 14," interpreted by usage to mean "range 38, township 14"); 1896, *Coulter Mfg. Co. v. Grocery Co.*, 97 Ia. 616, 66 N. W. 875 ("prices guaranteed against market price to date of shipment"; usage admitted, even though the words were not apparently obscure or technical); 1898, *Brody v. Chittenden*, 106 id. 524, 76 N. W. 1009 (whether certain jewelers' tools etc., were included under a mortgage of "furniture"; usage of the trade allowed); 1886, *Com. v. Hobbs*, 140 Mass. 443, 5 N. E. 158 ("The fact that the white arsenic was colored with lamp-black was immaterial; it still remained the substance known as white arsenic, though no longer white in appearance"); 1897, *Brown v. Doyle*, 69 Minn. 543, 72 N. W. 814 (warranty of a horse as "sure foal-getter"; evidence of the usual percentage of foal-getting from "sure foal-getters," received; here, 60 per cent); 1891, *Farnum v. R. Co.*, 66 N. H. 569, 29 Atl. 541 (authority for "noiseless steam motor"; technical application of that term to motors not operating without certain noise, held admissible); 1843, *Hinton v. Locke*, 5 Hill N. Y. 437 (contract to pay 12 s. per day for labor; trade usage admitted to show that "day" signified "ten hours"); 1891, *Reed v. Tacoma Ass'n*, 2 Wash. 198, 26 Pac. 252 (deed running a line "west"; the custom of the government surveyors, who had surveyed this land, to run lines not due west, but a little north of west, was admitted to show the meaning of "west").

⁹ 1868, *Thorington v. Smith*, 8 Wall. 1 (a contract to pay in "dollars" may be construed on the facts to mean dollars of the unlawful Confederate Government); 1898, *Higgins v. Cal. P. & A. Co.*, 120 Cal. 629, 52 Pac. 1080 (a contract to pay "fifty cents per ton for each and every gross ton" of asphaltum, etc., the statute providing that "twenty hundred weight constitute a ton"; the trial Court found that the parties used "gross ton" as meaning 2240 pounds; good opinion by Temple, J.).

For examples of the earlier contrary rule in the 1700s, see *ante*, § 2462.

¹⁰ 1790, *Calverley v. Williams*, 1 Ves. Sr. 210 (auction sale of "the lands in the possession of Groombridge"; the buyer, having taken the seller's schedule and tallied the land described in it, completed the purchase; but it was then discovered that seven acres more were in fact "in the possession of G."; held, that "the understanding of these parties applied to the lands

only settled instances are those of a secret cipher,¹¹ and of the designation of a party to a deed by a surname misused or misspelled according to the ordinary standard.¹² The reason for this hesitation is twofold, and is appreciable enough. In the first place, the existence of a special trade usage is much more credible and more definitely provable than a special usage of the parties to a specific transaction; the use of a regular cipher-code is almost the only instance of a tangible usage of the latter sort. In the second place, the parties' mutual "understanding" as to the sense of particular words or phrases is perilously akin to an "understanding" that certain terms not written shall prevail in place of the written terms, and this would be plainly a violation of the rule, already considered (*ante*, §§ 2430, 2442), against "varying the terms of the writing." Hence a judicial tendency to confuse the two rules. But neither of these is a sufficient reason for erroneously stating the present principle (*ante*, § 2462). Rather let the principle be acknowledged that the sense to be enforced is the special sense, if any, which the parties have fixed upon; but let there be the most convincing proof that they have distinctly and mutually so agreed, and let this process of interpreting their actual words not be made a cloak for evading the other rule against substituting their extrinsic for their written terms.

It may be added that the same considerations often apply to interpretation by the special usage of a *trade* or *locality*. So far as this usage merely interprets a particular word or phrase existing in the document, the present principle permits this (as indicated above). But so far as the usage endeavors to intrude into the document, or set up in rivalry with it, additional terms, it may violate the other rule against varying the written terms (*ante*, § 2440). The precedents, therefore, under that and the present rule are sometimes hard to distinguish.

§ 2464. **Usage of Trade or Locality, when to apply.** The usage of a trade or locality or sect or dialect being always eligible to supersede the ordinary or popular sense of words (*ante*, § 2463), it remains merely a question for the par-

specifically described" in the schedule, and that the buyer therefore was not entitled to the seven acres). Cases *contra* are cited *supra*, note 6.

For instances where the parties' understanding is allowed, there being an "ambiguity," see *post*, § 2465.

¹¹ N. Br. St. 1881, c. 14, § 3 (a telegraphic word or term agreed upon "as meaning between them some other word" etc., or as having "any other than the ordinary or apparent meaning," shall be taken "to be the word" etc. so agreed); 1899, Penn Tobacco Co. v. Leman, 109 Ga. 428, 434 S. E. 679 ("O. K." in a contract, allowed to be explained, because the parties agreed "these letters should have definite meaning as between themselves"); 1902, Powers v. Com., — Ky. —, 70 S. W. 644 (military officer's telegram, "all right," allowed to be shown by him to have a special meaning according to a secret code previously agreed upon).

¹² 1896, Hicks v. Ivey, 99 Ga. 648, 26 S. E.

68 (a grant to "Pulling"; deed from "Pullen"; the identity of persons allowed to be shown); 1895, De Cordova v. Korte, 7 N. M. 678, 41 Pac. 526 (that the grantee's name in a deed, being "H. K."; was used to indicate a partnership doing business under that name, allowed to be shown); 1815, Jackson v. Hart, 12 John. 77, 84 (a State land patent being in issue, "parol evidence would be admissible to prove that 'George Houseman' and 'George Hosmer' are the same person; but certainly it is not explaining a latent ambiguity to prove that a grant to 'George Houseman,' a real person, was intended for another person of the name of 'George Hosmer'"); 1893, Marmet Co. v. Archibald, 37 W. Va. 778, 788, 17 S. E. 299 (corporation contracting by an assumed name); and additional instances cited *post*, § 2529 (presumption of identity of person from identity of name).

Compare the doctrine as to a *bill* or *note* in a fictitious or wrong name: cases cited in Ames' Cases on Bills and Notes, I, 347, note; *ib.* 428, note.

ticular case whether the parties have in fact spoken according to that standard. Where all the parties are members of the same trade or other circle of persons, little difficulty can arise; the only requirement is that the special sense alleged should be in fact a usage, or settled habit of expression, and not merely the expression of a few persons or of casual occasions.¹ But when one of the parties is not a member of the trade or other circle, his acceptance of the standard must be made to appear. For this purpose, his *actual knowledge* of the particular sense as applicable to the transaction would suffice; otherwise it must appear to be so generally known in the community that his actual individual knowledge of it may be inferred.² The application of the general principle will then be a mere question of the probabilities of meaning for each case.³ Where the usage is not that of a trade, but of a *locality*, the form of it may be common reputation⁴ or commonly-used documents.⁵ When *initials* or other abbreviations are to be interpreted, the local usage or repute is of course receivable,⁶ even for electoral ballots;⁷ though

¹ For the mode of proving usage, see note 9, *infra*.

² 1863, *Russian Steam-Nav. T. Co. v. Silva*, 13 C. B. N. s. 610, 617 ("where the performance has reference to a particular trade, [it] necessarily involves an obligation on the party to make himself acquainted by due inquiry with the usages of that trade"); 1881, *Holt v. Collyer*, L. R. 16 Ch. D. 718, 721 ("beerhouse" as used in an ordinary lease, not interpreted by trade meaning); 1896, *Wheelwright v. Dyal*, 99 Ga. 247, 25 S. E. 170 (lumber trade usage held not broad enough); 1872, *Howard v. Ins. Co.* 109 Mass. 385 (warranty in a New York policy not to load above a certain quantity of "coal" at Cardiff; certain "patent fuel" having been so loaded, held that the usage not to include it under the term "coal" must be "known beyond Cardiff, and known so generally that the parties may fairly be presumed to have made their contract in view of its existence"); 1896, *Eaton v. Gladwell*, 108 Mich. 678, 66 N. W. 598 (excluding a custom among carpenters not so general as to be probably known to the opposite); 1872, *Walls v. Bailey*, 49 N. Y. 463, 473 (collecting the cases); 1895, *Armstrong v. Granite Co.*, 147 id. 495, 42 N. E. 186 (excluding usage as to the meaning of "minerals" "about there," i. e. in the C. valley, as not a settled one for the region); 1895, *Rickerson v. Ins. Co.*, 149 id. 307, 43 N. E. 856 (insurance of premises "No. 160 Mott St." containing two buildings; custom to describe a rear building specifically when intended, rejected); 1864, *Lowe v. Lehman*, 15 Oh. St. 179, 185 (good opinion by Welch, J.); 1899, *Shores Lumber Co. v. Stitt*, 102 Wis. 450, 78 N. W. 563 (actual knowledge is not necessary).

³ The following rulings will illustrate the application: 1811, *Udde v. Walters*, 2 Camp. 16 (policy of insurance to any port "in the Baltic"; evidence admitted of the nautical and mercantile understanding to include the Gulf of Finland in the Baltic, though geographers name them as distinct); 1836, *Clayton v. Gregson*, 5 A. & E. 302 ("level" in a mining contract); 1903, *Rastetter v. Reynolds*, 160 Ind. 133, 66

N. E. 612 (contract for elm strips of specified dimensions; a usage to determine measurements at the time of sawing, held binding); 1900, *Wood v. Allen*, 111 Ia. 97, 82 N. W. 451 ("dry goods"); 1857, *Ford v. Tirrell*, 9 Gray 401 (contract to build a stone wall at 11 cents a foot; to determine whether the inner or the outer face should be taken as the basis, usage was considered); 1896, *St. Paul & M. Trust Co. v. Harrison*, 64 Minn. 300, 66 N. W. 980 ("breeder" in a stallion-warranty); 1898, *Cambers v. Lowry*, 21 Mont. 478, 54 Pac. 816 (mining usage employed to interpret a lease); 1899, *Halsey v. Adams*, 63 N. J. L. 330, 43 Atl. 708 (trade meaning of "reduce" in an insurance contract); 1872, *Walls v. Bailey*, 49 N. Y. 463, 468 (contract for plastering at a price "per square yard"; local usage admitted to determine whether "yard" included space actually plastered or total superficial area of walls including windows and doors); 1864, *Lowe v. Lehman*, 15 Oh. St. 179, 184 (contract to furnish brick at \$6.25 "per thousand"; whether this signified the number furnished or used or the like, allowed to be shown by trade usage); 1870, *Hearn v. Ins. Co.*, 3 Cliff. 318 ("at and from the port," in a marine insurance policy).

⁴ 1895, *Sullivan v. Collins*, 20 Colo. 528, 39 Pac. 334 (the fact that certain property described in a tax list was well known by that description and in common understanding applied to specific property, admitted).

⁵ 1894, *Hanlon v. R. Co.*, 40 Nebr. 52, 58, 58 N. W. 590 (maps in accepted use by community at time of deed, received to interpret an uncertain line).

⁶ 1897, *Smith v. Brackett*, 69 Conn. 492, 38 Atl. 57 (insolvency docket); 1898, *State v. Howard*, 91 Me. 396, 40 Atl. 65 (record of tax-payers; "R. D. M. L." etc., explainable by interpretation); 1897, *Maurin v. Lyon*, 69 Minn. 257, 72 N. W. 72 (technical abbreviations of the wheat trade); 1898, *State v. White*, 70 Vt. 225, 39 Atl. 1085 (record of tax-payers; "R. L. D." and "\$25," interpreted by usage of office).

⁷ 1879, *Clark v. Board*, 126 Mass. 282, 286 (the application of ballot-names, by interpreta-

here the real doubt, if any, apparently involves the question whether in point of form (*ante*, § 2454) the terms of the vote or other act have been sufficiently embodied in writing.

Whether a usage, instead of interpreting the document's words, introduces additional terms into the transaction and thereby violates the rule against *varying a written transaction*, is a different question (*ante*, § 2440), as also the question of *implied contract* whether a usage has been so adopted as to form a term of the transaction.⁸ So, too, the question must be distinguished whether and when *expert opinion* may be availed of to prove the technical meaning of a word (*ante*, § 1955).⁹

§ 2465. **Parties' Mutual Understanding; Identifying a Description.** There is no reason, in the nature of things, why the individual parties to a transaction may not employ words in a particular sense, irrespective of the ordinary or popular sense; because what we are seeking, in interpretation, is their actual standard, and the popular standard is merely taken provisionally, as presumably theirs (*ante*, § 2461). It can thus be, in theory, only a question of fact in each case whether the parties *were* using a special mutual sense. But in practice two rules intervene to obstruct the simple application of this principle. One is the rule against varying the terms of a contract by setting up other terms in competition with it (*ante*, §§ 2430, 2442). This rule makes it often difficult to accept the parties' understanding as a source of interpreting the written words without virtually substituting extrinsic terms.¹ The other is the supposed rule against disturbing a "plain meaning" by any other meaning, or, as sometimes phrased, against using extrinsic evidence unless the terms are ambiguous. This rule, as affecting the present sort of data, has already been considered (*ante*, § 2363); and its policy, though unsound, is often deemed controlling. But, assuming these two rules to be not obstructive in a particular case, the general principle has full sway:

tion, to particular persons, as when the initial only is thereon marked, may be made by the proper tribunal, but not by a board of ministerial election officers); 1868, *People v. Cicott*, 16 Mich. 283, 308, 309, 317 (*contra*, on the first point; but *Christiancy, J.*, and *Cooley, C. J.*, approve the orthodox rule; "it has the merit of harmonizing with the rules applied to other written instruments, which I think is no slight recommendation; it is always objectionable and mischievous to lay down different rules for classes of cases which all come within the same reasons"). Compare the application of the Opinion rule, *ante*, § 1967.

⁸ The following ruling illustrates the distinction: 1892, *Richmond & D. R. Co. v. Hissong*, 97 Ala. 187, 190, 13 So. 209 (custom of brakemen in coupling, as varying from a rule of contract; not available unless acted on by both so as to alter the contract).

⁹ For other rules as to the *mode of evidencing a usage*, see *ante*, §§ 379, 1954 (number and kind of instances), as varying from a rule of contract; and § 2053 (number of witnesses).

¹ The following rulings illustrate the dis-

inction: 1840, *Doe v. Webster*, 4 Perry & D. 270, 274 (deed of land "with the appurtenances"; a certain lot was an appurtenance, but the original offer of sale had expressly excepted it; the purchaser's admissions, after the sale, that he had not bought it were excluded; "this evidence went to contradict the deed, not to apply the words of it to any particular thing"); 1872, *McCormick v. Huse*, 66 Ill. 319; 1876, *Black v. Bachelder*, 120 Mass. 171 (advertising contract, "payable as convenient"; an understanding that this signified "payable after sales made through the circulation of the advertisement," excluded, as a "construction of the contract in direct violation of its terms"); 1903, *Trustees v. Jessup*, 173 N. Y., 84, 65 N. E. 949 (contract to make "a roadway"; "the parties' understanding that the roadway should be of wooden piers, not a solid embankment, excluded).

Similarly, the parties' understanding cannot avail to evade the effect of an obligation in point of law: 1843, *Brockett v. Bartholomew*, 6 Metc. 396 (whether certain payments were applicable only to the rent of premises).

1868, *Wells, J.*, in *Stoops v. Smith*, 100 Mass. 63 (the defendant having agreed to pay the plaintiff "for inserting business card in 200 copies of his advertising chart," the defendant, refusing to pay, offered to show that the chart, as understood between them, meant a chart of cloth, to be posted up in two hundred public places near Worcester, and that no chart had been so made and posted): "The purpose of all such evidence is, to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself. The effect must be limited to definition of the terms used, and identification of the subject-matter. If so limited, it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends, not upon their promissory obligation, but upon the aid they afford in the interpretation of the contract in suit. They are not the less effective for the purposes of explanation and definition because they purport to carry the force of obligation. The contract in suit may illustrate this principle in a point that is not in dispute. The defendant agrees to pay fifty dollars 'for inserting business card,' etc. In applying this stipulation, if the defendant had a business card distinctively known and recognized as such, there would be no difficulty in giving effect to the contract. But the identification of that card would involve the whole principle of admitting parol evidence for the interpretation and application of written contracts to the subject-matter. It could be done only by the aid of parol testimony. Suppose he had several business cards, differing in form and contents, but one was selected and agreed upon for the purpose at the time the contract was signed; or that one had been prepared specially for the purpose. Clearly parol testimony would be competent to identify the card so selected or prepared, and to prove that the parties assented to and adopted it as the card to which the contract would apply. Suppose, thirdly, that no such card had been selected or prepared, but its form, contents and style had been described verbally and assented to, and the plaintiff had agreed to insert it as so described. Such evidence may be resorted to, not for the promise it contains, but for the aid it affords in fixing the meaning and applying the general language of the written contract. The same considerations render the evidence offered by the defendant competent for similar purposes. The term 'his advertising chart' requires to be practically applied. The representations of the plaintiff are in the nature of a description of the vehicle by which the publication of the business card was to be effected; and his account of the disposition he proposed to make of the charts was a description of the extent and the sense in which it was to be an 'advertising chart.'"²

The application of the principle has long been seen in the interpretation of *descriptions in deeds*,³ because there is there always some concrete and

² See also a good opinion by Barbour, J., in *Bradley v. Steam Packet Co.* (1839), 13 Pet. 89, 101-103.

³ *Eng.*: 1787, *Buller, J.*, in *Doe v. Burt*, 1 T. R. 701, 704 ("Where there is a conveyance in general terms of all that acre called Blackacre, everything which belongs to Blackacre passes with it. . . . But whether parcel or not of the thing demised is always matter of evidence"); *Can.*: 1849, *Doe v. Pitt*, 1 All. N. Br. 385 ("all those certain pieces of marsh land"); U. S.: 1896, *Derrick v. Sams*, 98 Ga. 397, 25 S. E. 509 ("land purchased by H. of D." identified by evidence); 1893, *Thompson v. Smith*, 96 Mich. 258, 267, 55 N. W. 886 (mortgage of "block B"; that the mortgagor told the mortgagee that certain lands were not to be included was excluded; but other deeds etc., were admitted to show their usage as to the term

"block B"); 1895, *Calloway v. Henderson*, 130 Mo. 77, 32 S. W. 34 (a farm described as "the farm known as the property of the late G. R.," allowed to be identified); 1896, *Diggs v. Kurtz*, 132 id. 250, 33 S. W. 815 ("lot No. 312"; no boundaries named and no plot referred to; oral agreement as to boundaries, admitted); 1897, *Axford v. Meeks*, 59 N. J. L. 502, 36 Atl. 1036 ("my place at Riverside," interpreted by considering the facts of the "place"); 1816, *Jackson v. Goes*, 13 John. 518, 524 ("The identity of the grantee, as well as of the thing granted, must generally speaking partake more or less of a latent ambiguity, explainable by testimony dehors the grant. It cannot be that this inquiry is restricted to the single case of ambiguity occasioned by there appearing to be two persons bearing the name of the patentee"); 1839, *Fish v. Hubbard*, 21 Wend. 651 ("A location on

local object, fully known to the parties but unknown to the Court, and in every such case it is obvious that "the words used must be translated into things and facts";⁴ the parties to the deed almost always use terms of description which are peculiar to themselves.

But the universal application of the principle to *contracts and other documents* has also gradually been perceived. There is no transaction whatever in which, for some idea or other, the parties do not use words in a sense of their own. Having themselves locked up the idea in the words, themselves must furnish the key to unlock it. The antiquated notion (*post*, § 2470) that a document must be construed solely within its four corners, no matter how puzzling the problem, served for a time to retard the full appreciation of sound doctrine. But it was well settled by the middle of the 1800s in England; the case of *Macdonald v. Longbottom*, in which "your wool" was to be interpreted, served to mark the period of full conviction.⁵ In the United States the principle has also received ample sanction and illustration.⁶

application of the description of parcels must always be made by evidence *aliunde*"; 1897, *Salmer v. Lathrop*, 10 S. D. 216, 72 N. W. 570 (facts to identify a grantee "I. C. McDowell" with one "Thomas C. McDowell," admitted).

⁴ Holmes, J., in *Doherty v. Hill*, 144 Mass. 468, 11 N. E. 581.

⁵ 1778, *Cooke v. Booth*, Cowp. 819 (whether a clause "under the same rents and covenants" should be construed inclusive or exclusive of the clause of renewal; Aston, J.: "As there have been four successive renewals, the lessor himself has put his own construction upon the covenant, and therefore is bound by it"); 1816, *Birch v. Depeyster*, 1 Stark. 210 (contract mentioning a captain's "privilege"; conversation between the parties beforehand, admitted "to show in which sense it was used on the present occasion"); 1821, *Smith v. Doe*, 2 B. & B. 473, 597 (marriage settlement containing a power to make leases which should include "a power of re-entry for non-payment of the rent"; the issue was whether leases made in alleged pursuance of the settlement were valid, their powers of re-entry being not absolute, but conditional on extension of time for payment and on inability to distrain; held, by a majority, that the usual and accustomed form of the leases of that estate could be considered in construing the clause in the settlement); 1839, *Doe v. Benjamin*, 9 A. & E. 644, 652 (whether a document agreeing to "take a lease" was a mere agreement or a present lease; Coleridge, J.: "The Courts have come to some inconsistent conclusions in cases of this kind; but from the main body of them the principle results that we must look to the intention of the parties, and that by considering the terms of the particular instrument, with reference, I agree, to the state of facts existing at the time"); 1846, *Smith v. Jeffries*, 15 M. & W. 561 (sale of "60 tons of ware potatoes"; there were two qualities, "Regent's wares" and "kidney wares," and the seller offered to deliver the latter; the parties' express understanding that "Regent's wares" were signified was excluded;

this case really rests on a misapplication of the principle of § 2466, *post*); 1859, *Macdonald v. Longbottom*, 28 L. J. Q. B. 297, 1 E. & E. 977 (purchase of "your wool"; a prior conversation admitted to interpret this phrase as used by the parties; L. C. J. Campbell: "Where there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of showing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract"); 1859, *Symonds v. Lloyd*, 6 C. B. n. s. 691, 696 ("In order to ascertain the intention of the parties, it is necessary to look to that which was the subject of the communication at the time or which was afterwards done"); 1859, *Mumford v. Gething*, 7 C. B. n. s. 305, 321 (contract "in consideration of my entering your employ"; the circumstances and understanding of the parties were received, showing that the employee was already a clerk in the employer's warehouse and had now additionally been employed as salesman to take the Midland district, and that "your employ" thus applied to the latter service only; Erle, C. J.: "[It was admissible] for the purpose of showing the circumstances under which such wide words were used, and of applying them according to the intention of the parties"); 1900, *Bank of New Zealand v. Simpson*, App. Cas. 182 (*Macdonald v. Longbottom* approved); 1902, *Re Huxtable*, 2 Ch. 793 (bequest of 4000*l.* to C., "for the charitable purposes agreed upon between us"; testatrix' agreement with C., admitted to define the charitable purposes; though not to establish that the income alone was to be given to such purposes).

⁶ Compare the cases cited *supra*, note 1; 1895, *Solary v. Webster*, 35 Fla. 363, 17 So. 646 (bond reciting the settlement of previous claims; identification of the claims, permitted); 1896, *Maynard v. Render*, 95 Ga. 652, 23 S. E. 194 ("cords" of wood; mutual understanding of the length of a cord, admitted); 1899, *Kentucky Cit. B. & L. Ass'n v. Laurence*, 106 Ky. 88, 49

§ 2466. **Individual Party's Meaning; (1) Deeds and Contracts.** When a person takes part in a bilateral act — *i. e.* a transaction in which other persons share — he must accept a common standard; he cannot claim to enforce his individual standard of meaning (*ante*, § 2461). The other party or parties are entitled to charge him with the common standard. This was long ago discussed and worked out as a general principle of casuistry: (?)

1785, Dr. *William Paley*, *Principles of Moral and Political Philosophy*, b. III, pt. I, c. V, "Promises": "Temures promised the garrison of Sebastia, that if they would surrender, *no blood should be shed*. The garrison surrendered; and Temures buried them all

S. W. 1059 (agreement to assume liabilities of a company "as shown by their books"; evidence received to show what "books" were meant); 1896, *New England D. M. & W. Co. v. Standard Worsted Co.*, 165 Mass. 328, 43 N. E. 112 (though by the statute the goods sold must be designated in the memorandum, the interpretation of such a phrase as "2000 lbs. F. C." is merely an application of the words to a specific object, and may be shown by the understanding of the parties); 1897, *Clark v. Lowe*, 113 Mich. 352, 71 N. W. 638 (guarantee of an undivided third of indebtedness; agreement as to the exact amount, admitted); 1895, *Pfeifer v. Ins. Co.*, 62 Minn. 536, 64 N. W. 1018 (indorsement cancelling a policy on two horses, so as to "cover one horse only"; evidence admitted as to which horse was actually understood); 1896, *Ripon College v. Brown*, — id. —, 68 N. W. 837 (deed subject to certain mortgages "which . . . agrees to assume"; the ambiguous "which" interpreted by the parties' understanding); 1902, *Gill v. Ferrin*, 71 N. H. 421, 52 Atl. 558 (circumstances of the parties, admitted to show their meaning by the word "incumbrances" in a warranty-deed); 1894, *Streppone v. Lennon*, 143 N. Y. 626, 37 N. E. 638 (agreement to "do brick-work"; usage and the parties' language, admitted to show whether this meant to include providing the bricks); 1895, *Brady v. Cassidy*, 145 id. 171, 39 N. E. 814 (goods on hand," interpreted by the parties' understanding); 1896, *Lupton v. Lupton*, 117 N. C. 30, 23 S. E. 184 ("one-half of boat" in a sale; circumstances identifying the boat, admitted); 1857, *Barnhart v. Riddle*, 29 Pa. 92, 97 ("Courts take the language employed and apply it to the surrounding circumstances, exactly as they believe the parties applied it"); 1898, *Cooper v. Potts*, 185 id. 115, 39 Atl. 824 (assignment of "all money due or to become due by M"; parties' understanding as to claims covered, received); 1902, *Murray v. Northwestern R. Co.*, 64 S. C. 520, 42 S. E. 617 (contract to erect a "freight and passenger depot"; circumstances considered for determining the mutual meaning); 1877, *Reed v. Ins. Co.*, 95 U. S. 23 (insurance of a vessel, "the risk to be suspended while vessel is at Baker's Island loading"; held, that "a reference to the actual condition of things at the time, as they appeared to the parties themselves," was allowable in interpreting these words, and that their sense included the case of being at the Island with the purpose of loading, though before the loading had actually begun); 1893, *Loneragan v. Buford*, 148 id.

581, 588, 13 Sup. 684 (contract reserving "2000 steers heretofore sold"; the previous contract of sale admitted to identify them); 1896, *Sanders v. Munson*, 20 C. C. A. 581, 74 Fed. 649 (shipping contract; "about April 10th"; parties' prior conduct, admitted); 1898, *The Barnstable*, 84 Fed. 895 (agreement to pay "the insurance on the vessel"; that the sense of this, as covering all kinds of risks, was communicated to the maker by the broker beforehand, admitted); 1901, *American Bonding & T. Co. v. Takahashi*, 49 C. C. A. 267, 111 Fed. 125 (contract for payment of money to a certain person as "trustee"; attendant negotiations considered, to interpret and apply the term); 1902, *Sun P. & P. Ass'n v. Edwards*, 51 id. 279, 113 Fed. 445 (contract to employ in a printing establishment; prior conversations admitted to interpret "what kind of a printing establishment was contemplated by the contract"); 1896, *Bartels v. Brain*, 13 Utah 162, 44 Pac. 715 (a lease exempting from injury by "reasonable use"; declarations of the parties admitted to show what uses were understood); 1898, *Brown v. Markland*, 16 id. 360, 52 Pac. 597 (conveyance of mining property subject to claims; circumstances resorted to for interpreting); 1895, *Coffrin v. Cole*, 67 Vt. 226, 31 Atl. 313 (a conveyance of "all right" possessed by the grantor, interpreted by the facts); 1896, *Richardson v. Bank*, 94 Va. 130, 26 S. E. 413 (a receipt for property "left" by H., explained by the circumstances); 1897, *Anderson v. Jarrett*, 43 W. Va. 246, 27 S. E. 348 ("the old fence between" F. and S.; Brannon, J.: "You have a right to use oral evidence to apply this bill [reciting the agreement], like a deed, physically to the ground"); 1897, *Waldheim v. Miller*, 97 Wis. 300, 72 N. W. 869 (guaranty of "account of B."; evidence that this meant a future account only, admitted). The following illustrates an occasional aberration: 1896, *Holman v. Whitaker*, 119 N. C. 113, 25 S. E. 793 (mortgage of a "one-horse wagon"; the mortgagor had four such; evidence that the mortgagee was working for the mortgagor and driving such a wagon of the latter's, and did not know that he had others, excluded).

Distinguish such a case as the following: 1889, *Fudge v. Payne*, 86 Va. 306, 309, 10 S. E. 7 (sale of lands "generally known as 'the loop'"; *semble*, a mutual understanding, different from the "generally known" sense would not be enforced; this is an instance of the parties having themselves expressly excluded their own sense of the words).

alive. Now Temures fulfilled the promise in one sense, and in the sense too in which he intended it at the time; but not in the sense in which the garrison of Sebastia actually received it, nor in the sense in which Temures himself knew that the garrison received it; which last sense, according to our rule, was the sense in which he was in conscience bound to have performed it."

The principle is applicable, not only to *deeds* and *contracts*,¹ but also to all bilateral transactions, including *notices* and *demands*,² — though not of notices having a purely individual significance,³ to which rather the principle for wills (*post*, § 2467) would apply.

There is, however, a qualification to be made. The person using words is to be treated from the point of view of the reasonable man, not only in determining the actual tenor of his act (*ante*, § 2413), but also in interpreting it. As a reasonable man, he must be charged with knowing that the standard to be applied is the mutual one, because he has willed to take part in a bilateral transaction. As a reasonable man, however, he may have good reason to believe that the specific mutual meaning — *i. e.* of the other party as well as himself — is one thing, whereas in fact it is a different thing. The common instance is that of a *name corresponding to two objects*, one of which is signified by the one party and the other by the other party. Here each party is entitled to be charged with only that sense of the word which under the circumstances he had good reason to believe was employed by the other party. As in the "Peerless" case,⁴ if the seller is ignorant that there is a second "Peerless," and could not reasonably be expected to know it, he is entitled to be charged with the "Peerless" in his own sense; and so of the other party; and thus, the senses of promise and consideration being different, the contract fails. But if the seller had known of the second "Peerless"

¹ 1897, *Gamble v. Mfg. Co.*, 50 Nebr. 463, 69 N. W. 960 (holding that a business-habit of an individual must be actually made known to the other party); 1896, *Rickerson v. Ins. Co.*, 149 N. Y. 307, 43 N. E. 856 (premises "known as 160 Mott St." insured; it contained two buildings; the insurer's testimony that he intended to insure only one, correctly rejected; but the Court did not point out that such intention would have been admissible if it had represented the mutual understanding); 1903, *Butte & B. C. M. Co. v. Montana O. P. Co.*, 58 C. C. A. 634, 121 Fed. 524 ("tailings," in a mining contract); 1897, *Anderson v. Jarrett*, 43 W. Va. 246, 27 S. E. 348 ("the old fence" between F. and S., agreed upon as a line; the defendant's interpretation as to which "old fence" was excluded). Other instances are cited *ante*, §§ 1967, 1971, in connection with the application of the Opinion rule to proof of a party's intent.

² 1837, *Lawless v. Grogan*, 1 Dru. & Walsh 53, 64 (L. C. Plunket: "When a notice is relied upon for the purpose of forfeiture, . . . [it must appear] that the intention of the landlord to insist on the forfeiture, and the information as to the facts which were peculiarly within the knowledge of the landlord, were fully brought home to the tenant"); 1877, *Locke v. R. Co.*, 46 Ia. 109, 111 (whether the plaintiff conductor

was negligent in running the train over a weak bridge; the sense of a notice received by him from the superintendent was held to be, not that which the latter meant, but "what did the dispatch mean when read by the conductor in the light of the surrounding circumstances").

³ 1803, *Holsten v. Jumpson*, 4 Esp. 189 (trover for household furniture, taken by the defendant on execution against the plaintiff's mother, and claimed by the plaintiff as her own; the defendant having put in a written demand by the mother for all the articles "belonging to her which had been seized," the plaintiff was allowed to show that this demand "was made of the effects of the mother herself, and were not those for which the action was brought").

⁴ 1864, *Raffles v. Wichelhaus*, 2 H. & C. 906 (the plaintiff sold to the defendant cotton to arrive "ex Peerless from Bombay"; the defendant refusing to accept, it appeared that there were two ships Peerless from Bombay, the plaintiff meaning the one to sail in December and the defendant the one to sail in October, and neither apparently knew that the other meant a different ship; a plea by the defendant alleging that the defendant meant the October ship, and that no cotton was delivered from that ship, was held good). Compare the explanation of this case in *Holmes, Common Law*, 309.

and also known that the buyer was aware of it, he might be charged with a sale of that cargo, if in fact the buyer was using that sense. The general principle of reasonable consequences (*ante*, § 2413) governs the interpretation of this class of cases.⁵

§ 2467. **Individual Party's Meaning; (2) Wills.** A unilateral act may be interpreted by the individual standard of the actor (*ante*, § 2461); that is, after resorting to the ordinary sense of words, and the local sense of words, for provisional assistance, we are still entitled to supplant all these by the individual usage, if it appears to have been different from the others. The will is the typical and almost the only instance of a unilateral act. The sense of the testator is therefore to be the ultimate criterion of interpretation:

1870, *Blackburn, J.*, in *Grant v. Grant*, L. R. 5 C. P. 727, 729 (quoting a passage from his own treatise on Sales): "The principles of the rules of law regulating the admissibility of extrinsic evidence to aid the construction of wills, and of contracts required to be in writing, seem to be the same. But, in applying them, it seems necessary to bear in mind that there is a distinction between the two classes of instruments. The will is the language of the testator, soliloquizing, if one may use the phrase, and the Court in construing his language may properly take into account all that he knew at the time, in order to see in what sense the words were used."

This principle is to-day universally conceded.¹ Only two particulars need to be noted as corollaries in its application. (a) The sense of the words must be sought in a usage or *habit* of the testator, for it would be impossible to attempt to ascertain the momentary or casual meanings which might have occurred to him. Hence, although all the circumstances and utterances of

⁵ Examples are as follows: *Eng.*: 1846, *Al-derson, B.*, in *Smith v. Jeffries*, 15 M. & W. 561 ("If I buy 60 tons of potatoes, surely the seller may deliver me kidney [*i. e.* one of several grades] potatoes"); 1900, *Folk v. Williams*, App. Cas. 176 (cipher cablegram; where a message is fairly ambiguous, the party seeking to charge the other one fails, because the former cannot show his interpretation to be the only reasonable one); *U. S.*: 1869, *Kyle v. Kavanagh*, 103 Mass. 356 (contract for the sale of land "in Waltham on Prospect Street"; there being two Prospect streets in Waltham, and each party signifying a different one, the buyer was held not bound); 1895, *Stoddard Mfg. Co. v. Miller*, 107 Mich. 51, 64 N. W. 948 (an order reading "Please ship me wone rite stele weel for a drill Two square feeting shafts. 4 ten hoe drills also some note blanks for drills"; the sender was allowed to show that he meant "shafts for 10-hoe drills"); 1832, *Hazard v. Ins. Co.*, 1 Sumner 218 (in a marine insurance policy the parties lived respectively in Boston and New York, and the term "coppered ship" had a different meaning in the two places; *Story, J.*, ruled that if neither party knew of the difference of sense of the word in the other place, neither would be bound, and that the jury were to determine the fact).

¹ 1856, *Kell v. Charmer*, 23 Beav. 195 (bequest "to my son W. the sum of i. x. x.; to my son R. C. the sum of o. x. x."; the testa-

tor having "in the course of his business used certain private marks or symbols to denote prices or sums of money," this usage was resorted to, and showed that the sums of 100*l.* and 200*l.* were signified); 1808, *Leigh v. Leigh*, 15 Ves. Jr. 92 (devise of a remainder to "the first and nearest of my kindred, being male and of my name and blood"; upon a consideration of all the circumstances, including the remainder of the will, it was held that this description was not meant to apply to a next of kin who had by license changed his name from "Smith" to "Leigh"); 1829, *Goblet v. Beechy*, 3 Sim. 24 (a sculptor bequeathed all his "marbles, busts, and models" to P. D. and B.; by a codicil he bequeathed his "tools in the shop, bankers, mod tools for carving," to the plaintiff; the models were valuable, the tools for modelling were not; *Shadwell, V. C.*, held "mod" to mean "models," upon the testimony of a sculptor that he "understood it to be a contraction of the word 'models,'" and of three sculptors that "in their opinion the testator by the word 'mod' meant 'models'"); 1903, *Reformed Presb. Church v. McMillan*, 31 Wash. 643, 72 Pac. 502 (bequest to the "Society for Disabled Ministers of the Reformed Presbyterian Church of Illinois," given to the "Reformed Presbyterian Church of North America, General Synod," which had a fund for disabled ministers). Numerous additional examples are collected *ante*, § 2463.

the testator may be searched (*post*, § 2470), as forming a mass of data in which the habit will appear, yet no one utterance can be emphasized as the sole and decisive embodiment of his usage.² (b) The *time* of the usage must be the time of the will's final sanction; for the will is in fact a standing expression from the date of its formal execution to the date of the testator's death without revoking it;³ hence a broad range of search. But where a will is in effect left with blanks at the time of execution, any subsequent document is virtually an addition of terms to the will, not an interpretation of existing terms, and hence, if not formally executed, cannot be considered.⁴

But three other rules, which constantly operate to obscure the full application of this principle, must be distinguished. (1) The rule against disturbing a *plain meaning* (*ante*, §§ 2462–2463), so far as it is recognized, will of course prevent the resort to the testator's individual meaning.⁵ (2) The rule against *express declarations of intention* (*post*, § 2471) operates to limit the sources of investigation to some extent. (3) The ignoring of the rule

² 1850, *Doe v. Hubbard*, 15 Q. B. 227, 248 (devise of "all those two cottages or tenements, the one occupied by my son J. H., the other occupied by my granddaughter"; there were two cottages which had been subdivided into five residences, two of them only occupied by the persons mentioned; the scrivener's testimony as to "what the testator said about the two cottages" was excluded; L. C. J. Campbell: "This was not confined to an inquiry into the meaning which the testator usually affixed to the expression 'his two cottages,' but was calculated to bring out an answer, which could not be admissible evidence, with regard to his intentions in making the will, irrespective of the language of the will itself"). Compare the principle of the rule *post*, § 2471, against declarations of intention.

³ 1871, *Castle v. Fox*, L. R. 11 Eq. 542, 550 (devise of "all my mansion and estate called Cleeve Court"; the testator had bought additional lands, appurtenant thereto, between the execution of the will and his death, and these were held to pass; Malins, V. C.: "The question is, not what was known by that name when he made his will, but what was known by that name and treated by him as coming under that description at any time during his life; . . . [the Wills Act] enacts that every will shall be construed, with reference to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator, unless a contrary intention should appear").

⁴ 1844, *Clayton v. Nugent*, 13 M. & W. 200 (will containing a list of devisees indicated by the letters K, L, M, N, etc., and stating that a "key and index to initials is in my desk"; the will was dated 1820, and a key dated 1828 and found in the desk, was excluded). Compare *Kell v. Charmer*, *supra*, note 1.

⁵ That rule was the foundation of some of the opinions in the case of *Lady Hewley's Charities*, though it was not involved; 1833–1843,

Attorney-General v. Shore, also on appeal *s. v. Shore v. Wilson*, 7 Sim. 309, note, 11 id. 592, 615, 5 Cl. & F. 355 (*Lady Hewley*, a Presbyterian, in 1704, deeded to charities for the assistance of "poor and godly preachers of Christ's holy gospel," etc.; the trustees having become Unitarians at a later period, a bill was filed to remove them and order the trust's administration for the benefit of persons described in the deed; for this purpose evidence of the founder's personal belief on points of theology was excluded, by apparently all the judges, but evidence of the theological tenets of the sect to which she belonged, and of the usage of that sect, was admitted, by a majority of the judges; the case as a whole is an extreme example of poor judicial treatment; for the opinions though lengthy are obscure, and such is their confusion and indefiniteness of views that the decision settled no principle, and even its actual tenor has been variously stated by commentators). A similar question was presented in the following case: 1885, *Hinckley v. Thatcher*, 139 Mass. 477, 480, 1 N. E. 840 (bequest to "the Authorized Agents of the Home and Foreign Missionary Societies"; testator's religious opinions, as involved in "his acts in connection with churches and religious societies and the usages of those churches and societies," considered; whether they could have been considered, apart from such acts and usages, not decided). In neither of the foregoing cases should there have been any hesitation. Compare the following case: 1835, *Attorney-General v. Pearson*, 7 Sim. 290, 308 (grant of land, in 1701–1726, for a meeting-house, by Presbyterians, for "the worship and service of God"; the trustees and the majority of the congregation having later ceased to be Trinitarian in belief, a bill to restrain the use of the land for non-Trinitarian tenets was brought, asking a decree of inquiry as to the tenets of the founders, for interpreting the terms of the trust, and the "tenets in general" of the founders were considered, by Shadwell, V. C.).

falsa demonstratio non nocet (*post*, § 2476) sometimes prevents the testator's meaning from being fully enforced.

2. Sources of Interpretation.

§ 2470. **General Principle: All Extrinsic Circumstances may be Considered.**

It was a part of the stiff formalism of earlier interpretation, not only that the law should fix the meaning of words and phrases (*ante*, § 2462), but also that all aids to the meaning must be found in the document itself. It is the document that "speaks," and if the document does not speak for itself, we cannot make other things speak instead of it, — such was the notion. The purely relative nature of words — their necessary association with external objects — was as yet not conceived. They were tangible tools, which must do their own work or remain ineffective. The writing fixed the will of the writer, and to look away from the writing was suggestive only of deviation and uncertainty. "The construction of wills," says Lord Coke,¹ "ought to be collected from the words of the will in writing, and not by any averment [*i. e.* circumstances] of evidence out of it," and then he recurs to the old apprehension (*ante*, § 2462) of uncertainty for legal advisers and landed estates, "for it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give, but it should be controlled by collateral averments out of the will." A hundred years later, Lord Holt,² a conservative by nature, protests in like strain against the newer spirit: "If we once travel into the affairs of the testator, and leave the will, we shall not know the mind of the testator by his words, but by his circumstances; so that if you go to a lawyer, he shall not know how to expound it. Men's rights will be very precarious upon such construction. We must not depart from the will to find the meaning of it in things out of it." Holt was here dissenting, and his extreme ideas were already becoming obsolete. But even after another century had passed, and the antiquated notions had been thoroughly discredited, the echo of conservatism is heard in Lord Eldon's remark that, "generally speaking, you must construe instruments by what is found within their four corners."³

The stages of progress may be marked off somewhat as follows: (1) Even in Coke's time it was conceded that in case of an equivocation (*post*, § 2472) or double-meaning description, outside data could be sought, because "no inconvenience can arise if an averment [of extrinsic data] in such case be taken; for he who sees such will cannot be deceived by any secret invisible averment, for he ought at his peril to inquire."⁴ This was at first the sole specific exception.

¹ 1591, Lord Cheyney's Case, 5 Co. Rep. 68 a.

² 1702, *Cole v. Rawlinson*, 1 Salk. 234, 2 Ld. Raym. 831.

³ 1821, *Smith v. Doe*, 2 B. & B. 473, 602. So, too, in 1801, *Rooke, J.*, in *Coker v. Guy*, 2 B. & P. 565, 569: "Every agreement must receive its construction from its own terms, without the introduction of any evidence *dehors*

the instrument, unless there be some latent ambiguity."

⁴ Lord Cheyney's Case, *supra*. In 1708, in *Strode v. Russell*, 3 Ch. Rep. 169, Lord Cowper put it that "where the words stand *in equilibrio* and are so doubtful that they may be taken one way or the other, there it is proper to have evidence read to explain them."

(2) Little by little it began to be seen that there might be other necessary instances of resort to "things extrinsic" (in Lord Holt's phrase). Lord Cowper and Lord Hardwicke were breakers of new ground in this respect.⁵ Their work was continued by Lord Thurlow, whose ruling in *Fonnereau v. Poyntz* was considered a dangerous innovation; it not only cost himself much intellectual perturbation, but was for some time afterwards regarded by many as discreditable to his reputation, and was explained away as imperfectly reported.⁶ As late as the beginning of the 1800s there were judges who still thought that the only proper exception was an equivocation,⁷ and there was a reactionary ruling which refused to recognize even that much relaxation for a sealed instrument.⁸ But in general, by that time, the weight of opinion conceded what Lord Thurlow had laid down, not that only for an equivocation, but also for any real and insurmountable uncertainty of meaning, resort to extrinsic circumstances for light was permissible.⁹ The commonest case, of course, was that in which the words of the document turned out not precisely or naturally to fit any external object over which the testator had disposal; and consolation was here obtained, for the apparent stretching of principle, by a plausible play upon words: "If you go to parol evidence to raise the ambiguity, you cannot well refuse it to explain such ambiguity."¹⁰ This conjuring phrase, which appears again and again in a defensive spirit, helped to liberalize the practice, and thus to prepare the way for a broader

⁵ 1749, Lord Hardwicke in *Goodinge v. Goodinge*, 1 Ves. Sr. 231 ("That rule is laid down much too large by Holt; for in several cases it is admitted it must be allowed, — namely, where the description or thing is uncertain (not only where two of the same name), it must be admitted to show that the testator knew such a person and used to call her by a nickname"). But even he was unwilling to advance rapidly, and he once criticised his predecessor, Lord Cowper, who had occasionally generalized too liberally; "I was never satisfied with this rule of Lord Cowper's, of admitting parol evidence in doubtful cases" (*Ulrich v. Litchfield*, 2 Atk. 372).

⁶ 1785, *Fonnereau v. Poyntz*, 1 Bro. C. C. 472 (bequest of "the sum of 500*l.* stock in long annuities"; this expression would ordinarily signify an income of 500*l.* per year; but L. C. Thurlow allowed the value of the estate to be considered, whence it appeared that she had only 120*l.* a year long annuities, and the bequest was therefore held to mean 500*l.* capital laid out in such stock; the ruling was treated as an inroad upon the rule "which will not admit of an instrument being construed *aliunde*," and which prescribes that "where the words used by a testator are sensible, they must be taken as they stand"; "the only question is, how to preserve the law, and yet to decide according to the intention of the testatrix," and was justified by Lord Thurlow "because the words she had used in the description are upon the whole of the context uncertain"). There were by this time some sufficient precedents for such a statement

of the rule, — for example, in 1750, *Hampshire v. Pierce*, 2 Ves. 216, by Strange, M. R.

⁷ 1816, *Doe v. Chichester*, 4 Dow 65, 93 (Gibbs, C. J. "The Courts of law have been jealous of the admission of extrinsic evidence to explain the intention of a testator; and I know of only one case in which it is permitted, that is, where an ambiguity is introduced by extrinsic circumstances").

⁸ 1821, *Doe v. Benson*, 4 B. & Ald. 588 (lease by parol from "Lady-day"; the local usage to signify "old Lady-day," instead of the new or legal Lady-day, *i. e.* March 25, was admitted; but *Doe v. Lea*, 11 East 312, was approved, because "there the letting was by deed, which is a solemn instrument, and therefore parol evidence was inadmissible to explain the expression 'Lady-day' there used, even supposing that it was equivocal").

⁹ 1822, *Plumer, M. R.*, in *Colpoys v. Colpoys*, Jacob 451, 456 ("The admission of extrinsic circumstances to govern the construction of a written instrument is in all cases an exception to the general rule of law, which excludes everything *dehors* the instrument. . . . It must be the case of an ambiguity which cannot otherwise be removed, and which may by these means be clearly and satisfactorily explained").

¹⁰ L. C. Thurlow in *Shelburne v. Inchiquin*, 1 Bro. C. C. 338, 341; *Plumer, M. R.*, *ubi supra*, declaring that "where there is a latent ambiguity raised by extrinsic circumstances, it may be got rid of in the same manner." Bacon had already resorted to this phrase in his *Maxim* (XXV) on Ambiguities; "*nam quod ex facto oritur ambiguum verificatione facti tollitur.*"

principle. Meantime the same progress and conflict was reflected in the judicial opinions in the United States.¹¹

(3) The truth had finally to be recognized that words always need interpretation ; that the process of interpretation inherently and invariably means the ascertainment of the association between words and external objects ; and that this makes inevitable a free resort to extrinsic matters for applying and enforcing the document. "Words *must* be translated into things and facts."¹² Instead of the fallacious notion that "there should be interpretation only when it is needed,"¹³ the fact is that there must always be interpretation.¹⁴ Perhaps the range of search need not be extensive, and perhaps the application of the document will be apparent at the first view ; but there must always be a travelling out of the document, a comparison of its words with people and things. The deed must be applied "physically to the ground."¹⁵ Perhaps the standard of interpretation will limit our search ; perhaps the obligation (as some Courts maintain) to enforce the ordinary standard as against the mutual or the individual standard (*ante*, § 2462), or to enforce the mutual as against the individual standard (*ante*, § 2466), will render certain data immaterial. But these restrictions are independent of the present principle. Once freed from the primitive formalism which views the document as a self-contained and self-operative formula, we can fully appreciate the modern principle that the words of a document are never anything but indices to extrinsic things, and that therefore all the circumstances must be considered which go to make clear the sense of the words,—that is, their associations with things. In the field of wills, where there is none but the individual standard of meaning to be considered, this principle is seen in unrestricted operation ; and its full sanction has often been judicially avowed :

1831, Sir *James Wigram*, V. C., *Extrinsic Evidence in Aid of the Interpretation of Wills*, Proposition V: "For the purpose of determining the object of a testator's bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, a Court may inquire into every *material* fact relating to the person who claims to be interested under the will, and to the property which is claimed as the subject of disposition, and to the circumstances of the testator and of his family and affairs, for the purpose of enabling the Court to identify the person or thing intended by the testator, or to determine the quantity of interest he has given by his will. The same (it is conceived) is true

¹¹ 1839, *Bradley v. Steam Packet Co.*, 13 Pet. 89, 99 (question as to the length of validity of a contract "for the use of the steamboat Franklin, until the Sydney is placed on the route to Potomac Creek"; the circumstances preceding the contract were admitted; Barbour, J.: "The rule which admits extrinsic evidence for the purpose of applying a written contract to its proper subject matter extends beyond the mere designation of the thing on which the contract operates, and embraces within its scope the circumstances under which the contract concerning the thing was made, when without the aid of such extrinsic evidence such application of the written contract to its proper subject matter could not be made"; four judges dissenting).

¹² Holmes, J., quoted *ante*, § 2465.

¹³ Quoted *ante*, § 2458.

¹⁴ 1835, Coleridge, J., in *Doe v. Holtom*, 4 A. & E. 76, 82 ("Some extrinsic evidence is necessary for the explanation of every will ; if the word 'Blackacre' be used, there must be evidence to show that the field in question is Blackacre"); 1892, Jeune, J., in *Paton v. Ormerod*, 66 Law T. Rep. 381 ("Parol evidence of existing facts and circumstances outside the will is admissible, and in truth is in every case necessarily, though informally, admitted in order to apply the terms of the will to that to which they are intended to refer").

¹⁵ Brannon, J., in *Anderson v. Jarrett*, cited *ante*, § 2465.

of every other disputed point, respecting which it can be shown that a knowledge of extrinsic facts can, in any way, be made ancillary to the right interpretation of a testator's words."

1833, *Parke, J.*, in *Doe v. Martin*, 4 B. & Ad. 770, 785: "It may be laid down as a general rule that all facts relating to the subject matter and object of the devise . . . are admissible to aid in ascertaining what is meant by the words used in the will."

1842, *Sugden, L. C.*, in *Attorney-General v. Drummond*, 1 Dr. & W. 356 (interpreting a deed containing the words "Christian" and "Protestant dissenter"): "The Court is at liberty to inquire into all the surrounding circumstances which may have acted upon the minds of the persons by whom the deed or will (it matters not whether it was one or the other) was executed. . . . The Court therefore has not merely a right, but it is its duty to inquire into the surrounding circumstances, before it can approach the construction of the instrument itself."

1886, *Blackburn, J.*, in *Allgood v. Blake*, L. R. 8 Exch. 160: "The general rule is that in construing a will the Court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention [*i. e.* sense] evidenced by the words used, with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words. As said in Wigram on Extrinsic Evidence, 'The question in expounding a will is, not what the testator meant—as distinguished from what his words express,—but simply, what is the meaning of his words.' But we think that the meaning of words varies according to the circumstances of and concerning which they are used."

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 445: "It had become possible for Wigram to lay it solidly down, over seventy years ago, that, with the exception of direct statements of intention, no extrinsic fact, relevant to any legitimate question arising in the interpretation of writings and admissible under the general rules of evidence, could be shut out."

It remains now to notice whatever qualifications there may be of this general principle.

§ 2471. **Exception for Declarations of Intention.** When the search is made for data which will exhibit the sense in which a word is used in a particular writing, not only the external objects (property, persons, localities, and the like) will assist, but also the *other utterances of the party* as embodying his usage. Just as a collation of various passages in the epistles of Paul will serve to expound his sense of the word "faith," so a collation of any person's utterances is useful and necessary for determining the sense of his words in a particular document,—as in *Doe v. Jersey*,¹ where the sense of the words "my Briton Ferry estate" was ascertained by examining the testator's rental-books, in which were entered under that name the lands which he so termed. This kind of data is common and natural enough; but it is worth while emphasizing that among the "circumstances" to be investigated are included, not only the corporal objects surrounding the party, but also his utterances, written and oral, as applied to those objects.

Among this latter class, however, there is one forbidden variety, namely, *expressions of intention* dealing with the subject of the document. For example, if there is a devise to "Benjamin Franklin, of Boston, my nephew,"

¹ Cited *ante*, § 2463, note 4.

and there is no nephew but one John Franklin, a letter of the testator to that nephew, declaring an intent to devise to him his property, would not be considered. This rule has never been questioned.² What is the reason for it? The reason is certainly not to be found in any prohibitory rule of evidence, for such declarations are admissible under the Hearsay exception (*ante*, §§ 1725, 1735). Nor is it that these declarations are not useful, for together with others they would certainly help to throw light on the question whether (as in the above example) the name "Benjamin Franklin" was by the testator habitually applied to designate the nephew. The true reason is found in another rule, already considered, — the rule which prohibits setting up any extrinsic utterance to compete with and overthrow the words of a document which solely embodies the transaction (*ante*, § 2425). The effect of that rule is to deny any legal effect to just such declarations.³ It is true that where the act is required by statute to be in written form — as, a will — there is the additional reason that the oral utterance would fail to fulfil that formality.⁴ But, even without such a statutory requirement, the other rule would be adequate to prohibit. When a transaction has been even voluntarily embodied in a single document, no other utterance of intent or will on the same subject can be given legal effect. Hence, such a declaration is excluded from consideration even in the process of interpretation, not because it would not for that purpose be useful, but because it would be improper for the other purpose. There being two conceivable purposes for which it could be used, the one proper, the latter improper, it is excluded because of the fear that the latter would dominate and that the temptation to abuse would be too strong. This conclusion might have been declined; and certainly the rule as it stands does not obey the principle (*ante*, § 13) that a fact relevant for one purpose but not for another may still be received for the former. Nevertheless, the rule is intelligible and its policy rational. It rests on an attempt to insure an observance of the Integration rule (*ante*, § 2452) even at the cost of losing some useful data for the process of Interpretation.⁵ This explanation of it was long ago made clear in the following passage:

1860, Mr. *F. M. Nichols*, *Extrinsic Evidence in the Interpretation of Wills*, *Juridical Society Papers*, II, 352: "There is a kind of evidence to which both of these reasons [securing certainty of title and preventing fraudulent proof], and the analogy of the law requiring the will to be in writing, must strongly apply; I mean, of course, the species

² It may be noted that, through the loose meaning of "intention," a judge who is referring only to the present exception appears sometimes to be contradicting the general principle of § 2470, *ante*; e. g., *Woods, J.*, in *Patch v. White*, 117 U. S. 210, 6 Sup. 617 (1886): "If there is any proposition settled in the law of wills, it is that extrinsic evidence is inadmissible to show the [sc. declarations of] intention of the testator, unless it be necessary to explain a latent ambiguity."

³ 1850, *Patteson, J.*, in *Doe v. Hubbard*, 15 Q. B. 227, 243 (such declarations "would in

truth have established a verbal will contrary to the written words").

⁴ 1568, *Brett v. Rigdon*, *Plowd.* 340 ("No will is within the statute but that which is in writing, which is as much as to say that all which is effectual and to the purpose must be in writing, without seeking aid of words not written").

⁵ Professor Thayer has said (*Preliminary Treatise on Evidence*, 444) that "while it partakes of the character of both [a rule of construction and a rule of interpretation], it must hold its place as a rule of evidence." But this statement hardly represents its true foundation.

of evidence which we have called direct evidence of intention; and which, if admitted, would consist for the most part of declarations and informal written memoranda of the testator, and of instructions given by him to the persons employed in the preparation of the formal instrument. Evidence so nearly allied in character to that furnished by the will itself, presents an aspect of rivalry to the will, which raises a prejudice against its reception. It may be fairly presumed to be the intention of the author that the solemn instrument, in its complete and final form, should supersede and extinguish all the informal and deliberative expressions of intention which preceded or accompanied its making. Again, evidence of this kind presents peculiar facilities to fraud. It may be easily imagined or invented, and when fraudulently produced is difficult of detection. If a witness swears that a deceased testator, in a private interview, explained to him the sense in which he wished some clause of his will to be understood, such evidence, however false, cannot possibly be disproved. The same policy of the law which precludes such evidence from directly governing the rights of the parties ought, it may be argued, to prevent it from indirectly influencing those rights by means of interpretation. On the other hand, it cannot be denied that testimony of this kind presents the most obvious, and possibly in some cases the only satisfactory, means of ascertaining the true meaning of an ambiguous or obscure expression. The practice of our own law has, nevertheless, made us familiar with its exclusion in all but some exceptional cases; and it can scarcely be said that this prohibition leads to any great inconvenience or hardship."

The application of the rule is a matter of little difficulty. In its ordinary form, for wills, what it does is to exclude the fact that the draftsman made a *mistake*, *i. e.* it prevents the testator's oral or written instructions, or other expressions of intent, from being set up to overthrow or replace the words of the will.⁶ In short, it excludes everything that would be excluded by the rule of Integration already considered (*ante*, §§ 2425-2447). Its difficulties, if any, arise only under its exceptions.

§ 2472. **Same: (1) Exception for Equivocation, or Latent Ambiguity.** The foregoing exception to the general rule has itself an exception, namely, that declarations of intention, though ordinarily excluded from consideration, are receivable to assist in *interpreting an equivocation*, — that is, a term which, upon application to external objects, is found to fit two or more of them equally. This rule dates at least as far back, in recognition, as Lord Coke's time; the only difference being that it was then the sole permissive exception to a general prohibitory rule against looking at any extrinsic circumstances (as noticed *ante*, § 2470), while now it is a permissive exception to a prohibitory rule which is itself an exception (*ante*, § 2471) to a general permissive rule.

⁶ 1832, *Miller v. Travers*, 8 Bing. 244 (devise of estates "in the county of Limerick and in the city of Limerick"; the testator had no estate in that county, but considerable estates in the County of Clare; his draft will, containing the words "counties of Clare and Limerick," and the scrivener's mistake in changing this, were not allowed to be proved; "the only mode of proving the intention of the testator is by setting up the draft of the will against the executed will itself," and this would be improper); 1896, *Jackson v. Alsop*, 67 Conn. 249, 34 Atl. 1106 (the words of a devise being unambiguous, expressions of intention were excluded); 1896,

Defreese v. Lake, 109 Mich. 415, 67 N. W. 505 (the expressed intention of the testator, excluded for construing the kind of estate given); 1896, *Emery v. Haven*, 67 N. H. 503, 35 Atl. 940 (whether a wife's will was intended by her to be an execution of a power left her by her husband; an express subsequent written statement that it was not, excluded); 1814, *Jackson v. Sill*, 11 John. 201 (devise "to my wife the farm I now occupy"; declaration of intent not admitted to show that this included seven acres actually occupied by S. under a lease); 1896, *Fuller v. Weaver*, 175 Pa. 182, 34 Atl. 634 (a deed-description of premises).

The reason for the present exception to that exception is plain enough. The original prohibitory exception is based on the risk of allowing an extrinsic utterance of intent to come into competition with the terms of the document on the same subject, and perhaps to prevail against them (*ante*, § 2471). Now in the case of an equivocation this risk does not exist. Since the term of the document describes equally two objects, and since it was used to designate one only, there can be no competition with the words of the document by declarations which merely expand and make more specific those words. The sense of the words can be interpreted without restriction, because the data offered cannot be used for any purpose but that of interpretation. Hence the reason for the original prohibitory rule falls away, and the general principle of interpretation resumes its full range:

1836, *Parke, B.*, in *Doe v. Needs*, 2 M. & W. 129: "The characteristic of all these cases is that the words of the will do describe the object or subject intended; and the evidence of the declarations of the testator has not the effect of varying the instrument in any way whatever; it only enables the Court to reject one of the subjects or objects to which the description in the will applies, and to determine which of the two the devisor understood to be signified by the description which he used in the will."¹

The typical illustration of the present exception is found in the much-quoted passage of Lord Coke:

1591, *The Lord Cheyney's Case*, 5 Co. Rep. 68 a; devise to his son H. and the heirs of his body, and then to T. C. and the heirs male of his body, on condition "that he or they or any of them" shall not alienate; proof by witnesses that it was "the intent and meaning of the testator" to include under "he or they" his son H., as well as T. C., was excluded; "he should not be received to such averment out of the will"; "but if a man has two sons, both baptized by the name of John, and conceiving that the elder, who had been long absent, is dead, devises his land by his will in writing to his son John generally, and in truth the elder is living, — in this case the younger son may in pleading or in evidence allege the devise to him, and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead, or that he at the time of the will named his son John the younger, and the writer left out the addition of the younger."

This exception finds frequent application. The only point of controversy which it may present is whether a particular term is on the facts an equivocation, *i. e.* whether, in applying it to external objects, the two (or more) which appear to correspond must *precisely* fit the description in the document, in order to invoke this exception. Here there is room for either strict or liberal construction; and the rulings do not differ except in exemplifying one or the other attitude. It may be added that the exception is applicable not only to *wills*,² but also to *deeds* and *contracts*; but in the latter kinds of

¹ So also: 1833, *Parke, J.*, in *Richardson v. Watson*, 4 B. & Ad. 787, 800 ("Such evidence is admissible to show, not what the testator intended, but what he understood to be signified by the words used in the will").

² *England*: 1750, *Hampshire v. Pierce*, 2 Ves. 216 (bequest of 100*l.* to "the four children

of my late cousin E. B.," and of 300*l.* to "the children of my late cousin E. B.," in fact, E. B. had six children, two by one husband P., and four by another husband B.; evidence that "the testatrix meant the four children by the last husband B." was admitted to interpret the former bequest, but not the latter; the former

documents, since the standard of interpretation must be a mutual one (*ante*, § 2466), it is naturally less frequent to find a mutual declaration of intention available for the purpose.³

It is the subject of the present exception which Lord Bacon designated by his much-abused term "latent ambiguity." He also terms it by its more specific name "equivocation," but, with the exception of a single application (*post*, § 2474), the two were to him synonymous. By the standard of his time, this was the only exception for which any extrinsic circumstances

being ambiguous, but not the latter); 1750, *Jones v. Newman*, 1 W. Bl. 60 (devise to "John Cluer of Calcot"; there appearing to be two persons, father and son, of that name, "parol evidence that the testatrix intended to leave it to J. C. the son" was admitted); 1820, *Doe v. Westlake*, 4 B. & Ald. 57 (gifts to a brother Thomas W., to the daughter of a brother Richard, and then a devise to "Matthew W., my brother, and to Simon W., my brother's son"); each of the three brothers had a son Simon; declarations of the testator that he intended the devise for Simon the son of Richard were excluded; but this seems erroneous, for "my brother" was not exclusively applicable to Matthew, even on the face of the will); 1836, *Doe v. Needs*, 2 M. & W. 129 (devise to "George Gord, the son of Gord"; there were two Gord's, John and George, each having a son George, and each of these sons was elsewhere explicitly named in the will; the deviser's declarations of intention were admitted); 1840, *Doe v. Allen*, 12 A. & E. 451 (devise to "John A., the grandson of my said brother Thomas," the property to be charged with payments to "each and every the brothers and sisters of the said John A."; there were two grandsons of Thomas named John; one had three brothers and four sisters, the other had one brother and one sister, at the time of the will's making; the testatrix' declarations of intention were admitted, on the ground that the statement of the numbers of brothers and sisters was "not part of the description of the devisee"; but the correct ground would have been that the statement, though certainly part of the description, did not imply the present existence of plural brothers and sisters but included equally a person who might thereafter have more than one of each); 1870, *Grant v. Grant*, L. R. 5 C. P. 727 (devise to "my nephew Joseph Grant"; there were two relations of that name, one being the son of the testator's brother, the other the son of his wife's brother, the testator being ignorant of the former's existence and being in the habit of terming the latter his nephew; declarations of intention were offered, but were expressly not passed upon, the Court having doubts; but these doubts were unnecessary); 1877, *Re Wolverton Mortgaged Estates*, L. R. 7 Ch. D. 197 (bequest to be void upon marriage with "Thomas Fisher, of Bridge Street, Bath"; there was at the time in Bridge Street a Thomas Fisher, married, and his son Henry Tom Fisher, unmarried and "often at his father's house"; the legatee having married the latter, evidence of the testator's intention

was admitted as for an ambiguity, because "there appear to be practically two Thomas Fishers living in Bridge Street"); *United States*: 1882, *Chambers v. Watson*, 60 Ia. 339, 14 N. W. 336 (devise of "60 acres, Se 25, toon 7; 40 acres, se 24, toon 6," not naming any range; the testator's declarations at the time of execution, admitted); 1864, *Bodman v. American Tract Society*, 9 All. 447 (bequest to "the American Tract Society"; there being two societies of that name, the testator's intention, as proved by the draftsman, was admitted); 1895, *Schlottman v. Hoffman*, 73 Miss. 188, 18 So. 893 (figures in a will which might mean \$5.00 or \$500, allowed to be explained by the testatrix' instructions); 1879, *Bartlett v. Remington*, 59 N. H. 364 (bequest "in trust for Sarah," shown to be intended for Sarah Sturoc); 1880, *Tilton v. American Bible Society*, 60 id. 377 (bequest to "the Bible Society"; claims being made by the New Hampshire Bible Society and the American Bible Society, it was treated as a latent ambiguity).

³ Not all of these rulings distinctly declare declarations of intention admissible; a clear appreciation of the distinction between "intention," or meaning, and declarations of intention, is indeed often wanting: 1893, *Hallidy v. Hess*, 147 Ill. 588, 35 N. E. 380 (deed describing land by bounds, and terming it "section 8"; there being in the county several sections 8 in the various townships, "parol evidence" was admitted); 1894, *Tewksbury v. Howard*, 138 Ind. 105, 37 N. E. 355 (deed describing land as the S. E. $\frac{1}{4}$ of S. 36, T. 25, R. 11, without county or State mentioned; parol evidence admitted); 1854, *Sargent v. Adams*, 3 Gray 72, 79 (lease of "the Adams House"; issue whether it passed the five stores in the building so known; held, a latent ambiguity, upon which the intention of the parties could be resorted to); 1897, *Illinois C. R. Co. v. Le Blanc*, 74 Miss. 650, 21 So. 760 ("fractional 38 acres in said S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, assessed to J. J. Carter"; other deeds, etc., admitted to identify the section, township, and range in which Carter owned 38 acres); 1898, *Ladnier v. Ladnier*, 75 id. 777, 23 So. 430 (deed omitting State and county of land in description; extrinsic facts admitted). The following case is therefore erroneous: 1901, *Mudd v. Dillon*, 166 Mo. 110, 65 S. W. 973 (deed of "80 acres of the E. $\frac{1}{4}$ of the N. E. of Sec. 13," not mentioning any township or range; held, a patent ambiguity, void for uncertainty, and not aidable by parol; the opinion is apparently ignorant of the principle applicable).

whatever could be consulted (*ante*, § 2470). When he allowed, in case of equivocation, an averment (*i. e.* extrinsic proof) of "intention," he was plainly using this word as signifying "meaning" or "sense," and not as specifically confined to "declarations of intention." Nevertheless, as the scope of interpretation expanded, and the use of words changed, his exposition came to fit in well enough with the modern exception to the exception against declarations of intention. It has thus served as a frequent authority; and though it has rightly been termed an "unprofitable subtlety,"⁴ and has unnecessarily confused the subject with artificial distinctions, its tenor must be kept in mind, as explaining much in modern opinions:

*Circa 1597, Sir Francis Bacon, Maxims, rule XXV (Works, Spedding's ed., 1861, vol. XIV, p. 273): "There be two sorts of ambiguities of words; the one is *ambiguitas patens* and the other is *ambiguitas latens*. *Patens* is that which appears to be ambiguous upon the deed or instrument; *latens* is that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity. *Ambiguitas patens* is never holpen by averment, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of inferior account in law; for that were to make all deeds hollow and subject to averments, and so, in effect, that to pass without deed, which the law appointeth shall not pass but by deed. Therefore if a man give land to I. D. *et* I. S. *hæredibus*, and do not limit to whether of their heirs, it shall not be supplied by averment to whether of them the intention was the inheritance should be limited. . . . But if it be *ambiguitas latens*, then otherwise it is. As I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all upon the deed; but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact; and therefore it shall be holpen by averment, whether of them it was that the parties intended should pass. . . . Another sort of *ambiguitas latens* is correlative unto this: for this ambiguity spoken of before is, when one name and appellation doth denominate divers things; and the second is, when the same thing is called by divers names. As, if I give lands to Christ-Church in Oxford, and the name of the corporation is *Ecclesia Christi in Universitate Oxford*, this shall be holpen by averment, because there appears no ambiguity in the words: for the variance is matter in fact. But the averment shall not be of the intention, because it does not stand with the words. For in the case of equivocation the general intent includes both the special, and therefore stands with the words: but so it is not in variance; and therefore the averment must be a matter that doth induce a certainty, and not of intention; as to say that the precinct of 'Oxford' and of 'the University of Oxford' is one and the same, and not to say that the intention of the parties was that the grant should be to Christ Church in the University of Oxford."*

§ 2473. **Same: Blanks and Latent Ambiguities.** A document may be void for intrinsic indefiniteness of terms (*ante*, § 2407); or it may be, though definite, impossible to enforce extrinsically, because there are no objects existing upon which its terms can operate. These are simple principles, well established in their sphere; but in concrete application both of them require discrimination from the foregoing principle concerning equivocations.

(1) Is a *blank space* an equivocation? It certainly fits two or more objects equally; and where it represents merely an insufficient term in an at-

⁴ Thayer, Preliminary Treatise on Evidence, 424; the learned author examines the history of Bacon's maxim at pp. 425, 471.

tempted description it may be treated as an equivocation; because the writer has fixed upon an object, but his words do not carry the description far enough. On the other hand, where a blank space represents a failure to make a final expression of will, the act is incomplete; to supply declarations of intention would be to set up a rival will; there can be no interpretation, for there is nothing to interpret. It therefore depends on the particular document whether a blank space is an equivocation.¹

(2) Where the words and phrases of a document are *in themselves indeterminate* (as where a devise is made of "one of my seven houses"), there is again a case of failure to make a final expression of will; the actor has failed to make his selection, and his act is incomplete. On the general principle of legal acts (*ante*, § 2407), the document is (in the part in question) ineffective and void for uncertainty. This is Lord Bacon's *ambiguitas patens*;² it cannot be interpreted, for there is nothing to interpret.³ But the terms may in effect indicate a final expression of will by leaving to some other person an *election* to take whichever object he wishes,—as in a devise of "any one of my seven houses"; here there is certainty of expression, and the act of another person is made a condition precedent.⁴ Where the words are

¹ *Eng.*: 1741, *Baylis v. Attorney-General*, 2 Atk. 239 (bequest "to the ward of Bread Street, according to Mr. — his will"; "parol evidence of the intention of the testator, where there is only a blank," excluded); 1790, *Hunt v. Hort*, 3 Prec. Ch. 311 ("my other pictures to become the property of Lady —"; L. C. Thurlow declined to "supply a blank by parol evidence"); 1799, *Price v. Page*, 4 Ves. Jr. 679 (bequest to "Price the son of — Price"; declarations of intent to give to a particular Price, admitted; "this is only that the testator did not know the Christian name"); 1877, *De Rosaz v. Goods*, L. R. 2 P. D. 66 (an executor named as "Percival of Brighton, Esq., the father"; applied to William Percival Boxall, who answered the description); *U. S.*: 1897, *Marske v. Willard*, 169 Ill. 276, 48 N. E. 290 (lease of "lot No. — in assessor's subdivision of Whiting's block No. 8"; the identity of the lot provable by parol, since "it is perfectly clear from the lease, considered within itself, that certain particular premises had been selected by the parties"); 1902, *Engelthaler v. Engelthaler*, 196 id. 230, 63 N. E. 669 (the will devised a homestead to the testator's wife for life, and further devised it after her death without naming any person; evidence of the testator's intention to devise it to his son F. E. was excluded).

The following curious case, which seems to belong here, should be compared with the citations in § 2467, *ante*: 1897, *Dennis v. Holsapple*, 148 Ind. 297, 47 N. E. 631 ("Whoever shall take good care of me, and maintain, nurse, clothe, and furnish me [etc.] . . . during the time of my life yet when I shall need the same, shall have all of my property," etc.; a letter of the testatrix to H., calling her to come and care for the testatrix and referring to the above provision in her will, admitted to show the testatrix' intention).

² See the quotation *ante*, § 2472. This is the problem satirized in Alexander Pope's Report of the Case of *Stradling v. Styles*, wherein it appeared that the testator had bequeathed "all my black and white horses" and the question was whether his six pyed horses passed (*Works*, Elwin & Courthouse's ed., X, 430).

³ 1802, *Doe v. Joinville*, 3 East 172 (devise to "my brother and sister's family"; held void for uncertainty); 1901, *Hanna v. Palmer*, 194 Ill. 41, 61 N. E. 1051 (deed granting a part of the "west half of the northeast quarter . . . containing one acre more or less," held void for uncertainty); 1896, *Wilkins v. Jones*, 119 N. C. 95, 25 S. E. 789 (description of land in a deed, held not too vague).

So, too, a case of apparent equivocation may, after declarations of intention are considered, turn out to be a case of failure to make a definite choice; 1833, *Richardson v. Watson*, 4 B. & Ad. 787 (devise of "the close in K. aforesaid now in the occupation of the said J. W."; the declarations of intention showed that the testator supposed that he had but one such close, but in fact he had two; the devise held void for uncertainty, and not subject to election).

So, too, the terms may be void for repugnancy, or one repugnant term may override the other: 1839, *Saunderson v. Piper*, 5 Bing. N. C. 425 (a bill of exchange read "two hundred pounds," and in the place for figures, "£245"; held, as against the acceptor, that his declarations indicating an intention to accept for £245 were inadmissible, on the theory of patent ambiguity, and that the verdict should be for £200; *Coltman, J.*, diss.); and cases cited *post*, § 2477, note 8.

⁴ Bacon, *Maxim XXV* (in a part of the passage not quoted *supra*); 1900, *Re Cheadle*, 2 Ch. 620.

on the face of the document not final, but the extrinsic facts happen to make them certain — as where the devise is to “one of the children of A,” and A has but one child —, the terms would seem to be void for uncertainty, whether the devisor knew the facts or not.⁵

(3) Where the terms of the document are definite, but the extrinsic facts make them *impossible of execution* — as where a devise is of “my house on Cedar street,” and in fact the testator has no such house —, the act is again void, — not however for lack of finality in expression, but merely for impossibility of enforcement.⁶

(4) Where the terms of a document contain an *erroneous description*, and under the principle of *falsa demonstratio (post, § 2476)* some part of it can be ignored as non-essential, the remainder may still become too vague and thus be void for uncertainty, on the principle of (2) above; for example, where a devise is made of “the house No. 19 Cedar street,” and there is no house at No. 19 Cedar street, but only at No. 13 Cedar street, it might be possible to ignore the number as non-essential, but what remains would then be too uncertain, “the house on Cedar street”; whereas if there had been an additional term of description, “the house which my son lives in at No. 19 Cedar street,” the remainder, ignoring the number, would have been sufficiently definite.⁷

§ 2474. **Same: (2) Exception for Erroneous Description.** Does the exception for equivocations extend also to misdescriptions? For example, a devise is made to “J. S., eldest son of R. S.,” and there are two persons, each of whom fulfils one part but not the whole of the description, one person being the eldest son of R. S., though not named J., and the other being a son of R. S. and named J., but not the eldest son; are declarations of intention proper to consider? There are among the earlier rulings some which can be wrested into precedents upon this point.¹ But the attitude towards inter-

⁵ Wigram, *Extrinsic Evidence*, § 79, suggests the contrary solution, where the testator knows the facts; “it is the form of expression only, not the intention, which is ambiguous.” The following case shows the distinction between this and equivocation: 1887, *Phelan v. Slattery*, 19 L. R. Ir. 177 (bequest to “my nephew,” there being at least five such persons; the testator’s instructions to his solicitor, admitted, because “the description is alike applicable to not only T. D. but to one or more other nephews”).

⁶ 1818, *Beaumont v. Field*, 2 Chitty 275 (deed of all the lands “now in the occupation of the widow K. and son”; at the time no lands were so occupied, the widow K. having been dead two years; held, that a verdict refusing to enforce the deed for uncertainty was good); 1834, *King v. Badeley*, 3 Myl. & K. 417 (devise over in case “certain contingent property” should vest in his children; there being no contingent interests in the children, the testator’s declarations of his meaning were excluded).

⁷ Examples of this are given in §§ 2476, 2477, *post*.

¹ Bacon’s Maxim (quoted *ante*, § 2472) seems at first sight to deal with it, in the concluding passage, but his notion is really a distinct one. Omitting some intervening cases, the course of rulings in the half-century before *Miller v. Travers* was as follows: 1790, *Baugh v. Read*, 1 Ves. Jr. 256 (similar to *Selwood v. Mildmay*, *infra*, the actual stock here being not so much as described; per L. C. Thurlow: “where a testator uses certain words which *prima facie* give a clear account, the same fact that enables you to prove that there is a latent ambiguity enables you to prove what was his intention”); 1792, *Delmore v. Robello*, 1 Ves. Jr. 412 (bequest to “all the children of his two sisters Reyne and Estrella”; before the date of the will, a sister named Reyne had become a nun and lived at Genoa, and another sister Rebecca living at Leghorn, with Estrella, had children; declarations of intention that he meant to provide for the children of his sisters at Leghorn were excluded, on the theory that this was not a latent ambiguity); 1796, *Thomas v. Thomas*, 6 T. R. 671 (devise “to my granddaughter Mary Thomas of Lleechlloyd in Merther parish”; one M. T.

pretation by extrinsic circumstances was down to the end of the 1700s so different from the modern attitude (*ante*, § 2470), and the rule for equivocations then held a relation to the rest of the law so different from its present one (*ante*, § 2472), that it is hardly possible to build up any doctrine to-day from the earlier rulings. However, in 1832, in the much-considered case of *Miller v. Travers*, the doctrine was plainly laid down that such a second exception existed:

1832, *Tindal, C. J.*, in *Miller v. Travers*, 8 Bing. 244: "The cases to which this construction [*Ambiguitas verborum latens verificatione suppletur*] applies will be found to range themselves into two separate classes. . . . The first class is, where the description of the thing devised, or of the devisee, is clear upon the face of the will; but upon the death of the testator it is found, that there are more than one estate or subject-matter of devise, or more than one person whose description follows out and fills the words used in the will. As where the testator devises his manor of Dale, and at his death it is found that he has two manors of that name, South Dale and North Dale; or where a man devises to his son John, and he has two sons of that name. In each of these cases respectively parol evidence is admissible to show which manor was intended to pass and which son was intended to take. The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised called A., and is described as in the occupation of B., and it is found, that though there is an estate called A., yet the whole is not in B.'s occupation; or where an estate is devised to a person whose surname or Christian name is mistaken; or whose description is imperfect or inaccurate; in which latter class of cases parol evidence is admissible to show what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

Such being the language of the opinion in *Miller v. Travers* — a ruling which appears neither then nor subsequently to have met with anything but approval —, it was a singular fate which led to the repeal of the second part of the rule by the citation of the authority of the very case itself. An eagle pierced with an arrow winged by its own opinion, — such was the treatment of

was in fact only a great granddaughter and lived in another parish, and one Elinor Evans, elsewhere named in the will, was a granddaughter and lived in M. parish; though the devise was ultimately held void for uncertainty, yet declarations of the testator were admitted, made on reading the will, that there was a mistake in the name but there was no need to rectify it, as the place of abode would suffice to describe the devisee; the jury found that no such mistake in fact had been made); 1797, *Selwood v. Mildmay*, 3 Ves. Jr. 306 (bequest of "part of my stock in the 4 per cent. annuities of the Bank of England"; the testator had sold his 4 per cents and at the time of execution owned only "long" annuities; the attorney's testimony was received that the testator's instructions were based on the wording of a former will executed before selling the 4 per cents); 1797, *Walpole v. Cholmondeley*, 7 T. R. 134, 145 (the testator made a will in 1752, and another in 1756, and a third by codicil in 1776; in the third he confirmed "his last will and testament dated Nov.

25, 1752"; it was offered to be shown by the scrivener of the third will that upon asking for the testator's prior will the testator referred him to M., who produced that of 1752; that the codicil of 1776 was then drafted by the scrivener in the belief that the will of 1752 was the last one, and that the recital of its date was not read over to the testator, etc., etc.; this was excluded, on the ground that there was no latent ambiguity); 1815, *Stockdale v. Bushby*, 19 Ves. Jr. 381 (bequest to "my namesake Thomas S., the second son of my brother J. S., over and above his equal share with his brothers, 1000 l."; there was no son Thomas, but the second son was William, and was given the legacy; the testator's declarations of intention to give the second son 1000l. more than the others being admitted); 1821, *Still v. Hoste*, 6 Madd. 192 (bequest to "Sophia Still, daughter of P. S."; there were two daughters, neither of them named Sophia; the scrivener's testimony to the testator's instructions and a mistake in copying them was admitted).

Miller *v.* Travers in the closely ensuing case of Doe *v.* Hiscocks.² The latter ruling rested, of course, on some misconception of the former one,—though how this could arise is incomprehensible. Doe *v.* Hiscocks was thereafter followed almost implicitly,³ and may be said to represent the law of England to-day;⁴ though some judges have expressed their dissatisfaction with the result.⁵ In the United States, the question has seldom been raised, and no distinct rule can be predicated,⁶—chiefly because of the frequent ignoring of the distinction between “intention” or meaning, as a general canon of interpretation, and “declarations of intention” as a specific subject of exception.

That the principle of the exception should include this class of cases can hardly be doubted. The description applies in part only to each object, and yet one of the two (or more) is obviously signified; there is no danger in receiving declarations of intention, because the precise words of the document cannot be literally applied in any event, and there is thus no competition between the words and the extrinsic utterance; it is simply a question which words shall be ignored as the un-essential part of the description:

² 1839, Doe *v.* Hiscocks, 5 M. & W. 363 (devise to “my grandson John H., eldest son of the said John H.”; in fact, there were two sons, Simon, the oldest by a first marriage, and John, the oldest by a second marriage; held that this was not an equivocation, but a misdescription, since J. fulfilled the name but not the relationship, and S. *vice versa*, and that the testator’s instructions and declarations were not admissible; several cases being cited as concededly opposed to this view, it was added that “these cases seem to us at variance with the decision in Miller *v.* Travers, which is a decision entitled to great weight,” and “we are prepared on this point, the point in judgment in Miller *v.* Travers, to adhere to the authority of that case”). The facts excluded in Miller *v.* Travers have been already noted (*ante*, § 2471, n. 6). The error in Doe *v.* Hiscocks consisted in not perceiving that the facts excluded in Miller *v.* Travers had been there offered for a very different purpose from that of the facts offered in Doe *v.* Hiscocks; the opinion excluding the facts in Miller *v.* Travers expressly sanctioned the purpose sought by the offer in Doe *v.* Hiscocks.

³ 1846, Lindgren *v.* Lindgren, 9 Beav. 358 (similar to Selwood *v.* Mildmay, *supra*, n. 1; the latter held not to have been overruled by Miller *v.* Travers or Doe *v.* Hiscocks); 1853, Bernasconi *v.* Atkinson, 10 Hare 345 (devise to “my first cousin Vincent B., the son of my late uncle Peter B.”; there existed a George Vincent B., son of another uncle Joseph B., and a Frederick B., son of the uncle Peter B.; the former visited the testator, but the latter did not; the Court considered the circumstances and habits of the persons, to ascertain the essential part of the description, but would not consider declarations of intent; following Doe *v.* Hiscocks); 1860, Drake *v.* Drake, 8 H. L. C. 172 (a description fitting two persons, each in part only; the testator’s instructions to the draftsman, excluded); 1874, Charter *v.* Charter, L. R. 7 H. L. 364 (the

facts are stated *post*, § 2477; declarations of intention were conceded by all the judges to be inadmissible, on the authority of Doe *v.* Hiscocks, Bernasconi *v.* Atkinson, and Drake *v.* Drake, though Lord Selborne added, “why the law should be so, . . . when evidence of the same kind is admitted in what Lord Bacon describes as cases of equivocation, I am not sure that I clearly understand”).

⁴ 1894, Chappell’s Goods, Prob. 98 (“declarations of the testator . . . are probably not admissible”).

⁵ 1874, Lord Selborne, in Drake *v.* Drake, *supra*; 1877, Hannen, J., in De Rosaz’ Goods, L. R. 2 P. D. 66, 71.

⁶ 1887, Decker *v.* Decker, 121 Ill. 341, 12 N. E. 750 (quoting with approval the above language of Tindal, C. J.); 1889, Ehrman *v.* Hoskins, 57 Miss. 192 (devise of “property deeded to B. by Knox,” with a description of bounds, etc., and afterwards a devise of the testator’s “present home by this will devised”; the former description in one point, and the phrase “present home,” applied to a lot deeded by one French, the home being partly on each, and the testator living in the part on the F. lot; declarations of intention were excluded); 1897, Gordon *v.* Burris, 141 Mo. 602, 43 S. W. 642 (bequest to “Lucy May Gordon, granddaughter”; there was a granddaughter Mary Jane Gordon; evidence received of a conversation between the testatrix and the scrivener in which the former insisted that a granddaughter named May was intended); 1902, Willard *v.* Darrah, 168 id. 660, 68 S. W. 1023 (quoted *supra*); 1899, Van Nostrand *v.* Board, 59 N. J. Eq. 19, 44 Atl. 472 (bequest to “the Domestic Missionary Society,” given to the “Board of Domestic Missions of the Reformed Church in America,” on consideration of testator’s membership in that church, his habitual use of “the Domestic Missionary Society” in referring to that Board, and his expressed intent; treated as an equivocation).

1902, *Brace, P. J.*, in *Willard v. Darrah*, 168 Mo. 660, 68 S. W. 1023 (the devise was to "my well-beloved nephews J. and W. W."; the testator had two grandnephews so named and also two grandsons so named, the latter being his intimates and the former being personally unknown to him; evidence of his repeated declarations that he had bought this land for them and that he had instructed the scrivener in their favor was admitted). "The devise is 'to my well-beloved nephews John and William Willard'; and it is found from the indirect parol evidence that there are two sets of brothers, each named John and William Willard, — the plaintiff and his brother, 'well-beloved' grandsons of the testator, and two grandnephews, not 'well beloved' of him, and having no legal or moral claim on his bounty. As to each of these sets of brothers the description contained in the will is partly correct and partly incorrect. It is correct as to the Christian and surnames of each set. It is correct as to neither in the superadded description of relationship to the testator, as the word "nephew," *simpliciter*, cannot be held to include grandnephews and the inapplicability in this case is re-enforced by the word 'beloved' prefixed thereto. So that the description in the will, when it comes to be applied to those only who can possibly have been intended, is just as equivocal in point of fact as if these additional words of description had been omitted, as in the first case supposed. The description of the persons is partly correct and partly incorrect, leaving something equivocal. The description does not apply precisely to either of these two sets of brothers, but it is morally and legally certain that it was intended to apply to one or the other, thus bringing the case within the rule established by the second class of cases, in which direct or extrinsic parol evidence, including expressions of intention, is admissible. Such evidence was therefore admissible in this case, in order to solve a latent ambiguity produced by extrinsic evidence in the application of the terms of the will to the objects of the testator's bounty, to prevent the fourth clause of the will from perishing, and obviate a partial intestacy of the testator. Its effect is not to establish an intention different in essence from that expressed in the will, but to let in light by which that intention, rendered obscure by outside circumstances, may be more clearly discerned, and the will of the testator, in its entire scope, effectuated according to his true intent and meaning."

§ 2475. **Same :** (3) **Exception for "Rebutting an Equity" (Legacies, Advancements, and Disinheritance).** Wherever in the interpretation of a will, a certain term or legal effect is implied by a general rule of law (and not as a matter of inference from the specific words or phrases of a particular will), the source of such an implication is something external to the will; therefore the reason for excluding declarations of intention (*ante*, § 2471) — namely, their rivalry with the words of the will, and the risk of their abuse — falls away, and the declarations may be considered. For example, when a testator names an executor, the rule of presumption, that the residue of personalty is by implication bequeathed to him, is a general and artificial rule independent of the particular will. So, too, the counter-presumption that a specific legacy to the executor negatives the implication of a bequest of the residue. Hence, if the rule is to be merely a presumption — *i. e.* if a contrary intent may be established —, the ascertainment of the actual intent may include all useful data, including the testator's circumstances and declarations:

1821, *Plumer, V. C.*, in *Hurst v. Beach*, 5 Madd. 351: "Where the Court raises the presumption against the intention of a double gift, by reason that the sums and the motive are the same in both instruments, it will receive evidence that the testator actually intended the double gift he has expressed; in like manner, evidence is received to repel the presumption raised against the executor's title to the residue from the circumstance of a

legacy given to him; and to repel the presumption that a portion [for a child] is satisfied by a legacy."

Accordingly such has long been the practice in dealing with the artificial rules as to a bequest of the residue to an executor,¹ a gift of advancement to a child² or a husband,³ and is capable of application to any general and artificial rule of inference as distinguished from a specific inference founded on a particular document.⁴

In more recent times an analogous situation has come to be presented under that class of statutes which requires that a child's intestate share be distributed to him, in spite of a testamentary disposal to other persons, unless it is made to appear that the child was "*intentionally omitted*" from the will. Here the rule of the statute is again merely one of presumption, artificially raised for all wills, independently of a particular document, and corresponding precisely (though reversely in tenor) to the rule which took the residue from the next of kin and gave it to the executor, unless a contrary intent appeared. Hence, unless the statute expressly requires the intent to be ascertained from the will alone,⁵ the testator's declarations may be considered with the other data.⁶

§ 2476. **Falsa Demonstratio non nocet; General Principle.** It is not necessary, and it is not humanly possible, for the symbols of description, which we call words, to describe in every detail the objects designated by the symbols. The notion that a description is a complete enumeration is an instinctive fallacy which must be got rid of before interpretation can be properly attempted (*ante*, § 2458). For example, a devise of "the house owned by me at No. 19 Cedar Street, Millville, Massachusetts," is obviously a mere shorthand indication of some simple but essential attributes of the house. How many stories, rooms, doors, windows, closets, has it? What is the color of paper on the respective walls, the kind of wood in the floors, the number of steps on each stair-flight, the pattern of the window frames? These and a hundred

¹ 1723, *Rachfield v. Careless*, 2 P. Wms. 158; 1734, *Brown v. Selwin*, Cas. t. Talbot, 242; 1791, *Nourse v. Finch*, 2 Ves. Sr. 344, 357; 1794, *Clenell v. Lewthwhite*, 2 Ves. Jr. 465, 644. The earlier doctrine about executors was changed by St. 1 W. IV, c. 40. Compare the following: 1816, *Langham v. Sanford*, 2 Meriv. 6; 1891, *Re Applebee*, 3 Ch. 422, 428.

² 1790, *Ellison v. Cookson*, 2 Ves. Sr. 100, 107; 1897, *Finch v. Garrett*, 102 Ia. 381, 71 N. W. 429; 1894, *Palmer v. Culbertson*, 143 N. Y. 213, 38 N. E. 199.

³ 1790, *Clinton v. Hooper*, 2 Ves. Sr. 173, 181.

⁴ Compare the following: 1897, *Wentworth v. Read*, 166 Ill. 139, 46 N. E. 777 (intent to charge legacies on realty; no extrinsic declarations admissible); 1898, *Ingersoll v. Hopkins*, 170 Mass. 401, 49 N. E. 623 (will in contemplation of marriage; extrinsic facts excluded; St. 1892, c. 118, construed).

⁵ As in Michigan: 1898, *Carpenter v. Snow*, 117 Mich. 483, 76 N. W. 78.

⁶ 1897, *Hawhe v. R. Co.*, 165 Ill. 561, 46 N. E.

240; 1899, *Re O'Connor*, 21 R. I. 465, 44 Atl. 591; 1889, *Coulam v. Doull*, 133 U. S. 216, 231, 10 Sup. 253 ("Since under the statute that evidence opens up a question as to the testator's intention which but for the statute could not have arisen, and which by the statute is not required to be determined by the will, we cannot perceive why the disposal of it should be so limited"; applying the Colorado statute, and examining prior cases); 1896, *Atwood's Estate*, 14 Utah 1, 45 Pac. 1036. *Contra*: 1895, *Re Salmon's Estate*, 107 Cal. 614, 40 Pac. 1030.

Distinguish the following question, arising under such a statute: 1898, *Callaghan's Estate*, 119 Cal. 571, 51 Pac. 860 (will leaving property in A. to grandchildren; the Code, § 1307, would allow them to have an equal share if in the will the testator had "omitted to provide" for them; to show that they had in effect been omitted, evidence that the testatrix did not own or claim any property in A. at the time of making the will, excluded, because there was an express provision).

other details would go to fill out the description. Without them, it is imperfect, in an absolute sense. Yet no one would insist that the devise was void for uncertainty, for lack of the addition of these details. Why? Because the features mentioned do happen to suffice to fulfil the purpose of interpretation, namely, to enable us to find the object designated, and to select it with fair certainty from others. Certainty, in other words, is a relative term; it signifies that the few terms employed are the essential ones for the purpose. Had they not been in themselves sufficient, we might even have looked at extrinsic declarations of intention (*ante*, § 2472).

Conversely, then, an *excessive* description is not inherently fatal, if the essential terms of it can be ascertained. A devise of "my yellow house at No. 19 Cedar Street" may lead us to a white house at that place; and if we can surely believe, under all the circumstances, that the street number of the house, not the color of the paint, is the essential term, we are to apply the devise to that house. Just as we found that the omitted terms were not essential to applying the description, so we may find that some of the inserted terms are not essential. Each description of a single object must be conceived of as a single utterance, — just as one cipher cable word may represent a message of forty words. We are doing it no violence by ignoring the non-essential terms; for neither the omission nor the insertion of non-essential terms alters its essence as a whole. By conceiving clearly the singleness of each description as a symbol of a single object, we appreciate that the imperfections of either omission or insertion do not destroy its character as a single effort at the designation of a single object. And so we come to the maxim *Falsa demonstratio non nocet*.

The practical problem in a particular case of course is to ascertain which specific term is the essential one. But the important point of principle is that the process of ascertaining it, and then of ignoring the others in the application of the description, is entirely consistent with the general process of interpretation. Ever since the time of Bacon (to go no further back) this has been understood and accepted:

Circa 1597, Sir Francis Bacon, Maxims of the Law, XXIV (Works, Spedding's ed., vol. XIV, p. 267): "Præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis. There be three degrees of certainty, — presence; name; and demonstration or reference: whereof the presence, the law holdeth of greatest dignity; the name, in the second degree; and the demonstration or reference, in the lowest; and always error or falsity in the less worthy shall not control nor frustrate sufficient certainty and verity in the more worthy. And therefore if I give a horse to I. D. being present, and say unto him, I. S. take this; this is a good gift, notwithstanding I call him by a wrong name; but so had it not been if I had delivered the horse to a stranger to the use of I. S. where I meant I. D. So if I say unto I. S., Here I give you my ring with the ruby, and deliver it with my hand, and the ring bear a diamond and no ruby; this is a good gift notwithstanding I named it amiss. . . . Now, for the second part of this rule, touching the name and the reference; for the explaining thereof it must be noted what things sound in name or in demonstration, and what things sound in demonstration or addition; as first, in lands the greatest certainty is, where the land hath a proper name and cognizance; as, 'the manor of Dale,' 'Grandfield,' etc.: the next is equal to that, when the land is set forth by

bounds and abutments, as 'a close of pasture abutting on the east part upon Emsden Wood, on the south upon, etc.' . . . Therefore if I grant my close called Dale, in the parish of Hurst, in the county of Southampton; and the parish likewise extendeth into the county of Berkshire, and the whole close of Dale lieth in the county of Berkshire; yet because the parcel is specially named, the falsity of the addition hurteth not; and yet this addition did sound in name; but, as was said, it was less worthy than a proper name."

1861, *Caton, C. J.*, in *Myers v. Ladd*, 26 Ill. 415, 417. "If I give a bill of sale of my black horses, and describe them as being now in my barn, I shall not avoid it by showing that the horses were in the pasture or on the road. The description of the horses being sufficient to enable witnesses acquainted with my stock to identify them, the locality specified would be rejected as surplusage. Nor is this rule confined to personal property. It is equally applicable to real estate. If I sell an estate, and describe it as my dwelling house in which I now reside, situate in the city of Ottawa, I shall not avoid the deed by showing that my residence was outside the city limits. So if a deed describe lands by its correct numbers, and further describe it as being situated in a wrong county, the latter is rejected. The rule is, that where there are two descriptions in a deed, the one, as it were, superadded to the other, and one description being complete and sufficient of itself, and the other, which is subordinate and superadded, is incorrect, the incorrect description, or feature or circumstance of the description, is rejected as surplusage, and the complete and correct description is allowed to stand alone."

In applying the principle there is no inherent difficulty. The process consists in looking at all the circumstances (*ante*, § 2470) that can throw light on the sense of the words of description and their relative essentiality; and the terms thus found to be the essential ones are applied, unless they are too uncertain (*ante*, § 2473) and therefore void. But the superficial bearing of other rules has tended often to create confusion, and to obstruct the full operation of the present one:

(1) The supposed rule against *disturbing a "plain meaning"* (*ante*, § 2462). When the present rule is to be applied, a part of the description being found erroneous but non-essential, three situations may be distinguished. First, only one object may be eligible to answer the description; this is the common case (illustrated above by Bacon's examples), about which no difficulty can arise. Secondly, two or more objects may be eligible, the description being in one part imperfect for one, in another part for the other; this is a frequent case, and the rule is equally well settled.¹ Thirdly, two or more objects may be eligible, one of which perfectly answers the description, the others imperfectly in some respects. Now in this situation the rule against disturbing a plain meaning (if such a rule be recognized) will of course oblige us to apply the description to the first object, even though it could be made to appear that a part of the description was non-essential and that the essential terms of it were actually used to designate one of the other objects. So far, then, as such a rule is recognized, it prevents the due operation of the present principle.²

(2) The rule against overthrowing the terms of a document by reason of a

¹ The only question here is whether declarations of intention may be considered: *ante*, § 2474.

² The cases are collected *ante*, § 2462; see especially *Tucker v. Seaman's Aid Society*, Mass.

mistake (*ante*, § 2421), or, what is the same thing, by declarations of a contrary intention (*ante*, § 2471), is a legitimate one, and must be observed. Hence, if a devise is of "my white house at No. 19 Cedar Street," and it is proposed to show that the word "white" was by mistake inserted for "green," this proposal must be rejected as improper. Now, in many of the instances of this sort,³ that has been the form of the proposal, and the Court's necessary rejection of it has therefore seemed to be a discountenancing of the present principle that *falsa demonstratio non nocet*. By approaching the problem from the wrong point of view, the party has prevented the document from being rightly dealt with. The words cannot be overthrown from within (as it were), by attacking the terms of the document; but, taking them as they are, they can be interpreted from without, and the imperfect surplusage of description will not prevent the application of its essential terms. Hence, in such cases as above, if the attempt is made to interpret the description by looking at the testator's circumstances, and if the circumstances are that he had one house only on Cedar Street, that it was numbered 19, and that it was in former days painted white, we may then be willing to conclude that the color-term in the description is entirely subordinate and non-essential, and that the now green house at No. 19 Cedar Street is the identical object which the testator was attempting to describe in the words "my white house at No. 19 Cedar Street." In so doing, we make no assumptions whatever as to how the word "white" came into the will, whether by a draftsman's mistake or otherwise; we merely interpret what is found in the document, and we conclude that the description as a whole was used of a particular house. The occasionally improper method of approaching the problem, then, explains most of the rulings in which the present principle seems to be inoperative.

(3) When, in applying the present principle, the imperfect surplusage is ignored, the remainder must of course be sufficiently definite to be capable of application; else it would be void for uncertainty (*ante*, § 2473). The question, then, often arises whether, in a will, a *term may be implied* which would be necessary, and also sufficient, to remove that uncertainty. For example, in a devise of "a four-story house at No. 19 Cedar Street," it may appear that the testator owns no house at No. 19, but does own a four-story house at No. 219 on that street; assuming, then, that the house-number is non-essential, the remaining terms are "a four-story house on Cedar Street"; but this is obviously by its vagueness incapable of application. Now it may be assumed that the testator would not have devised a house not owned (or believed by him to be owned) by himself;⁴ but the fact remains that the terms of a will are merely "a" four-story house. Is there, then, any stretch of reasoning by which, though not directly inserting the words "owned by me," we may construe the word "a" or "house" as signifying "one of mine," or the like? This is the point of controversy on which many rulings turn; and the general

³ Particularly in *Kurtz v. Hibner*, Ill., cited *post*, § 2477.

⁴ In Roman custom, on the contrary, this indirect mode of gift was not uncommon: Just.

Instit. II, 20, 4: "Non solum autem testatoris vel heredis res, sed et aliena legari potest; ita ut heres cogatur redimere eam et præstare, vel, si non potest redimere, æstimationem dare."

opinion is that no such implication is permissible. Such rulings, however, do not involve any doubt of the principle *falsa demonstratio non nocet*; they merely decline to imply into the will, for the purpose of being interpreted, words which are not there.

§ 2477. **Same: Application to Deeds and Wills.** (a) In its application to deeds of land, the foregoing principle has long been recognized without hesitation; and numerous presumptive canons of interpretation have been formed, as to the prevalence of monuments over distances, and the like, for those parts of a description which deal particularly with the metes and bounds. The principle is also frequently exemplified in other kinds of descriptive terms.¹ Probably the reason why there has not here been the confusion which has marked some of the testamentary cases is that, with deeds, no one would ordinarily think of proposing to overturn its words on the ground of individual mistake, the standard necessarily being a mutual one (*ante*, § 2466); and thus the problem is usually approached from the proper point of view.² The principle is of course equally applicable to contracts³ and all bilateral transactions.

¹ 1898, *Cowen v. Truefitt*, 2 Ch. 551 (deed of rooms on 2d floor of Nos. 13 and 14, Old Bond St., with free ingress "through the staircase and passage of No. 13"; there was a staircase in No. 14 but none in No. 13; held that the words "of No. 13" might be rejected as *falsa demonstratio*, and the deed made effectual by the only staircase); 1897, *Gordon v. Kitrell*, — Miss. —, 21 So. 922 (an assessment of "east fractional section 12, township 6, range 6, W.," and a deed of "lot 6, McLeod's subdivision, west side of river, section 12, township 6, range 6, W."; identity of the two parcels shown); 1844, *Hathaway v. Power*, 6 Hill N. Y. 453 (a deed of "all that certain tract or parcel of land situate in township number 11 in the third range of townships, . . . it being 160 acres of land, in lot number 14," held to convey all of lot 14, though it contained 185 acres; "the number of acres . . . can only be regarded as an attempted designation of quantity which turns out to be erroneous"); 1896, *Higdon v. Rice*, 119 N. C. 623, 26 S. E. 256 (example of erroneous courses, distances, etc., applied); 1896, *Davidson v. Shuler's Heirs*, ib. 582, 26 S. E. 340 (to locate a chestnut-tree corner, evidence of the one actually marked, admitted, although the description "a chestnut, S. E. corner of G. W.'s lot" became erroneous, and read "N. E. corner, etc."); 1900, *Wiseman v. Green*, 127 id. 288, 37 S. E. 272 (*Furches, J.*: "The deed contains the following calls: 'Beginning on the southeast bank of Toe river, two rods below the mill house, and runs west, north, east, and south, to the beginning, so as to include the mill and site and two acres of land, it being and including the land sold as the excess of the homestead of A. Wiseman.' It appears from the survey and the evidence in the case that the land contained in the calls of this deed does not include the saw mill, nor the grist mill, nor the mill site. But, if the first call 'west' is reversed, and read 'east,' instead of 'west,' the description in the deed, 'beginning on the southeast bank of

the Toe river, two rods below the mill house,' will include both the saw and grist mill and mill site. . . . It seems to us that common sense, justice, law, and the precedents of this Court sustain the ruling of the Court, and the finding of the jury that 'west' was a mistake, and should have been written 'east.' This being so, the Court does not change the deed, but only puts a legal construction upon it, which creates no new rights, nor does it affect the rights of others"); 1900, *Silliman v. Whitmer*, 196 Pa. 363, 46 Atl. 489 (deed describing land erroneously as to county, admitted); 1895, *Scates v. Henderson*, 44 S. C. 548, 22 S. E. 724 (where the fourth side of a lot was said to be bounded by a lot owned by C. H. C., and this, on being shown incorrect, was rejected, and a lot owned by K. and F. taken as boundary); 1858, *Fancher v. DeMontegre*, 1 Head 40 (deed-land described as "Grant No. 4795 to J. R."; that the grant was really No. 4794 to T. B. E., held immaterial, the land being otherwise sufficiently identified); 1892, *Rushton v. Hallett*, 8 Utah 277, 30 Pac. 1014 (deed reserving "the street heretofore deeded to said city"; a street had been laid off but not deeded; the description was applied to that street, the error being "matter of description only").

For cases involving the use of an *erroneous surname* of a person, see *ante*, § 2465.

² The following case illustrates how a Court may be misled in this way: 1899, *Donehoo v. Johnson*, 113 Ala. 126, 21 So. 70, 24 So. 888 (deed; described by a line "to a stake at the northwest corner," etc.; the fact that there was a stake at the northeast corner but none at the northwest corner, and that the word "northwest" had by mistake been inserted instead of "northeast," excluded).

³ 1891, *New York Life Ins. Co. v. Aitkin*, 125 N. Y. 661, 26 N. E. 732 (D. and his wife mortgaged to the plaintiff; then D. conveyed to G., who covenanted to pay the mortgage; then

(b) Many early English rulings upon *wills* recognize the principle, and some of them show a surprising approximation to the modern attitude;⁴ in the cases of later times there seems to have been a consistent observance of the principle.⁵ But in the rulings in the United States there has occurred, in

G. and his wife conveyed to the defendant, who covenanted to pay "a certain mortgage made and executed by the party of the first part to the N. Y. Life Ins. Co. bearing date the 3d day of December, 1868, to secure the sum of \$4000"; the defendant being charged with the mortgage made by D. and his wife, the description in the defendant's covenant was applied under the circumstances to D.'s mortgage, in spite of the error of describing it as G.'s).

⁴ 1607, *Sir Moyle Finch's Case*, 6 Co. Rep. 65 b (a deed held good, for "although the grantor's christian name was mistaken, yet forasmuch as there was a sufficient certainty to ascertain the name of the grantor, *sc.* Abbot of W., for that reason the grant was adjudged good; for in this lease it is true *nihil facit error nominis cum de corpore constat*; but otherwise it is of a writ"); 1629, *Chamberlaine v. Turner*, Cro. Car. 129 (devise of "the house or tenement wherein W. N. dwelleth, called The White Swan, in Old street"; it appeared that W. N. occupied only the entry and three rooms, while other persons occupied the remainder; the devise was held to pass the entire house); 1636, *Blague v. Gold*, Cro. Car. 447, 473 (devise of a house "called the Corner-House, in Andover, in the tenure of B. and H."; in fact the corner-house was not in H.'s tenure, but the adjoining house was; held, that the corner-house passed; "and the addition '*in tenura H.*' although it be not in his tenure and is a mistake, yet it is but surplusage, and although false, shall not vitiate the devise").

⁵ 1723, *Beaumont v. Fell*, 2 P. Wms. 141 (bequest of 500*l.* to "Catherine Earnley"; Gertrude Yardley claimed it, and the facts were that the testator had usually called her "Gatty" and of course would pronounce her surname "Yarnley," that he spoke so low that the draftsman could hardly understand, and finally that he had declared that he would do well for her in his will; the Master of the Rolls declared that this would not have been considered, for a devise of land, but being a chattel bequest "makes it a different case," even "after making the statute of frauds, provided there is a will in writing"); 1749, *Door v. Geary*, 1 Ves. Sr. 255 (bequest to the wife of "£700 capital East India stock in which he was then interested, possessed of, or intitled unto"; he had no East India stock, but had in his name £700 of Bank stock which had belonged to the wife; L. C. Hardwicke applied the bequest to the latter; "why is this a greater mistake than the devise of a black, having only a white horse, where the word 'black' should be rejected?"); 1784, *Thomas v. Steward*, 7 T. R. 140, note (devise to "Thomas Thomas, eldest son of Thomas Thomas of Chatham"; there was an eldest son Thomas, dead before the making of the will, and a second son Richard; on hearing evidence of the circumstances as known to the testatrix,

a verdict was given for Richard); 1812, *Garvey v. Hibbert*, 19 Ves. Jr. 125 (bequest to "the three children of D. D., the sum of 600*l.* each"; D. D. had four children, all born before the date of the will; and the bequest was applied to all; "the ground on which the Court has proceeded is that it is a mere slip in expression; the meaning is all children, or all servants; and the Court conceiving the intention to be to give to each child so much, strikes out the specified number"); 1813, *Goodtitle v. Southern*, 1 M. & S. 299 (devise of "all that my farm, lands, and hereditaments called Trogues-farm, situate within the parish of Darley in the county of Derby, now in the occupation of A. Clay"; two of the closes of Trogues-farm were not in the occupation of Clay, but were held to pass; "the defective description of the occupation will not alter the devise"); 1820, *Doe v. Huthwaite*, 3 B. & Ald. 632 (devise to "G. H. eldest son of J. H.", and in default, etc., to "S. H. second son of J. H." and in default, etc., to "J. H. third son of J. H." and in default, etc., to "C. H. youngest son of J. H."; in fact, S. H. was the third son, and J. H. was the second son; issue directed to ascertain whether the name or the relative age of the devisees was the essential part of the description); 1844, *Newbolt v. Pryce*, 14 Sim. 354 (bequest to "John N., second son of Rev. W. S. N., vicar of S."; there was a W. R. N., vicar of S., and he had three sons, G. D. N., R. H. N., and John P. N., the last being the third; the bequest was given to John P. N.; and the fact of the testatrix' "habit of calling one of the sons by the name of John" was held admissible); 1844, *Lee v. Pain*, 4 Hare 201, 249 (bequest to "the three sisters of the late Miss J. S."; she had four sisters surviving; Wigram, V. C., held that "where a legacy is given to the three children of A, A having four, five, or any larger number of children at the date of the will, the Court will reject the word 'three' upon the presumption of mistake, and all the children of A will be entitled"); 1853, *Bernasconi v. Atkinson*, 10 id. 345 (cited *ante*, § 2474); 1856, *The Clergy Society, 2 K. & J. 615* (bequest to "The Clergy Society . . . in London"; several societies considered, but none found to be the precise probable objects of the testatrix' words; the money therefore distributed by the Court upon its own scheme *cy pres*); 1874, *Charter v. Charter*, L. R. 7 H. L. 364 (appointment of "my son Forster Charter, as the executor," and devise of "all my messuages" to him, he to allow maintenance to the testator's wife "as long as they reside together in the same house"; the circumstances were that an elder son, William Forster C., and a younger son, Charles C., survived, and that the former had had disputes with his father and lived 100 miles away, and was known as "William," while the latter lived in his father's house on intimate terms; the

a few jurisdictions, more or less apparent confusion of precedents, due chiefly to one or another of the three considerations already noted (*ante*, § 2476). In particular, the case of *Kurtz v. Hibner*, in Illinois, has been the centre of much discussion, and serves well enough to illustrate both the principle and the misunderstandings about it.⁶ On the whole, a sound result is reached in the great majority of rulings.⁷

probate to William Forster having been revoked, this decree was sustained by an evenly divided vote, one half of the law lords apparently believing that the term of description "resides in the same house" was essential and prevailed over the name).

⁶ 1870, *Kurtz v. Hibner*, 55 Ill. 514 (devise to E. of the "W. $\frac{1}{2}$ of the S. W. $\frac{1}{2}$ of Sect. 32, T. 35, R. 10, containing 80 acres," and to J. of the "S. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the S. $\frac{1}{2}$ Sect. 31, in T. 35, R. 10, containing 40 acres"; the circumstances were excluded that the testator owned no 80-acre tract in S. 32, but did own such in S. 33, and that he owned a 40-acre tract in S. 32, but — presumably — not in S. 31, and that E. had been long in occupation of the 80-acre tract under a promise to devise it, and further that the draftsman of the will had by mistake inserted 32 for 33, and 31 for 32; the Court's ruling was clearly right, as excluding declarations of intent and the mistaken drafting, on the principle of §§ 2421, 2471, *ante*; and the opinion intimates that, had the will contained any other term of description identifying it, as in *Riggs v. Myers*, Mo., "my estate" or the like, the case could have been treated as one of misdescription and the erroneous term omitted; the opinion having been criticised by Redfield, C. J., the editor, in a note in 10 Am. Law Reg. n. s. 93, it was defended by Caton, J., not the writer of the opinion, in ib. 353, and was justified expressly on the above-named ground, that "if in this case the word 'my' had been used, instead of 'the,' in connection with the description, then indeed there would have been something in the will to construe, . . . an additional description by which the Court might have determined the subject of the devise after having eliminated '32'; . . . the fundamental error of the editor consists in his assuming that necessarily the testator designed to devise land to which he had a present existing title"; the ruling in *Kurtz v. Hibner*, thus explained, therefore stands for two propositions, (1) that if a description does not fit any object exactly, the circumstances may be considered and any part of the description which appears erroneous and unessential may be ignored; (2) that, in settling what is the description to be taken for this purpose, the words "being my property" cannot be read into the will by implication; on the first point, all the later cases in Illinois, except apparently *Bishop v. Morgan*, are in accord; on the second point, they all assume the same doctrine, but seem not expressly to meet the question; see further a comment by Julius Rosenthal, Esq., in the *Chicago Legal News*, Mar. 18, 1871).

⁷ *Illinois*: 1876, *Bishop v. Morgan*, 82 Ill. 351 (devise of "S. E. $\frac{1}{4}$ of Sec. 10, . . . contain-

ing 40 acres more or less," the testator really owning only the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$; the fact of his ownership of the latter, excluded, on the supposed authority of *Kurtz v. Hibner*; Dickey, J., and Sheldon, C. J., diss., on the ground that the clause "containing 40 acres" supplied a sufficient description; the dissent is clearly correct); 1878, *Emmert v. Hayes*, 89 id. 16 (devise of "my estate of 195 acres in T. 3, etc.," the testator not owning anything in the section named; this fact was admitted and the devise applied; "where there are two descriptions, one superadded to the other, and one description being complete and sufficient of itself and the other, subordinate and superadded, incorrect, the incorrect feature is rejected as surplusage"; this ruling follows out the implication of *Kurtz v. Hibner*; the above language is reproduced from the opinion in *Myers v. Ladd*, Ill., quoted *ante*, § 2476); 1885, *Bowen v. Allen*, 113 id. 53 (devise of "my house and lot in the town of P., Ill., the north $\frac{3}{4}$ part of lot 19 block no. 10, railroad addition"; held, that if the fact appeared that the testatrix owned no house and lot in lot 19, but did own one in lot 12, the description would be applied; "in *Kurtz v. Hibner*, had the will described the property as his farm in the township and he had held no other in the township, then a different result would have been reached"); 1887, *Decker v. Decker*, 121 id. 341, 12 N. E. 750 (devise of "my real estate," including "20 acres off the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of S. 33, T. 18, R. 11," the testator really owning only the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$; doctrine of the two preceding cases followed, in applying the description, treating the erroneous part as immaterial); 1892, *Bingel v. Volz*, 142 id. 214, 31 N. E. 13 (devise of "70 acres off the S. side of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of S. 16, T. 5, R. 6," the testator really owning only the S. W. $\frac{1}{4}$, not the N. W. $\frac{1}{4}$; this fact, and the error of the draftsman in not following the instructions, excluded; though "if the description, after rejecting the repugnant element, were sufficient to describe accurately the land, it might be adopted"; practically following *Kurtz v. Hibner* exactly, and not inconsistent with the three immediately foregoing cases; the error of the opinion consists in expressly reviving the authority of *Bishop v. Morgan*, which had practically been overruled by the three cases succeeding it); *Indiana*: 1865, *Cleveland v. Spillman*, 25 Ind. 95 (devise of "my land, being the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, T. 36, R. 3, S. 12," but the testator owned only the N. W. $\frac{1}{2}$; the devise was applied to that land, by treating the erroneous part of the description as immaterial); 1881, *Judy v. Gilbert*, 77 id. 96 (devise of "N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of T. 29, R. 37, S. 11"; but the testator owned only the N. E. $\frac{1}{4}$ of the

From the foregoing class of cases should be distinguished those in which an insufficient description (as in a deed naming a section, without range or

S. W. $\frac{1}{4}$; the mistake of the draftsman, not allowed to be shown); 1885, *Funk v. Davis*, 103 id. 281, 2 N. E. 739 (devise of "N. W. $\frac{1}{4}$ of T. 27, R. 28, S. 3," the testator owning only the N. E. $\frac{1}{4}$; there being in the will no words such as "my land," the devise was not applied to the N. E. $\frac{1}{4}$; *Judy v. Gilbert* followed, but on correcter reasoning; *Cleveland v. Spillman* distinguished on the above ground); 1889, *Sturgis v. Work*, 122 id. 134, 22 N. E. 996 (devise of the "W. $\frac{1}{2}$ of the S. W. $\frac{1}{2}$, etc.," the testator owning only the N. E. $\frac{1}{4}$; the fact of this ownership excluded; the correct principle was conceded, but no other sufficient descriptive item was found, and the words "being my property" were refused to be implied); 1895, *Rook v. Wilson*, 142 id. 24, 41 N. E. 311 ("My real estate, to wit, the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ " of a certain section; the only land owned by the testator was the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$; these facts were considered and the description applied to the latter piece); 1897, *Hartwig v. Schiefer*, 147 id. 64, 42 N. E. 471, 46 N. E. 75 ("my life insurance policy amounting to \$1000"; there was only one policy, payable to the wife, and, if dead, to her children; the wife was dead; facts admitted to identify it as having been treated by him as his, though running to his children); 1899, *Whiteman v. Whiteman*, 152 id. 263, 53 N. E. 225 (will reciting a former will of Oct. 18, 1890, and purporting to be a codicil thereto; the fact that no such former will existed, except one of Feb. 1890, destroyed after being incorporated in the codicil, admitted, on the theory of "latent ambiguity"); *Iowa*: 1873, *Fitzpatrick v. Fitzpatrick*, 36 Ia. 674 (devise of "W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of S. 23 in T. M. township," the testator owning only the E. $\frac{1}{4}$; declarations of intention excluded; "in all the cases . . . the language of the will, after rejecting the false description, has been sufficient to show what property or person was intended; . . . we cannot presume that the testator intended to assert his ownership of the thing bequeathed"; *Eckford v. Eckford*, *infra*, seems to ignore the tendency of the first quotation above); 1887, *Christy v. Badger*, 72 id. 581, 34 N. W. 427 (devise of "a small farm in Wayne Co., Ia., near the Missouri line"; rule of *Fitzpatrick v. Fitzpatrick*, *supra*, followed); 1887, *Covert v. Sebern*, 73 id. 564, 35 N. W. 636 (devise to "my stepson H. S. Covert"; there was only a stepson named John Harvey C.; the mistake of the scrivener allowed to be proved, to identify the devisee); 1892, *Eckford v. Eckford*, 91 id. 54, 58 N. W. 1093 (devise of "S. E. $\frac{1}{4}$ of T. 14, R. 98, S. 17," in a will beginning "I own the following estate"; the testator in fact owning only the S. W. $\frac{1}{4}$ in that section; held, that to omit the erroneous item of description was here impossible, because "there must be a sufficient general description in the will to lead to an identification after the particular description is written out"; the ruling is unsound in its application of the principle); *Kansas*: 1898, *Wilson v. Stevens*, 59 Kan. 771, 51 Pac. 903 ((1) a will giving to a

child Ollie; the fact was received that a daughter Viola was called Ollie in the family; (2) a will giving to a child "Florence Stevens," living "at Wichita"; the fact was received that there was a son living south of Wichita, and that the son's name Alonzo might have been the word understood by the scrivener as "Florence"); 1900, *Zirkle v. Leonard*, 61 id. 636, 60 Pac. 318 ("All the land I now have in the N. W. $\frac{1}{4}$ of S. 20, T. 13, R. 17, containing about 72 acres"; he owned only in the S. W. $\frac{1}{4}$; the description was applied to the latter); *Missouri*: 1855, *Riggs v. Myers*, 20 Mo. 997 (devise of "my estate," naming "the S. W. $\frac{1}{4}$ of S. 4, in T. 60, of R. 38, in Holt Co., Mo., with the privilege of using the water of the Big Spring"; the facts being that the testator owned no land in T. 60, but did own quarter-sections in T. 59, the land in T. 59 was given, being sufficiently identified by the terms "my estate" and "Big Spring"); 1897, *Gordon v. Burris*, 141 id. 602, 43 S. W. 642 (bequest to "Lucy May Gordon, granddaughter"; the fact was received that there was a granddaughter Mary Jane G., called "May" by the testatrix); *New Hampshire*: 1855, *Winkley v. Kaime*, 32 N. H. 268 (devise of "36 acres more or less in lot 37 in the 2d division in Barnstead," the testator really owning only lot 97; the description was applied to the latter; "by rejecting the words and figures 'in lot 37,' it will stand '36 acres in the 2d division in B., being the same I purchased of J. P.');" 1883, *Smith v. Kimball*, 62 id. 606 (cited *ante*, § 2462); *New Jersey*: 1899, *Congregational Home Missionary Soc. v. Van Arsdale*, — N. J. Eq. —, 42 Atl. 1047 (plaintiff allowed to take a bequest to the "Home Missionary Society of America"); 1900, *Kerrigan v. Conelly*, — id. —, 46 Atl. 227 (bequest to "Woodstock College in Howard Co., Md.," applied to W. College in Baltimore Co., there being no other W. College in Maryland); *Pennsylvania*: 1903, *Ambersson's Estate*, 204 Pa. 397, 54 Atl. 484 (bequest to "the Foreign Missionary Society," held to signify "the Missionary Society of the Methodist Episcopal Church"); *United States*: 1886, *Patch v. White*, 117 U. S. 210, 6 Sup. 617, 710 (will "touching worldly estates wherewith it has pleased Almighty God to bless me in this life," and disposing "of the same" by a devise of "lot no. 6, in square 403," with improvements, in Washington; the testator owned lot 3 in square 406, but not lot 6 in square 403, and the former had improvements, but the latter not, and all his other lots were otherwise disposed of in the will; held, a case of false description, so that the lot could be identified by omitting the erroneous numbers; four judges diss.); *Virginia*: 1897, *Wildberger v. Cheek's Ex'r*, 94 Va. 517, 27 S. E. 441 ("all the residue . . . among all my nieces and nephews; they are the following"; naming several, but omitting some; the testator's feelings towards the omitted ones, received to see whether the "all" should be regarded, or the enumeration); *Washington*: 1899, *Gorkow's Estate*, 20 Wash. 563,

township) creates an equivocation (*ante*, § 2472); those in which the misdescription suffices merely to deprive of the right to the remedy of specific performance; and those in which the misdescription arises on the face of the document, through inconsistencies or uncertainties which require to be reconciled or qualified as between each other.⁸

§ 2478. **Sundry Rules; Interpretation of Statutes.** (1) In the course of judicial experience, numerous *presumptive rules* have naturally developed themselves, concerning the probable meaning of various words, phrases, and grammatical constructions. They are in effect definitions of that ordinary usage of language which, by the general principle (*ante*, § 2461), is always the first to be applied, as representing the probable usage of the writer. These specific rules vary with the nature of the document and the transaction. In a complete treatise on Interpretation, they would find a place; but they are not included in the present purview.

(2) A *statute* is an act of expression by a legislative body; and, as a legal act, it presents the same problems as to intention, integration, form, and interpretation, as other legal acts. In general, the foregoing principles and problems recur, *mutatis mutandis*;¹ but the subject cannot be dealt with in the present survey.²

56 Pac. 385 (bequest to "Otto, the child of Martha K.," held to apply to Arthur K.); *West Virginia*: 1896, *Ross' Ex'r v. Kiger*, 42 W. Va. 402, 26 S. E. 193 (bequest to "the M. E. Church school situated in Buckhannon"; also to "the M. E. Church Foreign Missionary Society"; the facts were admitted, (1) as to the first, there being no such-named institution in B., but one known as the "West Virginia Conference Seminary at B.," that the testatrix had frequently given money to the latter, that it was controlled by Methodist Episcopalians and was often spoken of as "the Methodist school at B.," and that there was no other Methodist school there; (2) as to the second, there being no such-named society, but one known as the "Missionary Society of the M. E. Church," that the testatrix was a member of the M. E. Church and had contributed to its support); *Wisconsin*: 1878, *Sherwood v. Sherwood*, 45 Wis. 357 (devise of "lot 9 in block 20 in Oshkosh"; the correct principle conceded, but here, there being no other words "being my land," or the like, in the will, the devise was ineffective; otherwise,

if the will had said "my lot 9," or "the lot which I purchased of B.>").

⁸ *E. g.*: 1833, *Doe v. Galloway*, 5 B. & Ad. 43 (deed of "all that part of the park called or known by the name of Blenheim or Woodstock Park, situate and being in the county of Oxford, and now in the occupation of Richard Smallbones, in a direct line across the said park etc."; held, that the land passing was not merely the part in the occupation of R. S.); 1895, *Lassing v. James*, 107 Cal. 348, 40 Pac. 534 (where the terms of a covenant were contradictory, evidence of a mistake in not striking out one of them was considered). Compare the rule as to applying the written part of a policy when it conflicts with the printed part; *e. g.*: 1845, *Alsager v. St. Katherine's Dock Co.*, 14 M. & W. 794; 1839, *Saunderson v. Piper*, 5 Bing. N. C. 425 (cited *ante*, § 2473, note 3).

¹ This is illustrated in Endlich, *Interpretation of Statutes*, 1888, §§ 28-30, 357-371, 507-510.

² The question of the conclusiveness of the enrolled copy of a statute has been dealt with *ante*, § 1350.

BOOK II: BY WHOM EVIDENCE MUST BE PRESENTED (BURDEN OF PROOF, AND PRESUMPTIONS).

TITLE I: GENERAL THEORY.

CHAPTER LXXXVI.

§ 2483. Production of Evidence by the Parties.

§ 2484. Evidence sought by the Judge *ex mero motu*; Questions to Witnesses by the Judge.

§ 2485. Burden of Proof: (1) First Meaning: Risk of Non-persuasion of the Jury.

§ 2486. Same: Test for this Burden: Negative and Affirmative Allegations; Facts peculiarly within a Party's Knowledge.

§ 2487. Burden of Proof: (2) Second Meaning: Duty of Producing Evidence to the Judge.

§ 2488. Same: Test for this Burden.

§ 2489. Shifting the Burden of Proof.

§ 2490. Presumptions; Legal Effect of a Presumption.

§ 2491. Same: Presumptions of Law and Presumptions of Fact.

§ 2492. Same: Conclusive Presumption.

§ 2493. Same: Conflicting Presumptions; Counter Presumptions.

§ 2494. Same: *Prima facie* Evidence; Sufficient Evidence for the Jury; Scintilla of Evidence.

§ 2495. Same: Direction of a Verdict, Motion for a Nonsuit, and Demurrer to Evidence.

§ 2496. Same: Waiver of Motion by subsequent Introduction of Evidence.

§ 2497. Measure of Persuasion; (1) Proof beyond a Reasonable Doubt; Rule for Criminal Cases.

§ 2498. Same: (2) Proof by Preponderance of Evidence; Rule for Civil Cases.

§ 2483. **Production of Evidence by the Parties.** The apportionment of the task of producing evidence is one of the most characteristic features of the Anglo-American system. It is placed wholly upon the parties to the litigation; it is not required or expected of the judge. In this respect the emphasis is in contrast to the Continental system. Whether the political notions of self-help, self-government, and *laissez faire* have ultimately here a common source and analogy would be an interesting question. The Anglo-American feature shows itself, in other aspects, in its frequent relegation of the judge to the position of an umpire (*ante*, § 1845), in its abstinence from rules for preferred kinds of witnesses (*ante*, § 1286), and in its reliance upon cross-examination by the opponent (*ante*, § 1367). The Continental feature shows itself in its exaltation of the trial judge's function (as *Untersuchungsrichter* or *juge d'instruction*), and in its multiplication of artificial rules of measurement for aiding the judge in estimating the evidence (*ante*, § 2032, *post*, § 2490). Certainly the vital importance of the burden of proof means something very different for the parties, in our system of procedure, from its meaning in the other. It is this feature, together with that of the jury, which is responsible for the peculiar double aspect of the burden of proof (*post*, § 2487).

§ 2484. **Evidence sought by the Judge *ex mero motu*; Questions to Witnesses by the Judge.** So extreme has been the emphasis upon this feature of the production of proof, that even the judge's right to call forth evidence

has been at times questioned by the Bar. That he has no burden of doing so is plain in the law; but that he has no right to cause the evidence produced by the parties to be supplemented, where he believes this necessary, has never been conceded, — and never will be, so long as the Bench retains a true conception of its constitutional function and a due sense of self-respect:

1794, Mr. *Edmund Burke*, Report of Committee on Warren Hastings' Trial, 31 Parl. Hist. 348: "It is the duty of the Judge to receive every offer of evidence, apparently material, suggested to him, though the parties themselves through negligence, ignorance, or corrupt collusion, should not bring it forward. A judge is not placed in that high situation merely as a passive instrument of parties. He has a duty of his own, independent of them, and that duty is to investigate the truth."

1894, Lord *Esher*, M. R., in *Coulson v. Disborough*, 2 Q. B. 316, 318: "If there be a person whom neither party to an action chooses to call as a witness, and the judge thinks that that person is able to elucidate the truth, the judge in my opinion, is himself entitled to call him; and I cannot agree that such a course has never been taken by a judge before."

The trial judge, then, may *call a witness* not called by the parties,¹ or may consult any source of information on topics subject to *judicial notice*,² or may *put additional questions* to a witness called by the parties,³ — without derogating from the general principle that the risk and burden of producing evidence is upon the parties themselves.

§ 2485. **Burden of Proof; (1) First Meaning; Risk of Non-Persuasion of the Jury.** Since, then, the risk and burden of producing evidence falls upon the parties themselves, how is it to be apportioned between them? In short, *which party has the "burden of proof"?*¹

In every attempt to explain the principles of the law as to burden of proof and presumption, two things at least present themselves for consideration, — the general process, logical and legal, involved in determining the parties by whom evidence is to be produced, and the significance and usage of various terms employed and the incidental problems of each part of the process. The difficulties of such an attempt, almost insuperable,² arise not so much from the intrinsic complication or uncertainty of the situation as from the lamentable ambiguity of phrase and confusion of terminology under which

¹ 1894, *Coulson v. Disborough*, 2 Q. B. 316 (quoted *supra*); 1886, *Selph v. State*, 22 Fla. 537, 548 (a judge may "of his own accord, when the interests of justice demand it," call and examine witnesses; the word "not" is apparently omitted by error in the printed opinion); 1852, *Hoskins v. State*, 11 Ga. 92, 97 (the trial judge's right of "directing the necessary proofs to be adduced," conceded); 1898, *Fullerton v. Fordey*, 144 Mo. 519, 44 S. W. 1053 (here, a physician who had made an examination under order of Court previously made on motion). So, too, where he sits without a jury: 1883, *Badische A. & S. Fabrik v. Levinstein*, L. R. 24 Ch. D. 156, 167 (under Ord. 56, Rules of 1883, quoted *ante*, § 1674).

² *Post*, § 2569.

³ 1877, *Sparks v. State*, 59 Ala. 82, 87 (distinction drawn between the right to propound

questions openly to a witness and the impropriety of privately consulting a witness to discover or suggest further testimony); 1884, *Littleton v. Clayton*, 77 id. 571, 575; and cases cited *ante*, § 784.

¹ For an acute and comprehensive examination of the subject of this chapter, see chapters 8 and 9 in Professor Thayer's Preliminary Treatise on Evidence, the publication of which may truly be regarded as epoch-making. Professor Austin Abbott's article in the *University Law Review*, II, 59, is also enlightening.

² The following remark will be thought singular, in view of the condition of the precedents on this subject: "Every student of the law fully understands the exact import of the phrase 'burden of proof'" (1897, *State v. Thornton*, 10 S. D. 349, 73 N. W. 196).

our law has so long suffered. At the outset, then, it will be more satisfactory to analyze the logical and legal situation considered in itself and independently of the various usages and terms that chiefly cause the confusion.

(1) *Burden of Proof; Risk of Non-persuasion.* Whenever A and B are at issue upon any subject of controversy (not necessarily legal), and M is to take action between them, and their desire is, hence, respectively to persuade M as to their contention, it is clear that the situation of the two, as regards its advantages and risks, will be very different. Suppose that A has property in which he would like to have M invest money, and that B is opposed to having M invest money; M will invest in A's property if he can learn that it is a profitable object, and not otherwise. Here it is seen that the advantage is with B, and the disadvantage with A; for unless A succeeds in persuading M up to the point of action, A will fail and B will remain victorious; the burden of proof, or, in other words, the risk of non-persuasion, is upon A. This does not mean that B is absolutely safe though he does nothing, for he cannot tell how much it will require to persuade M; a very little argument from A might suffice; or, if M is of a rashly speculative tendency, the mere mention of the proposition by A might without more effect M's action; so that it may be safer in any case for B to say what he can on his side of the question; and thus in fact he, as well as A, has more or less risk, in the sense that there are always chances of A's persuading M, no matter how trifling his evidence and argument. But nevertheless the risk is really upon A, in the sense that if M, after all said and done, remains in doubt, and therefore fails to pass to the point of action, it is A that loses and B that succeeds; because it is A who wishes the action taken and needed as a prerequisite to accomplish the persuasion of M. The risk of non-persuasion, therefore, *i. e.* the risk of M's non-action because of doubt, may properly be said to be upon A. This is the situation common to all cases of attempted persuasion, whether in the market, the home, or the forum. So far as mere logic is concerned, it is perhaps questionable whether there is much importance in the doctrine of burden of proof as affecting persons in controversy.³ The removal of the burden is not in itself a matter of logical necessity. It is the *desire to have action taken* that is important. In the affairs of life there is a penalty for not sustaining the burden of proof, — *i. e.* not persuading M beyond the doubting point, — namely, that M will not take the desired action, to which his persuasion is a prerequisite.

Thus, in practical affairs generally, the burden of proof (in the sense of risk of non-persuasion) signifies that upon a person desiring action from M will fall the penalty of M's non-action unless M can be persuaded beyond

³ "In Logic, then, when we speak of the burden of proof, we are not speaking of some merely artificial law, with artificial penalties attached to it. . . . No penalty follows the misplacement of the burden of proof, except the natural consequence that the assertion remains untested, and the audience therefore (if inquiring) unconvinced. . . . There is no 'obligation'

on any one to prove an assertion, — other than any wish he may feel to set an inquiring mind at rest or to avoid the imputation of empty boasting. It is a natural law alone with which we are here concerned, — the law that an unsupported assertion may, for all that appears, be either true or false" (Professor Alfred Sidgwick, *Fallacies*, 163).

the doubting-point as to the truth of the propositions prerequisite to his action. What, then, is the difference, if any, between this risk of non-persuasion in affairs at large and the same risk in litigation? In litigation, the penalty is of course different; the action which is desired of M is the verdict of the jury, the decree, order, or finding of the judge, or some other appropriate action of the tribunal. But so also the action differs in other affairs, according as M is an investor with money to lend, or an employer with a position to fill, or a friend with a favor to grant. Is there no other and more radical difference? The radical difference in litigation, as distinguished from practical affairs at large, is as to the *mode of determining the propositions of persuasion which are a prerequisite* to M's action. In affairs at large, these are determined solely by M's notion of the proper grounds for his action, — depending thus on the circumstances of the situation as judged by M. In litigation, these prerequisites are determined, first and broadly, by the *substantive law*, which fixes the groups of data that enter into legal relations and constitute rights and duties, and, secondly and more in detail, by the *laws of pleading and procedure*, which further group and subdivide these larger groups of data, and assign one or another sub-group to this or that party as prerequisites of the tribunal's action in his favor. Thus, if A were endeavoring to persuade M to assist him with money because M's brother B had cruelly assaulted and beaten A, M might conceivably exact of A that the latter first prove to him — *i. e.* persuade him — not merely that B had beaten A, but further that B had not done this in self-defence or by A's consent or in ejecting A from B's premises or otherwise for some reason, legally justifiable or not. In a legal tribunal, on the other hand, the substantive law will define and limit, in the first place, the reasons to be regarded as justifiable, and will thus narrow the total of facts that can in any event be involved; and, in the second place, the law of pleading will further subdivide and apportion these facts. It will inform A that he need persuade the tribunal of two facts only, namely, that A was beaten and it was B who beat him;⁴ and that, upon persuading the tribunal of these facts, its action will be taken in his favor, and A's risk of the tribunal's non-action will thereupon cease. It will inform B that at this point the risk of non-action will turn upon him, in the sense that he needs the tribunal's action in order to relieve himself from the consequences of its previous action, and that this action (by way of reversing its provisional action in A's favor) will depend upon his persuading the tribunal as to certain specified facts by way of excuse or justification. Perhaps the same law of pleading may further apportion to A a third set of facts to be the subject of a replication, in case B succeeds in obtaining action in his favor on his plea.

But the groupings defined by the substantive law and the further subdivision by the law of pleading do not necessarily end the process of apportionment by law. Even within a single pleading there are instances in which

⁴ Assuming, of course, that there is no — is a proper subject for the general issue or for controversy as to whether inadvertence or the like — an affirmative plea.

the burden of proof (in the sense of a risk of non-persuasion) may be taken from the pleader desiring action and placed upon the opponent. In criminal cases, for example, though there is no affirmative pleading for the defence, it is put upon the defendant, in some jurisdictions, to prove the excuse of self-defence; in many jurisdictions in which payment need not be affirmatively pleaded to a contract-claim, the burden of proving payment is nevertheless put upon the debtor; and so in many other instances. The difference of effect between an apportionment under this method and an apportionment by requiring a pleading is merely that, in the latter method, all questions of burden of proof might conceivably be disposed of before trial or the entering into evidence;⁵ while by the other method the apportionment is not made until the trial proper has begun. The other method is less simple in the handling; but it has come more into vogue under the loose modes of pleading current in modern times in many jurisdictions.⁶

§ 2486. **Same; Test for this Burden; Negative and Affirmative Allegations; Facts peculiarly within a Party's Knowledge.** The characteristic, then, of the burden of proof (in the sense of a risk of non-persuasion) in legal controversies is that the law divides the process into stages, and apportions definitely to each party the specific facts which will in turn fall to him as the prerequisites of obtaining action in his favor by the tribunal. It is this apportionment which forms the important element of controversy for legal purposes. Each party wishes to know of what facts he has the risk of non-persuasion. By what considerations, then, is this apportionment determined? Is there any single principle or rule which will solve all cases and afford a general test for ascertaining the incidence of this risk? By no means. It is often said that the burden is upon the *party having the affirmative allegation*.¹ But this is not an invariable test, nor even always a significant circumstance; the burden is often on one who has a negative assertion to prove;² a common instance is that of a promisee alleging non-performance of a contract. It is sometimes said that it is upon the party to whose case the fact is essential. This is correct enough, but it merely advances the inquiry one step; we must then ask whether there is any general principle which determines to what party's case a fact is essential.

The truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in

⁵ Though in practice not usually at the present time; see Langdell's *Discovery under the Judicature Acts*, Harvard Law Review, XI, 157, 205.

⁶ The result is that what were properly questions of pleading are often discussed in terms of the burden of proof; e. g. 1896, *Hopson v. Caswell*, 13 Tex. Civ. App. 492, 36 S. W. 312 (indexed under "Burden of Proof"; it is said, of a plea in abatement, "the burden of sustaining the plea was upon the defendant"); 1895, *Goodell's Ex'rs v. Gibbons*, 91 Va. 608, 22 S. E. 504 (where the question of pleading affirmatively the statute of limitations is discussed indiffer-

ently in terms of pleading and of burden of proof).

¹ 1842, Greenleaf, *Evidence*, § 74; Ga. Code 1895, § 5160 (on the party "asserting or affirming a fact and to the existence of whose case or defense the proof of such fact is essential"); 1898, *People v. Boo Doo Hong*, 122 Cal. 606, 55 Pac. 402 (unlawful practice of medicine; the burden placed on the defendant to show a license; citing Greenleaf).

² *E. g.*, *Carmel N. G. & I. Co. v. Small*, 150 Ind. 427, 50 N. E. 476 (action to recover money from an officer not legally elected).

the different situations. Thus, in most actions of tort there are many possible justifying circumstances, — self-defence, leave and license, *volenti non fit injuria*, and the like; but it would be both unfair and contrary to experience to assume that one of them was probably present, and to require the plaintiff to disprove the existence of each one of them; so that the plaintiff is put to prove merely the nature of his harm, and the defendant's share in causing it; and the other circumstances, which would if they existed leave him without a claim, are put upon the defendant to prove. Nevertheless, in malicious prosecution, on the one hand, the facts as to the defendant's good faith and probable cause, which might otherwise have been set down for the defendant to show in excuse (as the analogous facts in an action for defamation are reserved for a plea of privilege), are here put upon the plaintiff, who is required to prove their non-existence; because as a matter of experience and fairness this seems to be the wiser apportionment. So, on the other hand, in an action for defamation ("false words," in the old nomenclature), it might have been supposed on other analogies that to the plaintiff it would fall to prove the falsity of the defendant's utterance; yet as a matter of fairness, it has in fact been put upon the defendant to prove the truth of his utterance. Thus, no one principle will serve in torts as a guiding rule for the various cases. In criminal cases, the innovation, in some jurisdictions, of putting upon the accused the burden of proving his insanity has apparently also been based on an experience in the abuses of the contrary practice. In claims based on written instruments, experience has led in most jurisdictions to a statutory provision, requiring the execution by the defendant to be specially traversed or else taken for admitted, — a step which stops short of changing the burden of proof, but well illustrates the considerations affecting its incidence. The controversy whether a plaintiff in tort should be required to prove his own carefulness, or the defendant should be required to prove the plaintiff's carelessness, has depended in part on experience as to a plaintiff being commonly careful or careless, in part on the fairness of putting the burden on one or the other, and this in part on the consideration which of the parties has the means of proof more available.

This last consideration has often been advanced as a special test for solving a limited class of cases, *i. e.* the burden of proving a fact is said to be put on the *party who presumably has peculiar knowledge* enabling him to prove its falsity if it is false.³ But this consideration furnishes no working rule; if it did, then the plaintiff in an action for defamation charging him to be living in adultery should be required to prove that he is lawfully married. This consideration, after all, merely takes its place among other considerations of fairness and experience as one to be kept in mind in apportioning the burden of proof in a specific case.

There is, then, no one principle, or set of harmonious principles, which afford a sure and universal test for the solution of a given case. The logic of the situation does not demand such a test; it would be useless to attempt

³ 1842, Greenleaf, Evidence, § 79; 1896, Lehman v. Knapp, — Ala. —, 20 So. 674.

to discover or to invent one; and the state of the law does not justify us in saying that it has accepted any. There are merely specific rules for specific cases, resting for their ultimate reasons upon broad and undefined reasons of experience and fairness.

§ 2487. **Burden of Proof; (2) Second Meaning; Duty of producing Evidence to the Judge.** So far as concerns the principles examined above, the matter may have come before any kind of tribunal. The inquiry peculiarly concerns the procedure in legal controversies; but the settlement of it was not affected by the nature of the tribunal. The tribunal might be a judge, or a jury, or both, so far as regards apportioning the risk of non-persuasion. Nothing has been said, or need be, about a distinction between judge and jury. But we come now to a peculiar set of rules which have their source in the bi-partite constitution of the common-law tribunal. Apart from the distinction of functions between judge and jury, these rules need have had no existence. They owe their existence chiefly to the historic and unquestioned control of the judge over the jury, and to the partial and dependent position of the jury as a member of the tribunal whose functions come into play only within certain limits.¹ The treatment of the situation, and the operation of the rules, can best be comprehended by keeping this consideration in mind, namely, that the *opportunity to decide finally upon the evidential material that may be offered does not fall to the jury as a matter of course*; that each party must first with his evidence pass the gauntlet of the judge; and that the judge, as a part of his function in administering the law, is to keep the jury within the bounds of reasonable action. In short, in order to get to the jury on the issue, and bring into play the other burden of proof (in the sense of the risk of non-persuasion of the jury), both parties alike *must first satisfy the judge that they have a quantity of evidence fit to be considered* by the jury, and to form a reasonable basis for the verdict. This duty of satisfying the judge is peculiar in its operation, because if it is not fulfilled, the party in default loses, by order of the judge, and the jury is not given an opportunity to debate and form conclusions as if the issue were open to them. It operates somewhat as follows:²

(a) The party having the risk of non-persuasion (under the pleadings or other rules) is naturally the one upon whom first falls this duty of going forward with evidence; because, since he wishes to have the jury act for him, and since without any legal evidence at all they could properly take no action, there is no need for the opponent to adduce evidence; and this duty thus falls first upon the proponent (a term convenient for designating the party having the risk of non-persuasion). This duty, however, though determined in the first instance by the burden of proof in the sense of the risk of non-persuasion (*ante*, § 2485), is a distinct one, for it is a *duty towards the judge*, and the judge rules against the party if it is not satisfied; there is as yet no opportunity to get to the jury and ask if they are persuaded. The judge, then,

¹ *Post*, § 2550; Thayer, Preliminary Treatise, c. 5.

² See on this part of the subject a useful article by the late Professor Austin Abbott, en-

titled "Two Burdens of Proof," in the Harvard Law Review, VI, 125, and his article cited *ante*, § 2485.

requires that at least enough evidence be put in to be worth considering by the jury.³

(b) Suppose, then, that the proponent has satisfied this duty towards the judge, and that the judge has ruled that sufficient evidence has been introduced. The duty has then ended. Up to that point the proponent was liable to a ruling of law from the judge which would put an end to his case. After passing this point he is now *before the jury*, bearing only his risk of non-persuasion (*ante*, § 2485). There is now no duty on either party, with reference to any rule of law in the hands of the judge, to produce evidence. Either party may introduce it, and doubtless both parties will do so; but there is nothing that requires either to do so under penalty of a ruling of law against him. The proponent, however, still has his burden of proof in the sense of the risk of non-persuasion of the jury; *i. e.* should the jury be in doubt after hearing the evidence of the proponent, either with or without evidence from the opponent, the proponent fails to obtain their verdict upon that issue, and the opponent remains successful. In this second stage of the trial, with the evidence before the jury, the only burden operating is that which concerns the jury, — the risk of non-persuasion; and not that which concerns the judge, — the duty of producing evidence.

(c) Suppose, however, that the proponent is able to go further and to adduce evidence which if believed would make it beyond reason to repudiate the proponent's claim, — evidence such that the jury, acting as reasonable men, must be persuaded and must render a verdict on that issue for the proponent. Here the proponent has now put himself in the same position that was occupied by the opponent at the opening of the trial, *i. e.* unless the opponent now offers evidence against the claim and thus changes the situation, the jury should not be allowed to render a verdict against reason, — a verdict which would later have to be set aside as against evidence. The matter is thus *in the hands of the judge again*, as having the supervisory control of the proof; and he may now, as applying a rule of law, *require the opponent to produce evidence*, under penalty of losing the case by direction of the judge. Thus, a duty of producing evidence, under this penalty for default, has now arisen for the opponent. It arises for the same reasons, is measured by the same tests, and has the same consequences as the duty of production which was formerly upon the proponent. There are, however, two ways in which it may be invoked by the judge, differing widely in terms and in appearance, but essentially the same in principle. (c') In the ordinary case, this overwhelming mass of evidence, bearing down for the proponent, will be made up of a variety of complicated data, differing in every new trial and not to be tested by any set formulas. The judge's ruling will be based on a survey of this mass of evidence as a whole; and it will direct the jury on that issue to render a verdict on that *mass of evidence* for the proponent. The propriety of this has sometimes been doubted by Courts who do not believe the process to be precisely analogous to that of directing a nonsuit for the proponent or

³ The detailed rules for determining this sufficiency of evidence are examined *post*, §§ 2494, 2495.

of enforcing a presumption, as shortly to be explained (*post*, § 2495); but the better authority gives ample recognition to this process. (*c''*) Another mode under which this process is carried out employs the aid of a fixed rule of law, *i. e.* a *presumption*, applicable to *inferences from specific evidence to specific facts forming part of the issue*, rather than to the general mass of evidence bearing on the proposition in issue. If it is a part of the proponent's case, for example, to prove that a person is deceased, and he has offered evidence that the person has been absent, unheard from, for seven years or more, and there is no other evidence on the subject, then the proponent may ask that the jury be directed, if they believe this fact of absence, to take as true the proposition that the person is deceased; if that, moreover, were the only proposition at issue, then the direction would be to find a verdict for the proponent if this fact of absence were believed. The result is the same as in the preceding form of the process (*c'*), *i. e.* the opponent loses as a matter of law, in default of evidence to the contrary; in other words, the presumption creates for the opponent a duty of producing evidence, in default of which he loses as a matter of legal ruling, the matter not being open for the jury, and the risk of non-persuasion, which applies only to the jury's deliberations, having ceased to affect the proponent. This particular form of the process, however (*c''*), happens to have become known as a "presumption." The term "presumption" has been the subject of much confused usage. The particular ambiguity which we need here to guard against is the confusion between the inference itself — *i. e.* the propriety of making the inference from the evidence to the *factum probandum* ⁴ — and the effect of the inference in the hands of the judge. So far as "presumption" means anything for the present purpose, it signifies a ruling as to the duty of producing evidence. "The essential character and operation of presumptions, so far as the law of evidence is concerned, is in all cases the same, whether they be called by one name or the other; that is to say, they throw upon the party against whom they work the duty of going forward with the evidence; and this operation is all their effect, regarded merely in their character as presumptions." ⁵

(*d*) Keeping in mind, then, that a presumption signifies a ruling of law, and that to this extent the matter is in the judge's hands and not the jury's, what is the effect upon the legal situation of the opponent if he does respond to this duty and *comes forward with other evidence* against the fact presumed? When he has thus fulfilled his duty under the ruling of law, he puts himself out of the hands of the judge and his ruling, and finds himself back again in the hands of the jury. He is precisely where the proponent was in the first place when he fulfilled the duty, then his, of producing evidence and succeeded in getting from the judge to the jury. The case is now open again as to that specific issue, *i. e.* free from any liability to a ruling of law against either side, and is before the jury, where the original proponent (as ever, when the issue is open

⁴ This is one of the earlier uses of "presumption"; it is in effect an equivalent of "inference (*ante*, §§ 25, 38)." Such are Coke's *viz.*, violent, probable, and light or temerary" (Co. Litt. 6, b). This is what is usually meant by "presumption of fact" (*post*, §§ 2490, 2491).

⁵ Thayer, *ubi supra*, 339.

to the jury) has the burden of proof in the sense of the risk of non-persuasion of the jury. The important thing is that there is now *no longer in force any ruling of law by the judge* requiring the jury to find according to the presumption. "All is then turned into an ordinary question of evidence, and the two or three general facts presupposed in the rule of presumption take their place with the rest, and operate, with their own natural force, as a part of the total mass of probative matter. . . . The main point to observe is that the rule of presumption has vanished;"⁶ because its function was as a legal rule to settle the matter only provisionally, and to cast upon the opponent the duty of producing evidence, and this duty and this legal rule he has satisfied.⁷

(e) Are there any further stages in this possible shifting of the duty of producing evidence? It is conceivable that the proponent may be able to invoke other presumptions, though this is not common. But may not the opponent go further than to produce evidence sufficient to remove the presumption? May he not only get the issue opened before the jury again, but also go further and raise what may be termed a *counter-presumption* in his favor, so that the proponent will find himself in his original position at the opening of the trial, namely, subject to the duty of producing sufficient evidence to go to the jury, under penalty, in case of default, of suffering a ruling against him by the judge as a matter of law? This result is possible in principle, and there are instances of it, though rare. For example, a plaintiff, in an action for the burning of his property by the defendant railway-company's negligence, created a presumption of negligence by showing the setting of the fire by sparks from the defendant's locomotive; the duty of producing evidence was thus put upon the defendant, who not only removed it, producing evidence sufficient to go to the jury, but by showing the proper construction, equipment, and inspection of the locomotive was held to have raised a presumption that it had not been negligent, and thus to be entitled to a ruling by the judge against the plaintiff, taking the case from the jury.⁸

The important practical distinction between these two senses of "burden of proof" is this: The *risk of non-persuasion* operates when the case has come *into the hands of the jury*, while the *duty of producing evidence* implies a liability to a *ruling by the judge* disposing of the issue without leaving the question open to the jury's deliberations.⁹

⁶ Thayer, *ubi supra*, 346.

⁷ The following passage from Professor Abbott's article, already mentioned, will serve to illustrate the general situation involved in this duty of producing evidence: "To use a homely illustration, a civil jury trial may be compared to a game of shuffle-board. The first and nearest to the player is the field of mere scintillas; if the plaintiff's evidence halts there, he is lost. The next, or middle, field is that of balancing probabilities: if his evidence reaches and rests there, he gets to the jury; but they alone can decide the cause, and they may decide it either way, or may disagree. The third and last field is that of legal conclusion: if his evidence can be pushed into that division, he is entitled to

his victory at the hands of the judge, and the jury cannot draw it into doubt; but before the judge can do so, the defendant has a right to give evidence, and that evidence may bring the plaintiff's evidence back into doubt again, and leave the case in the field of balancing probabilities."

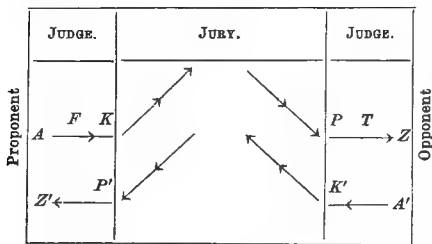
⁸ 1895, *Menomenie R. S. & D. Co. v. R. Co.*, 91 Wis. 447, 65 N. W. 176; the opinion particularly distinguishes previous cases in which the defendant had merely removed the presumption against him by evidence sufficient to go to the jury, but had not raised a counter-presumption requiring a ruling of the judge in his favor.

⁹ The various possible stages in the foregoing process may be illustrated by a diagram; the

§ 2488. **Same: Tests for ascertaining this Burden.** The term "burden of proof" is used commonly as applying equally to the two preceding kinds of situations, and often is applied in both senses in the same judicial opinion. Apart, therefore, from the difficulty of some of the problems of law germane to each situation, peculiar confusion is added by the unfortunate ambiguity of the terms of discussion. There is at this day a fairly widespread acceptance and understanding, in judicial utterances, of the distinction between the two things themselves, the risk of non-persuasion of the jury, and the duty of going forward with evidence sufficient to satisfy the ruling of the judge. The law which regulates respectively this risk and this duty is in most respects either generally settled or is the subject of local differences of decision whose lines of dispute are not difficult to discern. The main source of difficulty lies in the interchangeable use of the term "burden of proof," which forces the judges from time to time to distinguish, explain, and even repudiate former judicial utterances employing analogous language but dealing with distinct situations; and thus there is an appearance (and to some extent, a reality) of confusion in the precedents on the subject.

As to the tests for determining this second burden of proof, it has already been pointed out that (*a*) for the one burden (the risk of non-persuasion of the jury) the substantive law and the pleadings, primarily, serve to do this, and, subsidiarily, a rule of practice, within the stage of a single pleading, may

particular usefulness of the graphic method being that it shows in small compass the relation of the stages and the vital distinction between the judge's and the jury's situation for the two kinds of burdens:



Let *A* = the starting-point of the proponent having the risk of non-persuasion on a given issue;

A' = the starting-point of the opponent on the issue;

Z = the point of complete persuasion or proof for the proponent;

Z' = the corresponding point for the opponent. The proponent then finds, as soon as he begins his production of evidence, that at any point between *A* and *K* he is subject to a ruling of the judge defeating him for lack of sufficient evidence. After reaching *K*, and obtaining a judicial ruling in his favor as to sufficiency of evidence, he is now free from his duty of producing evidence to the judge, and has only his risk of non-persuasion of the jury. But he may

be able to reach with his evidence the point *P*, and invoke again the control of the judge, thus shifting to the opponent the duty of producing evidence. This may be done either by some general rule of presumption that is applicable, or by a specific ruling of the judge upon the mass of evidence adduced. If the duty is thus created for the opponent, he starts from point *A'* to sustain it. Until he has by some evidence reached point *K'*, he is liable to a judicial ruling defeating him on that issue. If he can reach point *K'*, the duty and liability of satisfying the judge disappears, and he is in the field of the jury again. Here, however, the risk of non-persuasion of the jury is still, as before, upon the proponent for that issue; but neither party has any duty to satisfy the judge. Further, however, the opponent may succeed in reaching point *P'*, at which the judge, either by a general rule of counter-presumption or by a specific ruling on the mass of evidence, will order a verdict for the opponent, unless the proponent comes forward with more evidence. Thus the proponent again has the liability to produce some evidence, and must again attain point *K*, in order to come into the field of the jury once more. The process, however, seldom reaches these advanced stages.

If the parties cease all production of evidence while the case is between points *K* and *P* or *K'* and *P'*, i. e. when the risk of non-persuasion of the jury comes to be the only and final stage, there are rules for the jury's guidance, namely, the rules for preponderance of evidence and reasonable doubt (*post*, §§ 2497, 2498).

further apportion the burden; but this apportionment depends ultimately on broad considerations of policy, and, for individual instances, there is nothing to do but ascertain the rule, if any, that has been judicially determined for that particular class of cases. (b) For the other burden (the duty of going forward with evidence to satisfy the judge) there is always, at the outset, such a duty for the party having the first burden, or risk of non-persuasion, until by some rule of law (either by a specific ruling of the judge upon the particular evidence, or by the aid of an appropriate presumption, or by matter judicially noticed) this line is passed. Then comes the stage in which there is no such duty of law for either party (although, if the proponent has invoked some presumption, this stage is immediately passed over). Then, either by a ruling on the general mass of evidence, or by the aid of some applicable presumption, the duty of law arises anew for the opponent. Finally, it may supposably, by similar modes, be later re-created for the proponent. There is therefore no one test, of any real significance, for determining the incidence of this duty; at the outset the test is furnished by ascertaining who has the burden of proof, in the sense of the risk of non-persuasion of the jury, under the pleadings or other rules declaring what *facta probanda* are the ultimate facts of each party's case; a little later, the test is whether the proponent has by a ruling of the judge (based on the sufficiency of the evidence, or a presumption, or a fact judicially noticed) fulfilled this duty; later on, it will be whether the proponent, by a ruling of the judge upon a presumption or the evidence as a whole, has created a duty for the opponent; and still later, whether, for the purposes of the judge's ruling, the opponent has satisfied this duty. It has been suggested¹ that "the test ought in strict accuracy to be expressed thus, namely: which party would be successful if no evidence at all, or no more evidence (as the case may be), were given?" But it is obvious that this is not a test, in any sense of being a useful mode for ascertaining the unknown from the known; it is simply defining and re-stating in other words the effect of this duty of producing evidence; it says "the burden of proof, in this sense, means that the party liable to it will lose as a matter of judicial ruling if no evidence or no more evidence is given by him"; and this does not solve the main problem of determining in a given case which is the party thus liable to these consequences.

§ 2489. **Shifting the Burden of Proof.** (a) The *first burden* above described — the risk of non-persuasion of the jury — *never shifts*, since no fixed rule of law can be said to shift. The law of pleading, or, within the stage of a given pleading, some further rule of practice, fixes beforehand the issuable facts respectively apportioned to the case of each party; each party may know beforehand, from these rules, what facts will be a part of his case, so far as concerns the ultimate risk of non-persuasion. He will know from these rules that such facts, whenever the time comes, will be his to prove, and not the other party's; and that they will not be sometimes his and sometimes the other's, or possibly his and possibly the other's. The other

¹ 1849, Best, Evidence, § 268.

party and himself will of course have their turns in proving their respective *facta probanda* (though under a strict system of pleading these turns of proof will be more clearly fixed before trial, and may occur at different stages and not the same stage of the cause); and the putting-in of evidence may therefore "shift" in the sense that each will take his turn in proving the respective propositions apportioned to him. But the burden does not "shift" in any real sense; for each may once for all ascertain beforehand from rules of law the *facta probanda* apportioned to him, and this apportionment will always remain as thus fixed, to whatever stage the cause may progress.

(b) The *second kind of burden*, however — the duty of producing evidence to satisfy the judge, — *does have* this characteristic referred to as a "*shifting*." It is the same kind of duty for both parties, but it may rest (within the same stage of pleading and upon the same issue and during one burden of the first sort) at one time upon one party and at another time upon the other. Moreover, neither party can ascertain absolutely beforehand at what time it will come upon him¹ or cease to be upon him, or by what evidence it will be removed or created, — except so far as a presumption has by a rule of law been laid down as determining the effect attached to certain facts. Moreover, in a distinctive sense, this kind of burden "shifts" and the other does not, in that during the unchanged prevalence of the first kind of burden for one party, the second kind may be shared in turn by one and the other, though the first — the risk of non-persuasion of the jury, should the case be left in their hands — has not come to an end.²

§ 2490. **Presumptions; Legal Effect of a Presumption.** The whole situation is complicated, quite apart from any ambiguity of terms, by the operation of presumptions upon specific fragments of the issue under a single pleading, in combination with the established practice of leaving to the jury for a general verdict the whole of the issues under a pleading. For example, suppose that the whole of the plaintiff's case and the whole proposition as to which he has the burden of proof in the first sense and the whole of the issue under the pleadings is that A is dead without heirs; suppose that the plaintiff has offered testimony that A has been for seven years absent from home and unheard from, and that there is also testimony in contradiction of these facts from the defendant and also testimony from both sides as to the existence of heirs. Here it is obvious that the case is not in the hands of the judge to order a verdict for the plaintiff, first, because the death of the plaintiff, assuming the presumption from absence to determine this, is not the only proposition essential to the plaintiff's case, and, secondly, because he cannot pass upon the truth of the plaintiff's contradicted testimony as to absence and therefore it cannot then be known whether the fact exists on which the presumption operates; and thus the case is still in appearance in the hands of the jury.

¹ Except that it comes first upon the proponent having the burden of proof in the former sense.

² The following opinion explains the distinction: 1884, Zollars, J., in *Carver v. Carver*, 97 Ind. 497, 510.

Nevertheless, the matter is still in the hands of the judge (in theory of law, at least) as much as it ever was ; that is to say, the presumption or rule of law still operates, so that the fact of absence for seven years unheard from is to be taken, by a rule of law independent of the jury's belief, as equivalent to death, in the absence of any explanatory facts to the contrary from the defendant. This rule of law is still applied, notwithstanding the additional elements in the case ; for the judge will instruct the jury that if they find the fact of absence for seven years unheard from, and find no explanatory facts to account for it, then by a rule of law they are to take for true the fact of death, and are to reckon upon it accordingly in making up their verdict upon the whole issue. The situation here is even simpler than it is in perhaps the majority of issues in litigation ; so that the theoretical effect of presumptions as legal rulings affecting the duty of producing evidence tends to be lost sight of, in that the issue does go to the jury and the case of the opponent of the presumption is apparently not brought to an end by a ruling of the judge. Nevertheless, in theory this legal effect is merely postponed, and will have due place if the jury understands the instructions and does its duty.¹

§ 2491. **Same : Presumptions of Law and of Fact.** The distinction between presumptions "of law" and presumptions "of fact" is in truth the difference between things that are in reality presumptions (in the sense explained above) and things that are not presumptions at all. A presumption, as already noticed, is in its characteristic feature a rule of law laid down by the judge, and attaching to one evidentiary fact certain consequences as to the duty of production of other evidence by the opponent. It is based, in policy, upon the probative strength, as a matter of reasoning and inference, of the evidentiary fact ; but the presumption is not the fact itself, nor the inference itself, but the legal consequence attached to it. But, the legal consequence being removed, the inference, as a matter of reasoning, may still remain ; and a "presumption of fact," in the usual sense, is merely an improper term for the rational potency, or probative value, of the evidentiary fact, regarded as not having this necessary legal consequence. "They are, in truth, but mere arguments," and "depend upon their own natural force and efficacy in generating belief or conviction in the mind."¹ They have no significance so far as affects the duty of one or the other party to produce evidence, because there is no rule of law attached to them, and the jury may give to them whatever force or weight it thinks best, — just as it may to other evi-

¹ 1903, Walker, J., in *Cogdell v. R. Co.*, 132 N. C. 852, 44 S. E. 618 : "The Court was requested to charge that there was a presumption that the deceased had exercised care, which the Court refused to give, but charged the jury that there was an inference that due care was exercised. The presumption has a technical force or weight, and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption ; but, in the case of a mere inference, there is no technical force at-

tached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence, and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

¹ Greenleaf, Evidence, § 44.

dence. There may be a preliminary question whether the evidence is relevant and admissible as having any probative value at all; but, once it is admitted, the probative strength of the evidence is for the jury to consider. So long as the law attaches no legal consequences in the way of a duty upon the opponent to come forward with contrary evidence, there is no propriety in applying the term "presumption" to such facts, however great their probative significance. The employment here of the term "presumption" is due simply to historical usage, by which "presumption" was originally a term equivalent, in one sense, to "inference";² and the distinction between presumptions of fact and of law was a mere borrowing of misapplied Continental terms.³ There is in truth but one kind of presumption; and the term "presumption of fact" should be discarded as useless and confusing.

Nevertheless, it must be kept in mind that the peculiar effect of a presumption "of law" (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion *in the absence of evidence to the contrary* from the opponent. If the opponent does offer evidence to the contrary (sufficient to satisfy the judge's requirement of some evidence), the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule:

1771, *R. v. Almon*, 5 Burr. 2686, 2688 (purchase of a libel imprinted with the defendant's name and bought in his shop); Lord Mansfield: "This being *prima facie* evidence of a publication by the master himself, it stands good till answered by him; and if not answered at all, it thereby becomes conclusive so far as to be sufficient to convict him. . . . [It] must stand *till* contradicted or explained or exculpated by some other evidence, and if not contradicted, explained, or exculpated, would be in point of evidence sufficient or tantamount to conclusive. . . . If it be sufficient in point of law, and the juryman believes it [*i. e.* the fact of purchase], he is bound in conscience to give his verdict according to it"; Mr. Justice Aston "laid down the same maxim as being fully and clearly established, 'that *prima facie* evidence (if believed) is binding *till* contrary evidence be produced.'"⁴

It is therefore a fallacy to attribute (as do some judges) an artificial probative force to a presumption, increasing for the jury the weight of the facts, even when the opponent has come forward with some evidence to the contrary.⁵ For example, if death be the issue, and the fact of absence for seven years unheard from be conceded, but the opponent offers evidence that the absentee, before leaving, proclaimed his intention of staying away for ten years, until a prosecution for crime was barred, this satisfies the opponent's duty of pro-

² *Ante*, §§ 25, 38; compare the passage from Coke, cited *ante*, § 2487, n. 4; so Abbott, C. J., as late as 1820, in *R. v. Burdett*, 4 B. & Ald. 161: "A presumption of any fact is properly an inferring of that fact from other facts that are known; it is an act of reasoning." Compare Professor Thayer's account (p. 317 ff.) of the progress in various instances from the mere suggestion of such inferences to the creation of rules of law attached to them. The following case shows the word in the correct sense: 1810, *Davis v. Curry*, 2 Bibb 238, 239 ("Two questions are presented by this case; first, whether color and possession afford such a presumption of slavery

as to throw the burthen of proof upon the person claiming right to freedom").

³ See Thayer, *ubi supra*, p. 343.

⁴ 1846, *Smith v. Asbell*, 2 Strobh. 141, 147 ("Presumptions . . . are artificial rules which have a legal effect independent of any belief, and stand in the place of proof *until the contrary be shown*").

⁵ 1899, *Sturdevant's Appeal*, 71 Conn. 392, 42 Atl. 70 (where such language to the jury is justified as necessary to explain the case to a jury); 1900, *Johnson v. Johnson*, 187 Ill. 86, 58 N. E. 237.

ducing evidence, removing the rule of law; and when the case goes to the jury, they are at liberty to give any probative force they think fit to the fact of absence for seven years unheard from. It is not weighed down with any artificial additional probative effect; they may estimate it for just such intrinsic effect as it seems to have under all the circumstances.⁶ This much is a plain consequence in our mode of jury trial; and the fallacy has arisen through attempting to follow the ancient Continental phraseology, which grew up under the quantitative system of evidence (*ante*, § 2032) fixing artificial rules for the judge's measurement of proof.

§ 2492. **Same: Conclusive Presumptions.** In strictness, there cannot be such a thing as a "conclusive presumption." Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case;¹ and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions or varying the duty of coming forward with evidence.² The term has no place in the principles of evidence (although the history of a "conclusive presumption" often includes a genuine presumption as its earlier stage³), and should be discarded.

§ 2493. **Same: Conflicting Presumptions; Counter-Presumptions.** Presumptions are sometimes spoken of as "*conflicting*." But, in the sense above examined, presumptions do not conflict. The evidentiary facts, free from any rule of law as to the duty of producing evidence, may tend to opposite inferences, which may be said to conflict. But the rule of law which prescribes this duty of production either is or is not at a given time

⁶ 1901, Sharpe, J., in *Alabama G. S. R. Co. v. Taylor*, 129 Ala. 238, 29 So. 673 (repudiating an instruction that the jury must find negligence if the fire was set by the defendant's locomotive: "In actions of this kind the communication of fire to the property of another by an engine of a defendant railroad company is, when nothing appears to the contrary, presumed to have been the result of negligence on the part of the defendant. The presumption so arising is not a conclusive one, so as to preclude the defendant to rebut it; *nor does it take the place of actual evidence of negligence further than to cast upon the defendant the burden of showing by evidence that at the time of the occurrence it was in the exercise of ordinary care in respect to the construction, equipment, and management of the engine. When, by proof, it has so repelled the presumption, the burden shifts to the plaintiff, who must go forward anew with actual evidence to disprove that of the defendant, either directly or inferentially, by showing that a carefully constructed, equipped, and managed engine would not have set fire to the property. When there is no evidence of negligence other than that supplied by the presumption referred to,*

and the presumption has been, to its full extent, repelled by undiscredited evidence, the jury should find for the defendant, if they believe the evidence, and the Court should so charge, if requested in writing to do so"); 1878, Baker, J., in *Graves v. Colwell*, 90 Ill. 612, 616 ("[When contrary evidence has been introduced and the conflicting evidence is being weighed by the jury], in this latter process the presumption of law loses all that it had of mere arbitrary power, and must necessarily be regarded only from the standpoint of logic and reason, and valued and given effect only as it has evidential character").

¹ 1870, Willard, A. J., in *State v. Platt*, 2 S. C. 150, 154 ("Where several independent acts are required to be performed in order to accomplish a given result, to say that proof of the performance of one of them shall be admitted as conclusive proof of the performance of the other, is to say in effect that one alone is really requisite").

² The various uses of the term have been examined in detail *ante*, §§ 1345-1354 (conclusive testimonial preferences).

³ *Post*, § 2522.

upon a given party. If it is, and he removes it by producing contrary evidence, then that presumption, as a rule of law, is satisfied and disappears; he may then by his evidence succeed in creating another presumption which now puts the same duty upon the other party, who may in turn be able to dispose of it satisfactorily. But the same duty cannot at the same time exist for both parties, and thus in strictness the presumptions raising the duty cannot conflict. There may be successive shiftings of the duty, by means of presumptions successively invoked by each; but it is not the one presumption that overturns the other, for the mere introduction of sufficient evidence would have the same effect in stopping the operation of the presumption as a rule of law. This shifting of the duty of production of evidence, by reason of the successive invocation of different presumptions, may create a complicated situation difficult to work out; but it can more properly be spoken of as a case of successive presumptions than of conflicting presumptions; and the ultimate key to the situation is very often found by ascertaining the incidence of the burden of proof in the other sense, *i. e.* the ultimate risk of non-persuasion.¹

A *counter-presumption* is merely that presumption which is available for the opponent when he has not only fulfilled the duty of producing evidence against a presumption, but has gone further and evidenced additional facts which create a new presumption in his favor, and thus restored to the original proponent the duty of producing evidence. This situation is of rare occurrence.²

§ 2494. **Same: Prima Facie Evidence; Sufficient Evidence for the Jury; Scintilla of Evidence.** The term "*prima facie* evidence" or "*prima facie* case" is used in two senses, and it is often difficult to detect which of these is intended in the passage in hand. (1) In discussing presumptions, the term "*prima facie*" is sometimes used as *equivalent to the notion of a presumption*, even in the strict sense of a ruling of the judge putting upon the opponent the duty of producing evidence.¹ In other words, the term is thus applied to the stage of the case already noted in a preceding section (*ante*, § 2487) as (*c'*) and (*c''*), namely, where the proponent, having the burden of proving the issue (*i. e.* the risk of non-persuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself

¹ Compare the presumption of innocence (*post*, § 2511) and the presumption of marriage (*post*, §§ 2505, 2506), which furnish the chief field for "conflicting" presumptions. Some good instances of these situations are worked out by Professor Thayer, *ubi supra*, pp. 343-350.

² Compare the example cited *ante*, § 2487, note 8.

¹ *E. g.*: 1883, Bowen, L. J., in *Abrath v. R. Co.*, L. R. 11 Q. B. D. 440, 455, 32 W. R. 50, 53 ("If he [the plaintiff] makes a *prima facie* case, and nothing is done by the other side to answer it, the defendant fails"); 1810, Mans-

field, C. J., in *Banbury Peerage Case*, 1 Sim. & St. 153 ("In every case in which there is *prima facie* evidence of any right existing in any person, the *onus probandi* is always upon the person or party calling such right in question"); 1849, Best, Evidence, § 273 ("The burden of proof is shifted . . . by every species of evidence strong enough to establish a *prima facie* case against a party"); 1895, *State v. Sattley*, 131 Mo. 464, 33 S. W. 41 ("the *prima facie* case is sufficient and conclusive, unless rebutted by the other evidence in the case").

to a ruling that the opponent should fail if he does nothing more in the way of producing evidence. Though this usage for the term is less usual, and being ambiguous, is objectionable, yet it serves to subsume under one name the similar legal effects (*c'*) and (*c''*) produced by a specific presumption or by a ruling on the mass of evidence in the particular case.

(2) But the phrase "*prima facie*" is also, and clearly enough, found used in a very different sense, representing the stage already noted (*ante*, § 2487) as (*a*), namely, where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury be allowed to consider his case. This sufficiency of evidence to go to the jury (the significance of which is that the proponent is no longer liable to a nonsuit or to the direction of the verdict for the opponent) is also often referred to as a *prima facie* case.² In this sense the phrase is used to emphasize the insufficiency of evidence which is indeed admissible, so far as the various rules of evidence might have excluded it, but yet, being all the evidence offered by the proponent, is not enough in quantity to be worth submitting to the jury.³ The difference between the two senses of the term is practically of the greatest consequence; for, in the latter sense, it means merely that the proponent is safe in having relieved himself of his duty of going forward, while in the former sense it signifies that he has further succeeded in creating it anew for his opponent.⁴ Some of the chief occasions of its use, and therefore of an unfortunate obscurity in the significance of the rulings, are in the proof of execution of attested documents,⁵ or of the identity of the person signing them,⁶ or of the authentication of ancient writings,⁷ where it is often difficult to determine whether the effect of the ruling is merely that the document may be read or amounts to directing the jury to take it for genuine.⁸

² For example: 1832, Story, J., in *Crane v. Morris*, 6 Pet. 598, 621 (referring to evidence of a deed: "Whenever evidence is offered to the jury which is in its nature *prima facie* proof, . . . whatever just influence it may derive from that character, the jury have a right to give it; . . . the law has submitted it to them to decide for themselves"). In the following Irish case, the obscurity of the legal phrase was brought out by a question from an intelligent juror: 1848, R. v. O'Doherty, 6 State Tr. N. S. 831, 873 (Pennefather, B., charging the jury, in a prosecution for publishing an article with seditious intent: "The publishing them is certainly *prima facie* evidence against him, as being the registered proprietor [of the newspaper]"; a juror: "There is a difference of opinion among the jurors; some hold that, from your lordship stating there being *prima facie* evidence of the prisoner's guilt, we should at once go to find him guilty; others receiving the phrase thus, that your lordship did not mean to convey that it was sufficient [to require that finding]"; Pennefather, B.: "I did not mean, gentlemen, to direct you or tell you that in point of law, because he was the publisher and proprietor of the paper, he therefore necessarily knew the con-

tents. I did not mean to convey that. But I told you that it was evidence that he did know the contents, and that you were to form your judgment upon the whole of the case, reading the documents and the evidence").

³ As in *Benoit v. R. Co.*, 154 N. Y. 223, 48 N. E. 524 (1897), where it was ruled, the plaintiff having to show the defendant's *scienter* of a horse's unmanageable disposition, that a single instance of its having run away, though admissible evidence, was not sufficient evidence to go to the jury.

⁴ The following opinion notices the distinction: 1876, Cushing, C. J., in *King v. Hopkins*, 57 N. H. 334, 359.

⁵ *Post*, § 2520.

⁶ *Post*, § 2529.

⁷ *Post*, § 2521.

⁸ The following case has been greatly responsible for the confusion of usage; its language is of no service nowadays: 1820, R. v. Burdett, 3 B. & Ald. 717-758 (arguments of counsel); 4 id. 95-183 (opinions of the judges); Best and Holroyd, JJ., use the term "presumptive evidence" as equivalent to "circumstantial evidence," and their ruling is merely that there was sufficient of it to go to the jury; Bayley, J., held that

The question is thus presented, in determining this sufficiency of evidence to go to the jury, whether there are any detailed *tests to control or to guide the judge* in his ruling. The ruling will, in truth, depend entirely on the nature of the evidence offered in the case in hand; and it is seldom possible that a ruling can serve as a precedent. It has been ruled, for instance, that to show a *scienter* of a horse's unmanageable disposition, a single instance of its having run away is, though admissible, not sufficient evidence for the jury;⁹ mere identity of name has been thought both sufficient and insufficient evidence of identity of person;¹⁰ but even these can hardly be taken as fixed precedents. There is no virtue in any form of words. There was an old phrase that a "mere scintilla of evidence" was sufficient;¹¹ but this has been abandoned by most Courts.¹² Other varieties of phrasing have sometimes been attempted.¹³ In some Courts it is said that the test for the ruling is the same as it would be on a motion after verdict to set aside the verdict as being against the overwhelming weight of evidence.¹⁴ Even if this were so,

"in order to warrant a presumption, a *prima facie* case must at least be made out," meaning the same as above, but on the facts he thought that there was not here sufficient evidence, adding "if they did draw that presumption, they acted, not upon justifiable inference, but upon unwarrantable conjecture"; Abbott, C. J., used the same meanings; "a presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; . . . if the [jury's] conclusion is a reasonable inference from the premises, we ought not to disturb their verdict").

⁹ 1897, *Benoit v. R. Co.*, 154 N. Y. 223, 48 N. E. 524. So also: 1899, *Creamer v. McIlvain*, 89 Md. 343, 43 Atl. 935 (like *Benoit v. R. Co.*); 1899, *Weigand v. Refining Co.*, 189 Pa. 248, 42 Atl. 132 (one former kick by a mule, not sufficient evidence of viciousness, on the facts).

¹⁰ *Post*, § 2529.

¹¹ The phrase is mentioned, to be repudiated, in the 1800s: 1857, *Toomey v. R. Co.*, 3 C. B. n. s. 146, 150; 1857, *Wheelton v. Hardisty*, 8 E. & B. 232, 262, 277; 1868, *Ryder v. Wombwell*, L. R. 4 Exch. 32; but it is difficult to find any prior time when it was ever a recognized test in England.

¹² 1893, *James v. Crockett*, 34 N. Br. 540, 548; 1887, *Bartelott v. International Bank*, 119 Ill. 259, 269, 9 N. E. 898; 1898, *Offutt v. Expos. Co.*, 175 id. 472, 51 N. E. 650 (scintilla rule disapproved; evidence "tending to prove" suffices; *Bartelott* case approved); 1899, *Laidlaw v. Sage*, 158 N. Y. 73, 52 N. E. 679; 1900, *Schoepflin v. Coffey*, 162 id. 12, 56 N. E. 502; 1901, *Cogdell v. R. Co.*, 129 N. C. 398, 40 S. E. 202; 1873, *Philadelphia & R. R. Co. v. Yeager*, 73 Pa. 121, 124; 1876, *Commissioners of Marion Co. v. Clark*, 94 U. S. 278, 284; 1897, *Taft, J.*, in *Ewing v. Goode*, 78 Fed. 442 ("The preliminary question for the Court to settle in this case, therefore, is whether there is any evidence sufficient in law to sustain a verdict that defendant was unskillful or negligent, and that his want of skill or care caused injury. In the

Courts of this and other States the rule is that if the party having the burden of proof offer a mere scintilla of evidence to support each necessary element of his case, however overwhelming the evidence to the contrary, the Court must submit the issue thus made to the jury, with the power to set aside the verdict, if found against the weight of the evidence. In the Federal Courts this is not the rule. According to their practice, if the party having the burden submits only a scintilla of evidence to sustain it, the Court, instead of going through the useless form of submitting the issue to the jury, and correcting error, if made, by setting aside the verdict, may in the first instance direct the jury to return a verdict for the defendant. Hence our inquiry is: Does the case now submitted show more than a scintilla of evidence tending to show want of skill or care by defendant, or injury caused thereby?"); 1903, *New York C. & H. R. R. Co. v. Difendaffer*, — C. C. A. —, 125 Fed. 893 (*Marion County v. Clark* followed). There is a collection of authorities for various jurisdictions in *Thompson on Trials*, §§ 2246 ff. The opinion of Brannon, J., in *Ketterman v. R. Co.*, 48 W. Va. 606, 37 S. E. 683 (1900) is a valuable one.

¹³ 1893, *Catlett v. R. Co.*, 57 Ark. 461, 468, 21 S. W. 1062 ("evidence legally sufficient to warrant a verdict"); 1893, *Ohio & M. R. Co. v. Dunn*, 138 Ind. 18, 27, 36 N. E. 702, 37 N. E. 546 ("evidence from which when undisputed" a finding would be justified); 1897, *State v. Couper*, 32 Or. 212, 49 Pac. 959 (either "no competent evidence at all bearing upon the subject," or "so weak that a verdict against the defendant would necessarily be attributable to passion, prejudice, or partiality"); 1898, *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059 (must be more than to raise "a mere surmise or suspicion"); 1900, *Ketterman v. R. Co.*, 48 W. Va. 606, 37 S. E. 683.

¹⁴ 1874, *Brett, J.*, in *Bridges v. R. Co.*, L. R. 7 H. L. 213; 1894, *Fornes v. Wright*, 91 Ia. 392, 59 N. W. 51; 1893, *Market & F. N.*

it would not afford any more concrete and tangible guide. But it seems unsound,¹⁵ on principle, to assert such an identity, for two reasons, — in the first place, because the mass of evidence in the two situations is very different (for after verdict the defendant's evidence has to be considered with the rest), and in the next place, because the setting aside of a verdict leads merely to a new trial, while the ruling of insufficiency leads usually to the direction of a verdict for the opponent (*post*, § 2495), and therefore a total quantity of the proponent's evidence which would justify the former might be more than would justify the latter.¹⁶ Perhaps the best statement of the question is this: "[The proposition] cannot merely be, Is there evidence? . . . The proposition seems to me to be this: Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?"¹⁷

§ 2495. **Same: Direction of a Verdict, Motion for a Nonsuit, and Demurrer to Evidence.** It remains to ask what shall be the form and effect of this ruling of the judge that the proponent's evidence is insufficient to go to the jury? It is commonly said that he "ought to withdraw the question from the jury, and direct a nonsuit or a verdict for the defendant if the onus is on the plaintiff, or direct a verdict for the plaintiff if the onus is on the defendant,"¹ *i. e.* decide against the proponent having the risk of non-persuasion on that particular issue, whether he be plaintiff or defendant. There are, however, three distinct forms of ruling, which raise different questions.

1. The *nonsuit*, which has several other applications, may be employed for the present purpose. Its marked feature is that it does not lead to a judgment against the proponent, and (in England) that the proponent's consent is necessary. But the local rules for nonsuit have been so widely varied by modern statutes and practice that generalizations are hardly possible as to its service for the present purpose.²

Bank v. Sargent, 85 Me. 349, 351, 27 Atl. 192; 1893, *Haines v. Trust Co.*, 56 N. J. L. 312, 314, 28 Atl. 796; 1893, *Holland v. Kindregan*, 155 Pa. 156, 160, 25 Atl. 1077 (scintilla rule; but treated as equivalent to the Federal rule); 1893, *Evans v. Chamberlain*, 40 S. C. 104, 106, 18 S. E. 213 ("any pertinent evidence"); 1887, *Northern Pa. R. Co. v. Bank*, 123 U. S. 727, 733, 8 Sup. 266; 1893, *Elliott v. R. Co.*, 150 id. 245, 246, 14 Sup. 85; 1892, *Monroe v. Ins. Co.*, 3 C. C. A. 280, 52 Fed. 777; 1893, *Colorado C. C. M. Co. v. Turck*, 4 id. 313, 54 Fed. 262; 1894, *Laclede F. B. M. Co. v. Hartford Co.*, 9 id. 1, 60 Fed. 351 (not merely if "some evidence"); 1896, *Mount Adams & E. P. I. R. Co. v. Lowery*, 20 id. 596, 74 Fed. 463 (containing a full survey of cases).

¹⁵ *Accord*: 1899, *Serles v. Serles*, 35 Or. 289, 57 Pac. 634 (citing cases); 1897, *Wright v. Express Co.*, 80 Fed. 85. See a useful article in the *Western Reserve Law Journal* for October, 1898.

¹⁶ 1862, *Chapman, J.*, in *Denny v. Williams*, 5 All. 1, 5; 1871, *Brooks v. Somerville*, 106 Mass. 271, 275 (approving *Denny v. Williams*).

¹⁷ 1874, *Brett, J.*, in *Bridges v. R. Co.*, L. R. 7 H. L. 218.

Other examples of rulings are as follows: 1906, *Granby v. Ménard*, 31 Can. Sup. 14; 1895, *Howard v. State*, 108 Ala. 571, 18 So. 813; 1891, *Ambler v. Whipple*, 139 Ill. 311, 322, 28 N. E. 841; 1902, *Kansas C. F. S. & M. R. Co. v. Perry*, 65 Kan. 792, 70 Pac. 870; 1897, *Fitzgerald v. R. Co.*, 154 N. Y. 263, 48 N. E. 514; 1897, *State v. Satterfield*, 121 N. C. 558, 28 S. E. 491.

Distinguish here the questions whether the evidence is sufficient under the present rule and whether it is sufficient under the rule of *conditional relevancy* (*ante*, § 1871); on this point, compare *Reed v. Clark*, 47 Cal. 194, 200 (1873).

¹ 1878, *Lord Blackburn*, in *Dublin*, etc. R. Co. v. *Slaterry*, L. R. 3 App. Cas. 1155.

² The following opinions are useful for the orthodox theory: 1853, *Willard, J.*, in *People v. Cook*, 8 N. Y. 67, 74; 1892, *Magruder, C. J.*, in *Joliet A. & N. R. Co. v. Velie*, 140 Ill. 59, 29 N. E. 706. The following cases illustrate some of the considerations that may enter:

2. The *direction of a verdict* is the appropriate and most usual form of the ruling.³ Two main questions here arise: (a) Is there any reason why an order directing a verdict for insufficiency of evidence may not be made *in favor of the opponent* (i. e. usually, the defendant)? (b) Is there any reason against making it *in favor of the proponent* (i. e. usually, the plaintiff)?

(a) It is almost universally conceded that the direction of a verdict *for the opponent* is in general a proper form of ruling. That much, and no less, is the very thing that is signified by this part of the judge's function in the trial.⁴ In making the decision, however, the truth of the proponent's testimony must be assumed;⁵ for only the jury could have the right to decide to the contrary upon that material. Moreover, the sufficiency of evidence which will defeat such a motion may be found in the opponent's own evidence (which he himself cannot gainsay),⁶ just as the insufficiency of facts which will justify such a direction may be found in the opponent's evidence, provided it is undisputed.⁷

(b) That a verdict may also be directed *for the proponent* is accepted by the majority of Courts, though it is more plausibly open to dispute.⁸ The usual situation is that of a plaintiff who has produced a mass of evidence sufficient to throw upon the defendant the liability of producing some evidence to the contrary, and if this duty is not sustained, it is the judge's function to make the decision (*ante*, § 2487). The only objection here can be that the judge must not reach his decision by assuming the plaintiff's testimony to be true (because that is the jury's province); yet where the testimony is undisputed, or where in some other way that assumption is unnecessary, this objection disappears. A less common situation is that of a defendant having an affirmative plea (for example, payment of a note, or contributory negligence in personal injury); but here also a verdict may be ordered for the defendant, provided the result can be reached upon undisputed testimony of the defendant, or upon testimony of the plaintiff, which

1898, *Williams v. R. Co.*, 155 N. Y. 158, 49 N. E. 672 (where the testimony at a second trial was so different that it appeared to be manufactured to suit the decision in the former appeal, a non-suit was held improper); 1898, *Foskett & B. Co. v. Swayne*, 70 Conn. 74, 38 Atl. 893 (applied to a cause tried by a judge without a jury).

³ This has an equivalent, in some of the Southern States and elsewhere, in a *motion to exclude all of the evidence*, — an anomalous and misleading term.

⁴ The leading case is usually regarded to be *Commissioners of Marion Co. v. Clark*, 94 U. S. 278, 284 (1876; opinion by Clifford, J.).

The contrary rule in a few States is based on some misapprehension of the jury's function; e. g.: 1868, *Littlejohn v. Fowler*, 8 Coldw. Tenn. 284, 288; 1898, *Gannon v. Gaslight Co.*, 145 Mo. 502, 46 S. W. 968; 1903, *Dalton v. Poplar Bluff*, 173 id. 39, 72 S. W. 1068. This fallacy is dealt with in the following opinions: 1896, *Norris v. Clinkscapes*, 47 S. C. 448, 25

S. E. 797; 1900, *Ketterman v. R. Co.*, 48 W. Va. 606, 37 S. E. 683.

⁵ 1885, *Meadows v. Ins. Co.*, 67 Ia. 57, 24 N. W. 591.

⁶ 1898, *Gagnon v. Dana*, 69 N. H. 264, 39 Atl. 982.

⁷ 1900, *Lonzer v. R. Co.*, 196 Pa. 610, 46 Atl. 937.

⁸ 1899, *Brown v. Drake*, 109 Ga. 179, 34 S. E. 309; 1900, *Marshall v. J. Grosse C. Co.*, 184 Ill. 421, 56 N. E. 807; 1853, *People v. Cook*, 8 N. Y. 67, 74; 1890, *Delaware L. & W. R. Co. v. Converse*, 139 U. S. 469, 472, 11 Sup. 569; 1894, *Union P. R. Co. v. McDonald*, 152 id. 262, 284, 14 Sup. 619; 1903, *Leach v. Burr*, 188 id. 510, 23 Sup. 393 ("the power of a Court to direct a verdict for one party or the other is undoubted"). *Contra*: 1897, *Anniston National Bank v. Committee*, 121 N. C. 109, 28 S. E. 134; 1897, *Eller v. Church*, ib. 269, 28 S. E. 364. Perhaps *Neal v. R. Co.*, N. C., *infra*, displaces these.

the latter must concede to be true.⁹ It is maintained by most Courts that in a *criminal case* there can be no direction of a verdict for the prosecution;¹⁰ and this conclusion is supposed (but erroneously) to follow from the rule of persuasion beyond a reasonable doubt (*post*, § 2497).

3. The *demurrer to evidence* is a form of raising an objection of law, which has a history of its own in its original use.¹¹ But the term and the form came to be used, in some American jurisdictions, as the practical equivalent for the foregoing process,—the motion to direct a verdict for insufficiency of evidence. The chief effect of this has been to introduce a certain confusion into the rulings which deal with the subject of waiver, now to be noticed.

§ 2496. **Same: Waiver of Motion by Subsequent Introduction of Evidence.** When an opponent, at the close of the proponent's case in chief, has made a motion asking in effect for the direction of a verdict, how is the opponent's situation affected by his subsequent conduct, with respect to a *waiver* of the motion? (1) In the first place, the opponent cannot claim a ruling by the judge, as a matter of right, if he makes the motion at the close of the proponent's case in chief *without then resting his own case*. At that point, he is only invoking the Court's discretion; not until the entire evidence is closed may he demand a ruling as of right.¹ (2) In the next place, it follows that the opponent *waives no right by going on to put in his own evidence* after the judge's refusal to rule against the proponent for insufficiency of evidence at the close of the proponent's case in chief. The opponent *may* therefore *renew the motion* at the close of the whole case on both sides, and is entitled to the benefit of the ruling, if in his favor at that time.² (3) Conversely, however, he cannot take advantage of the judge's *original erroneous refusal* to direct a verdict for insufficiency at the time of the first motion, if he does *not renew* the motion at the close of all the evidence, or if at the time of the

⁹ 1900, *Neal v. R. Co.*, 126 N. C. 634, 36 S. E. 117 (contributory negligence; Douglas and Clark, JJ., diss.); this case therefore qualifies the following ruling: 1898, *Cable v. R. Co.*, 122 id. 892, 900, 29 S. E. 377 (contributory negligence). The following cases illustrate the distinction: 1900, *Haven v. Mo. R. Co.*, 155 Mo. 216, 55 S. W. 1035 (case of contributory negligence not taken from the jury where plaintiff and another witness testified to facts which if true sustained her case); 1896, *American Exchange Bank v. N. Y. B. & P. Co.*, 148 N. Y. 693, 43 N. E. 168 (where the person having the burden proves his facts by a cross-examination of the opponent's witness, the judge may direct the issue to be found for the former, because the only question that can arise is that of the credibility of the witness, and the opponent cannot dispute that).

¹⁰ 1899, *People v. Warren*, 122 Mich. 504, 81 N. W. 360 (collecting cases); 1895, *Sparf v. U. S.*, 156 U. S. 51, 177, 15 Sup. 273. *Contra*: 1873, *Com. v. Magee*, Pa., 12 Cox Cr. 549. Compare the following: 1897, *Agnew v. U. S.*, 165 U. S. 36, 50, 17 Sup. 35 ("In criminal

cases, the burden of establishing guilt rests on the prosecution from the beginning to the end of the trial. But when a *prima facie* case has been made out, as conviction follows unless it be rebutted, the necessity of adducing evidence then devolves on the accused"); 1902, *McKnight v. U. S.*, 54 C. C. A. 358, 115 Fed. 972; 1902, *U. S. v. German*, 115 Fed. 987; and the cases cited *post*, §§ 2501, 2512-2514.

¹¹ 1793, *Gibson v. Hunter*, 2 H. Bl. 187; 1873, *Trout v. R. Co.*, 23 Gratt. 619; Thayer, *Preliminary Treatise*, 234.

¹ 1892, *Columbia & P. S. R. Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. 591.

² 1889, *Weber v. Kansas City C. R. Co.*, 100 Mo. 194, 12 S. W. 804, 13 S. W. 587.

In a few States this right of the opponent to proceed to introduce his own evidence, after the motion refused, was formerly denied, probably on the analogy of a demurrer to evidence; but this has usually been changed by statute; *e. g.*, *Barabasz v. Kabat*, Md., *infra*; 1896, *State v. Groves*, 119 N. C. 822, 824, 25 S. E. 819; 1898, *Purnell v. R. Co.*, 122 id. 832, 835, 29 S. E. 953; compare N. C. St. 1899, c. 131.

final motion the ruling *correctly refuses* to order a verdict for insufficiency;³ the Court is at that time entitled to decide upon a survey of the whole evidence; and this survey naturally renders any prior error immaterial. This is sometimes put upon the ground of waiver; but it is rather a necessary consequence of the discretionary nature and limited scope of the first ruling.

§ 2497. **Measure of Persuasion:** (1) **Proof beyond a Reasonable Doubt; Rule for Criminal Cases.** After the tribunal having the function of deciding upon facts, *i. e.* the jury, has retired to reach and frame its decision, a question arises as to the nature or degree of its persuasion. Here, it is to be noticed, we are no longer concerned with the incidence of the duty or burden of proof as between the parties to the cause, but merely with the tribunal's own duty and conduct as to its *standard of persuasion*.

Now the logical notion involved in the situation is that the tribunal must be persuaded to believe the affirmation of the burden-bearer before it can be asked to act as desired, but that this persuasion or conviction in the mind of the tribunal may have more than one degree or quality of positiveness; and an attempt is made by the law to define the degree of positiveness of persuasion which must exist in order to justify action in the shape of a verdict for the burden-bearer. The attempt to define these qualities of persuasion has great difficulties; and many useless refinements and wordy quibbles have marked the countless and more or less unsuccessful attempts.

In *criminal cases* a rule has grown up that the persuasion must be *beyond a reasonable doubt*.¹ This precise distinction seems to have had its origin no earlier than the end of the 1700s, and to have been applied at first only in capital cases, and by no means in a fixed phrase, but in various tentative forms. "A clear impression," "upon clear grounds," "satisfied," are the earlier phrases; and then "rational doubt," "rational and well-grounded doubt," "beyond the probability of doubt," and "reasonable doubt" come into use. Then, in Mr. Starkie's classical treatise, "moral certainty, to the exclusion of all reasonable doubt," is given vogue.² From time to time, various ill-advised efforts have been made to define more in detail this elusive and undefinable state of mind. One that has received frequent sanction and has been quoted

³ 1892, *Joliet A. & N. R. Co. v. Velie*, 140 Ill. 59, 63, 26 N. E. 1086; 1893, *Ames & Frost Co. v. Strachurski*, 145 id. 192, 195, 34 N. E. 43; 1900, *Barabasz v. Kabat*, 91 Md. 53, 46 Atl. 337 (good opinion by Pearce, J.); 1901, *New York P. & N. R. Co. v. Jones*, 94 id. 24, 50 Atl. 422; 1889, *Weber v. Kansas City C. R. Co.*, Mo., *supra*; 1903, *Klockenbrink v. R. Co.*, 172 id. 678, 72 S. W. 900; 1902, *Sigua Iron Co. v. Brown*, 171 N. Y. 488, 64 N. E. 194; 1892, *Columbia & P. S. R. Co. v. Hawthorne*, U. S., *supra*; 1894, *Union Pacific R. Co. v. Daniels*, 152 id. 684, 687, 14 Sup. 756; 1902, *McCrea v. Parsons*, 50 C. C. A. 612, 112 Fed. 917; 1903, *Walton v. Wild Goose M. & T. Co.*, 60 C. C. A. 155, 123 Fed. 209. *Contra*: 1898, *Purnell v. R. Co.*, 122 N. C. 832, 29 S. E. 953

(construing a statute; the original error may be reviewed).

In Illinois, there is a local question whether the motion to direct a verdict must be *in writing*, under a statute requiring instructions to the jury to be in writing: 1893, *Ames & Frost Co. v. Strachurski*, *supra* (undecided); but it is plain that the two are different things.

¹ In Georgia alone, it seems, this test does not obtain: Ga. Code 1895, § 5145, Cr. C. § 987 (in criminal cases "a greater strength of mental conviction" than preponderance of testimony is necessary).

² For the historical data above summarized, see an article by Judge May of Boston, in the *American Law Review*, X, 642, 656, the author of the treatise on Criminal Law, and Thayer's *Preliminary Treatise*, pp. 551-558.

innumerable times is that of Chief Justice Shaw of Massachusetts, on the trial of Dr. Webster for the murder of Mr. Parkman: ³ "[Reasonable doubt] is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. . . . The evidence must establish the truth of the fact to a reasonable and moral certainty, — a certainty that convinces and directs the understanding, and satisfies the reason and judgment. . . . This we take to be proof beyond a reasonable doubt."

Many others, in varying forms, convey the same notion in more or less well-chosen words; and each Court has its stores of precedents of instructions approved and disapproved.⁴ Nevertheless, when anything more than a

³ 1850, *Com. v. Webster*, 5 Cush. 295, 320. Another is this: 1875, Gray, C. J., in *Com. v. Costley*, 118 Mass. 1; "Proof 'beyond a reasonable doubt' is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis, except that which it tends to support. It is proof to a 'moral certainty,' as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; each has been used by eminent judges to explain the other, and each signifies such proof as satisfies the judgment and consciences of the jury, as reasonable men, and applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible."

⁴ The following list represents almost all the jurisdictions; from Alabama is given the material of two or three years' rulings, merely to illustrate what a futile grist of profuse jargon is permitted by some Courts to be ground out annually in the name of truth and justice: 1895, *Jackson v. State*, 106 Ala. 12, 17 So. 333; *Thomas v. State*, ib. 19, 17 So. 460; *Bonner v. State*, 107 id. 97, 18 So. 226; *Howard v. State*, 108 id. 571, 18 So. 813; 1896, *Peazler v. State*, 110 id. 11, 20 So. 363; *Allen v. State*, 111 id. 80, 20 So. 490; *Barnes v. State*, ib. 56, 20 So. 565; *Crawford v. State*, 113 id. 661, 21 So. 214; 1897, *Mitchell v. State*, 114 id. 1, 22 So. 71; *Yarbrough v. State*, 115 id. 92, 22 So. 534; *Pickens v. State*, ib. 42, 22 So. 551; *Newell v. State*, ib. 54, 22 So. 572; *Koch v. State*, ib. 99, 22 So. 471; 1898, *Bryant v. State*, 116 id. 445, 23 So. 40; *Titus v. State*, 117 id. 16, 23 So. 77; *Bones v. State*, ib. 138, 23 So. 138; *Walker v. State*, ib. 42, 23 So. 149; *Burks v. State*, ib. 140, 23 So. 530; *Nicholson v. State*, ib. 32, 23 So. 792; *Dennis v. State*, 118 id. 72, 23 So. 1002; 1895, *Jones v. State*, 61 Ark. 88, 32 S. W. 81; 1896, *Lewis v. State*, 62 id. 494, 36 S. W. 689; 1897, *People v. White*, 116 Cal. 17, 47 Pac. 771; *People v. Ashmead*, 118 id. 508, 50 Pac. 681; *People v. Hubert*, 119 id. 216, 51 Pac. 329; 1896, *Boykin v. People*, 22 Colo. 496, 45 Pac. 419; 1898, *Gantling v. State*, 40 Fla. 237, 23 So. 857; 1896, *Hanye v. State*, 99 Ga. 212, 25 S. E.

307; 1896, *Burney v. State*, 100 id. 65, 25 S. E. 911; 1897, *Campbell v. State*, ib. 267, 28 S. E. 71; 1898, *Spalding v. People*, 172 Ill. 49, 49 N. E. 993; 1897, *Reynolds v. State*, 147 Ind. 3, 46 N. E. 31; 1897, *Hauk v. State*, 143 id. 238, 46 N. E. 127; 1898, *Shields v. State*, 149 id. 395, 49 N. E. 351; 1898, *McIntosh v. State*, 151 id. 251, 51 N. E. 354; 1897, *State v. Van Tassel*, 103 Ia. 6, 72 N. W. 497; 1897, *State v. Debolt*, 104 id. 105, 73 N. W. 499; 1898, *State v. Marshall*, 105 id. 38, 74 N. W. 763; 1899, *State v. Novak*, 109 id. 717, 79 N. W. 465; 1898, *Stevens v. Com.*, — Ky. —, 45 S. W. 76; 1898, *State v. Bazile*, 50 La. An. 21, 23 So. 8; 1898, *People v. Swartz*, 118 Mich. 292, 76 N. W. 491; 1896, *Webb v. State*, 73 Miss. 456, 19 So. 238; 1896, *Cherry v. State*, — id. —, 20 So. 837; 1897, *Powers v. State*, 74 id. 779, 21 So. 657; 1898, *Lipscomb v. State*, 75 id. 559, 23 So. 210; *Herman v. State*, ib. 340, 22 So. 872; 1896, *State v. Blue*, 136 Mo. 41, 37 S. W. 796; *State v. Goforth*, ib. 111, 37 S. W. 801; 1898, *State v. Duncan*, 142 id. 456, 44 S. W. 263; 1899, *State v. Garrison*, 147 id. 548, 49 S. W. 508; 1895, *State v. Gleim*, 17 Mont. 17, 41 Pac. 998; 1898, *State v. Clancy*, 20 id. 498, 52 Pac. 267; 1895, *Collins v. State*, 46 Nebr. 37, 64 N. W. 432; 1896, *Barney v. State*, 49 id. 515, 68 N. W. 636; 1897, *Davis v. State*, 51 id. 301, 70 N. W. 984; 1897, *Morgan v. State*, 51 id. 672, 71 N. W. 788; 1897, *Johnson v. State*, 53 id. 103, 73 N. W. 463; 1898, *Carrall v. State*, ib. 431, 73 N. W. 939; *Whitney v. State*, ib. 287, 73 N. W. 696; *Bartley v. State*, ib. 310, 73 N. W. 744; *Maxfield v. State*, 55 id. 44, 74 N. W. 401; 1898, *State v. Mandich*, 24 Nev. 336, 54 Pac. 516; 1896, *Terr. v. Lermo*, 8 N. M. 566, 46 Pac. 16; *Terr. v. Padilla*, ib. 510, 46 Pac. 346; 1897, *People v. Barker*, 153 N. Y. 111, 47 N. E. 31; 1896, *State v. Rogers*, 119 N. C. 793, 26 S. E. 142; 1903, *State v. Wilcox*, 132 id. 1120, 44 S. E. 625; 1898, *Patzwald v. U. S.*, 7 Okl. 232, 54 Pac. 458; 1897, *State v. Aughtry*, 49 S. C. 285, 26 S. E. 619; 1895, *Isaac v. U. S.*, 159 U. S. 487, 16 Sup. 51; 1897, *State v. Cushing*, 17 Wash. 544, 50 Pac. 512; 1896, *Emery v. State*, 92 Wis. 146, 65 N. W. 848; *Frank v. State*, 94 id. 211, 68 N. W. 657; 1897, *Hoffman v. State*, 97 id. 576,

simple caution and a brief definition is given, the matter tends to become one of mere words, and the actual effect upon the jury, instead of being enlightenment, is rather confusion, or, at the least, a continued incomprehension. In practice, these detailed amplifications of the doctrine have usually degenerated into a mere tool for counsel who desire to entrap an unwary judge into forgetfulness of some obscure precedent, or to save a cause for a new trial by quibbling, on appeal, over the verbal propriety of a form of words uttered or declined to be uttered by the judge. "No man can measure with a rule he does not understand; neither can juries determine by rules obscure in themselves and made yet more obscure by attempted definition."⁵ The effort to perpetuate and develop these unserviceable definitions is a useless one, and serves to-day chiefly to aid the purposes of the tactician. It should be wholly abandoned.⁶ Yet its defence has been attempted by an able judge:

1899, *Marshall, J.*, in *Buel v. State*, 104 Wis. 132, 80 N. W. 78: "Much discussion is found in the adjudged cases as to whether any attempt to explain it does not tend to confuse rather than to enlighten the jury. It is said that scholastic attempts to explain the meaning of such words, which are more easily understood than explained, are liable to lead such men as commonly make up our juries to think that the ordinary processes of reasoning, by which they are accustomed to come to conclusions in the ordinary affairs of life, are not suitable to the jury room in a criminal case, but that some other process of reasoning is to be adopted which they are to gather from the language of the trial judge, and that they are thereby really weakened in their ability to come to a just conclusion; that it would be better to leave them to exercise their own intelligence in regard to language so plain that it is not easy to make it plainer by explanation. Mr. Justice Newman said, in *Hoffman v. State*:⁷ 'It needs be a skillful definer who will make the meaning of the term ("beyond a reasonable doubt") more clear by the multiplication of words,' while the writer expressed the view, in *Emery v. State*,⁸ that the due administration of justice in many cases requires a careful explanation of the term to be given to the jury, and that without it justice is liable at times, through ignorance, to be defeated, and the efficacy of the law to protect society, and its administration by courts, discredited. In *State v. Sauer*,⁹ Mitchell, J., expressed the opinion that 'most attempts at explaining the meaning of a "reasonable doubt" are made by the use of expressions that themselves need explanation more than the term sought to be explained by them, and that the better way is to omit such attempts, but that if such attempts be indulged in it would be better to adopt those definitions that have received general approval by Courts.' In *People v. Stubenvoll*,¹⁰ Champlin, J., speaking for all the members of the Court, said: 'We do not think that the phrase "reasonable doubt" is of such unknown or uncommon signification that an exposition by the trial judge is called for. Language that is within the comprehension of persons of ordinary intelligence can seldom be made plainer by further defining or refining. All persons who possess the qualifications for jurors know that a doubt of the guilt of the accused, honestly entertained, is a reasonable doubt.' In Judge

73 N. W. 52; 1899, *Emery v. State*, 101 id. 627, 78 N. W. 145.

⁵ Judge May, in the article above cited, which contains some just remarks upon the doctrine.

⁶ The following is a model treatment of the subject: 1901, *Lenert v. State*, — Tex. Cr. —, 63 S. W. 563 ("The jury sent word to the Court . . . that they desired an additional charge upon the meaning of 'reasonable doubt.' . . . Thereupon the Court told the jury verbally 'that the two words "reasonable doubt" were words of common use, and the jury could under-

stand them as easily as the Court, and the Court had a reasonable doubt as to whether or not he could under the law charge them as to their meaning.' We see no error in this action of the trial Court calculated to injure the rights of the appellants").

⁷ 97 Wis. 576, 73 N. W. 52.

⁸ 101 Wis. 627, 78 N. W. 145.

⁹ 38 Minn. 438, 38 N. W. 355; this was one of the great judicial minds of the passing generation.

¹⁰ 62 Mich. 329, 28 N. W. 883.

Thompson's work on Trials,¹¹ it is said that 'all the definitions are little more than metaphysical paraphrases of an expression invented by the common-law judges for the very reason that it was capable of being understood and applied by men in the jury box.' Many more instances might be given where judges of appellate Courts and text writers have discouraged all attempts at explanation of what is a reasonable doubt, from the standpoint of a juror. Nevertheless the fact remains that trial judges, at least in important criminal trials, generally take great pains to explain the term so that the commonest understanding can grasp its meaning. The practice in that regard has grown up from frequent observations of the necessity of it. It is considered here that it is proper in all cases to make a careful explanation of the term, and that where the prosecution relies wholly on circumstantial evidence it is the better practice to do so, taking the utmost care, however, to use only expressions that have been approved, particularly by this Court."

It is generally and properly said that this measure of reasonable doubt need not be applied to the specific detailed facts, but only to the *whole issue*,¹² and herein is given opportunity for much vain argument whether the strands of a cable or the links of a chain furnish the better simile for testing the measure of persuasion.

§ 2498. **Same: Proof by Preponderance of Evidence; Rule for Civil Cases.** In *civil cases* it should be enough to say that the extreme caution and the unusual positiveness of persuasion required in criminal cases do not obtain. But it is customary to go further, and here also to attempt to define in words the quality of persuasion necessary. It is said to be that state of mind in which there is felt to be a "preponderance of evidence" in favor of the demandant's proposition. Here, too, moreover, this simple and suggestive phrase has not been allowed to suffice; and in many precedents sundry other phrases — "satisfied," "convinced," and the like — have been put forward as equivalents, and their propriety as a form of words discussed and sanctioned or disapproved, with much waste of judicial time.¹

But the chief topic of controversy has been whether in certain civil cases the measure of persuasion for *criminal cases* should be applied. Policy sug-

¹¹ II, § 2469.

¹² 1893, *Jamison v. People*, 145 Ill. 357, 380, 34 N. E. 486; 1896, *Keating v. People*, 160 id. 480, 43 N. E. 724; 1897, *Williams v. People*, 166 id. 132, 46 N. E. 749; 1899, *Kossakowski v. People*, 177 id. 53, 563 N. E. 115; 1902, *Henry v. People*, 198 id. 162, 65 N. E. 120; 1897, *Hinshaw v. State*, 147 Ind. 334, 47 N. E. 158; 1895, *State v. Gleim*, 17 Mont. 17, 41 Pac. 998; 1897, *Morgan v. State*, 51 Nebr. 672, 71 N. W. 788; 1903, *Horn v. State*, — Wyo. —, 73 Pac. 705 (good opinion by Potter, J.). *Contra*: 1899, *State v. Cohen*, 108 Ia. 208, 78 N. W. 857; 1902, *State v. Flemming*, 130 N. C. 688, 41 S. E. 549; 1900, *State v. Young*, 9 N. D. 165, 82 N. W. 420.

The general rule for reasonable doubt ought to apply equally to *misdemeanors*: 1894, *Vandeverter v. State*, 38 Nebr. 592, 595, 57 N. W. 397.

¹ 1896, *O'Connor M. & M. Co. v. Dickson*, 112 Ala. 304, 20 So. 413; 1896, *American Oak Extr. Co. v. Ryan*, ib. 337, 20 So. 644; 1897, *Alabama M. R. Co. v. Marcus*, 115 id. 389, 22

So. 135; 1897, *Louisville & N. R. Co. v. Hill*, ib. 334, 22 So. 163; 1898, *Morrow v. Campbell*, 118 id. 330, 24 So. 852 ("clear and convincing proof," not required); 1898, *Moore v. Heineke*, 119 id. 627, 24 So. 374; 1896, *Murphy v. Waterhouse*, 113 Cal. 467, 45 Pac. 866 ("convince the minds" of the jury, held improper); 1898, *Sams A. C. Co. v. League*, 25 Colo. 129, 54 Pac. 642; Ga. Code 1895, §§ 5144, 5145 (phrase defined); 1896, *Taylor v. Felsing*, 164 Ill. 331, 45 N. E. 161 (not a "clear preponderance"); 1896, *French v. Day*, 89 Me. 441, 36 Atl. 908 ("clear preponderance and convincing proof," held too strong, as understood by "the common mind"); 1898, *Sanborn v. Gerald*, 91 id. 366, 40 Atl. 67; 1898, *First National Bank of Omaha v. Goodman*, 55 Nebr. 409, 75 N. W. 846; 1896, *Moore v. Stone*, — Tex. Civ. App. —, 36 S. W. 909 ("by a preponderance of proof to your reasonable satisfaction," held improper); 1898, *Sigafus v. Porter*, 28 C. C. A. 443, 84 Fed. 430; 1898, *Curran v. Stange Co.*, 98 Wis. 598, 74 N. W. 377; 1898, *Knopke v. Ins. Co.*, 99 id. 289, 74 N. W. 795.

gests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case.² Nevertheless, the effort has been made (though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. (1) It is sometimes said that, in general, wherever in a civil case a *criminal act is charged* as a part of the case, the rule for criminal cases should apply; but this has been generally repudiated.³ (2) Nor is such a doctrine better established for individual kinds of cases. It does not apply to an action for a *statutory penalty*;⁴ nor to a plea of truth to an action for a *defamatory charge of crime*;⁵ nor to a plea of *arson* by the insurer in an action on a policy of fire insurance;⁶ nor in *disbarment* proceedings;⁷ nor in an action for *support* charging the defendant as the father of a *bastard*;⁸ nor in an action for *seduction*,⁹ nor a proceeding for *divorce* on the ground of adultery;¹⁰ nor in proceedings for *contempt*¹¹ or for an *injunction*.¹² But a stricter standard, in some such phrase as "clear and convincing proof," is commonly applied to measure the necessary persuasion for a charge of *fraud*;¹³ for the existence and contents of a *lost will*;¹⁴ for an *agreement to bequeath by will*;¹⁵ for *mutual mistake* sufficient to justify *reformation of an instrument*;¹⁶ and for a few related classes of cases.¹⁷

² Compare Judge May's article, above cited, in which the rule for civil cases is judiciously discussed.

³ 1897, *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195 (forgery); 1894, *Grimes v. Hilliary*, 150 Ill. 141, 146, 36 N. E. 977 (left undecided; though previous rulings in this State had adopted the criminal rule; prior decisions apparently doubted; but the criminal rule held not applicable to a defendant's malicious destruction of a note, the malice not being essential to recovery); 1897, *Nebraska Nat'l B'k v. Johnson*, 51 Nebr. 546, 71 N. W. 294 (action to recover the proceeds of money stolen by the defendant).

⁴ 1900, *Campbell v. Burns*, 94 Me. 127, 46 Atl. 812; 1891, *Sparta v. Lewis*, 91 Tenn. 370, 374, 23 S. W. 182 (municipal ordinance forbidding battery).

⁵ 1898, *Hearne v. DeYoung*, 119 Cal. 670, 52 Pac. 150; 1893, *Atlanta Journal v. Mayson*, 92 Ga. 640, 18 S. E. 1010; *Ind. Rev. St.* 1897, § 378; 1872, *Ellis v. Buzzell*, 60 Me. 209, 213 (leading case); 1897, *Finley v. Widner*, 112 Mich. 230, 70 N. W. 433. The supposed doctrine *contra* is criticised by Judge May in 10 Amer. Law Rev. 642.

⁶ 1895, *Blackburn v. Ins. Co.*, 116 N. C. 821, 21 S. E. 922; 1898, *First National Bank v. Commercial Assur. Co.*, 33 Or. 43, 52 Pac. 1050. *Contra*: 1852, *Darling v. Banks*, 14 Ill. 46; 1856, *McConnells v. Ins. Co.*, 18 id. 228. The *contra* cases are criticised by Judge May in 10 Amer. Law Rev. 642.

⁷ 1899, *Re Wellcome*, 23 Mont. 450, 59 Pac. 445. *Contra*: 1900, *Re Evans*, 22 Utah 366, 62 Pac. 913.

⁸ 1900, *Bell v. State*, 124 Ala. 94, 27 So. 414; 1872, *People v. Christman*, 66 Ill. 162; 1870,

Knowles v. Scribner, 57 Me. 495 (leading case); 1893, *Dukehart v. Caughman*, 36 Nebr. 412, 414, 54 N. W. 680.

⁹ 1894, *Nelson v. Pierce*, 18 R. I. 539, 28 Atl. 806.

¹⁰ 1898, *Lenning v. Lenning*, 176 Ill. 180, 52 N. E. 46; 1896, *Lindley v. Lindley*, 68 Vt. 421, 35 Atl. 349.

¹¹ 1896, *Drakeford v. Adams*, 98 Ga. 722, 25 S. E. 833 (proceedings by a receiver for contempt for not turning over moneys).

¹² 1895, *State v. Collins*, — N. H. —, 44 Atl. 495 (injunction against a liquor-nuisance).

¹³ 1897, *Kansas M. O. M. Ins. Co. v. Ram-melsberg*, 58 Kan. 531, 50 Pac. 446 (requiring something more than a mere preponderance); 1900, *Conner v. Groh*, 90 Md. 674, 45 Atl. 1024 ("convincing," not merely preponderating); 1896, *Lalone v. U. S.*, 164 U. S. 255, 17 Sup. 74 (pension application); 1897, *U. S. v. American Bell Tel. Co.*, 167 id. 224, 17 Sup. 809 ("clear, unequivocal, and convincing"; revocation of a patent for fraud); 1897, *Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 38, 71 N. W. 69 ("clear and satisfactory evidence"). *Contra*: 1897, *Nelms v. Steiner*, 113 Ala. 562, 22 So. 435 (overruling *Clafin Co. v. Rodenberg*, 101 id. 213, 13 So. 272).

¹⁴ The cases are collected *ante*, §§ 2052, 2106.

¹⁵ 1875, *Mundy v. Foster*, 31 Mich. 313, 322 ("should be proved in the clearest manner and the evidence ought to be above suspicion").

¹⁶ 1871, *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, 317; 1900, *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. 535; 1892, *Southard v. Curley*, 134 N. Y. 148, 31 N. E. 330 (collecting many forms of phrasing).

¹⁷ 1901, *Rowe v. Hibernia S. & L. Soc.*, 134 Cal. 403, 66 Pac. 569 (identifying separate prop-

The application of the phrase "preponderance of evidence" is apt to lead the judicial discussion close to the danger line of the fallacious quantitative or numerical theory of testimony (*ante*, § 2033).¹⁸ Although that theory has been generally repudiated in our law, yet there is often a lurking recurrence to it in the statement that an uncontradicted witness must be believed,¹⁹ *i. e.* his testimony constitutes *per se* a preponderance. The unsoundness of this conception has already been noticed (*ante*, §§ 1013, 2033, 2034).²⁰

erty acquired after marriage); 1903, *Gritten v. Dickerson*, 202 Ill. 372, 66 N. E. 1090 (impeaching a notary's certificate of acknowledgment; see other cases cited *ante*, § 1347, 1352); 1899, *Seymour v. Alkire*, 47 W. Va. 302, 34 S. E. 953 ("clear, convincing, beyond reasonable controversy," required for correcting a mistake in a decree).

¹⁸ *E. g.*: 1902, *West Chicago S. R. Co. v. Lieserowitz*, 197 Ill. 607, 64 N. E. 718; 1896, *People v. Tuczkewitz*, 149 N. Y. 240, 43 N. E. 549 (though not in a criminal case).

¹⁹ 1890, *Quock Ting v. U. S.*, 140 U. S. 420, 11 Sup. 734 ("Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the

decision of the Court; but that rule admits of many exceptions"); 1902, *Ray, J.*, in *U. S. v. Lee Huen*, 118 Fed. 442, 457 ("The general rule is that uncontradicted evidence, free from inherent improbability, when given by disinterested witnesses, and in no way discredited, is conclusive"; yet in the very same opinion the Court inconsistently but correctly says: "It is impossible to prescribe any fixed rule by which the credibility of the witness is to be tested or which shall bind the conscience of the Court as to the conclusiveness of the evidence in a given case").

²⁰ For the relative value of *circumstantial* and *testimonial* evidence, see *ante*, § 26.

TITLE II: BURDENS AND PRESUMPTIONS IN SPECIFIC ISSUES.

CHAPTER LXXXVII.

- § 2499. Introductory.
- § 2500. Sanity: (1) Testamentary and other Civil Causes; Suicide.
- § 2501. Same: (2) Criminal Causes.
- § 2502. Undue Influence and Fraud: (1) Testamentary Execution.
- § 2503. Same: (2) Confidential Relations of Grantee or Beneficiary.
- § 2504. Same: (3) Fraudulent Conveyances against Creditors.
- § 2505. Marriage: (1) Consent, from Cohabitation or Ceremony.
- § 2506. Same: (2) Capacity, as affected by Intervening Death, Divorce, or Marriage.
- § 2507. Negligence and Accident: (1) Contributory Negligence.
- § 2508. Same: (2) Loss by a Bailee.
- § 2509. Same: (3) Defective Machines, Vehicles, and Apparatus.
- § 2510. Same: (4) Death by Violence.
- § 2511. Crimes: (1) Innocence, Malice, Intent, etc.
- § 2512. Same: (2) Self-Defence, Alibi.
- § 2513. Same: (3) Possession of Stolen Goods.
- § 2514. Same: (4) Capacity (Infancy, Intoxication, Coverture).
- § 2515. Ownership: (1) Possession of Land and Personality.
- § 2516. Same: (2) Possession of Negotiable Instrument.
- § 2517. Payment: (1) Lapse of Time.
- § 2518. Same: (2) Possession of Instrument or Receipt.
- § 2519. Execution and Contents of Documents: (1) Letters and Telegrams.
- § 2520. Same: (2) Execution of Deeds (Delivery, Date, Seal, Consideration).
- § 2521. Same: (3) Ancient Documents.
- § 2522. Same: (4) Lost Grant; Lost Documents in General.
- § 2523. Same: (5) Will (Execution and Revocation).
- § 2524. Same: (6) Spoliation or Suppression of Documents.
- § 2525. Same: (7) Alteration of Documents.
- § 2526. Gifts (Wife's Separate Estate, Child's Advancement, Child's Services).
- § 2527. Legitimacy.
- § 2528. Chastity; Child-bearing.
- § 2529. Identity of Person (from Name, etc.).
- § 2530. Continuity; (1) in general (Ownership, Possession, Residence, Insanity, etc.).
- § 2531. Same: Life and Death.
- § 2532. Same: Survivorship.
- § 2533. Seaworthiness.
- § 2534. Regularity; (1) Performance of Official Duty and Regularity of Proceedings.
- § 2535. Same: (2) Appointment and Authority of Officers, Incorporation.
- § 2536. Similarity of Foreign Law.
- § 2537. Contracts.
- § 2538. Statute of Limitations.
- § 2539. Malicious Prosecution.
- § 2540. Sundry Presumptions and Burdens.

§ 2499. **Introductory.**¹ In applying the foregoing principles to the different kinds of propositions presented for proof in litigation, it will be found that the rulings are constantly ambiguous in the language, in dealing with the three chief questions arising under those principles. Sometimes the ruling involves the first "burden of proof," *i. e.* the *risk of non-persuasion of the jury* (*ante*, § 2485); this is, in strictness and usually, a question of Pleading rather than of Evidence. Sometimes the ruling involves the second "burden of proof," the *duty of producing evidence to the judge*, in its initial aspect, *i. e.* whether there is *sufficient evidence* to satisfy that duty and enable the party to go to the jury (*ante*, § 2494). Sometimes it involves the same burden in its ulterior aspect, *i. e.* whether there is a *presumption*, which *shifts*

¹ EXPLANATORY NOTE. In this Chapter, the preceding one, and the three ensuing ones, no attempt has been made to secure all the authorities, for the reasons already stated in the Preface. The subjects are on the border line between Evidence and Procedure, and would require constant excursus into the latter field;

most of the rulings on the topics of the present Chapter turn on minute and voluminous details of the particular case, and the judicial language is often ambiguous and dangerous to state concisely; some years of additional labor would be required for a complete presentation of the material.

the duty to the opponent to come forward with evidence (*ante*, § 2487). Any topic of proof may give rise to all three of these questions; and it is often impossible to determine which effect the ruling is intended to have, except after a detailed analysis of the whole opinion, — and sometimes not even then. Moreover, many rulings, though using the language of presumptions, do not mean to do anything more than declare the admissibility of circumstantial evidence (*ante*, § 2491). This difficulty of interpretation must be kept in mind in any consideration of the precedents.

§ 2500. **Sanity:** (1) **Testamentary and other Civil Causes; Suicide.** (*a*) It seems to be generally conceded that the burden of proof as to a *testator's* *sanity* is on the proponent of the will,¹ in the sense that, when the case goes to the jury, he has the risk of non-persuasion; the testator's sanity is a fact essential to the proponent's claim. But there is a difference of views as to the duty of going forward with evidence. According to one view, the evidence of execution with due formalities, introduced by the proponent, may suffice to raise a presumption of sanity, so as to require the opponent to introduce evidence of insanity. By another view, the evidence of execution does not raise this presumption, and the proponent therefore has the duty of coming forward, as in any other case, with some evidence (it may be but slight) of his *factum probandum*, *i. e.* sanity.²

¹ Except in Indiana.

² The subject is further complicated, in many jurisdictions, by the variety of modes of trial for a will's validity, and by the presumptive effect sometimes given to the preliminary finding, on a later contest in the nature of an appeal, in a chancery or a jury court, as also by the *prima facie* effect occasionally given to the oath of the attesting witnesses: *Eng.*: 1857, *Sutton v. Sadler*, 3 C. B. N. s. 87 (leading case); *Can.*: 1883, *Doe v. Gilbert*, 22 N. Br. 576, 581; 1890, *Harrison's Will*, 30 id. 164, 184; 1890, *Doe v. Savoy*, ib. 227, 231; 1856, *Brocklebank's Will*, 2 *Morris Newf.* 88, 92; *Conn.*: 1893, *Barber's Appeal*, 63 *Conn.* 393, 27 *Atl.* 973 (evidence of execution shifts the burden to the contestant; subject, however, to the peculiarity that the attesting witnesses must be called by the proponent and asked as to capacity); *Ill.*: 1894, *Taylor v. Pegram*, 151 *Ill.* 106, 118, 37 N. E. 837 (the burden is on the contestant, provided the attesting witnesses have spoken to capacity); 1897, *Harp v. Parr*, 168 id. 459, 48 N. E. 113 (the introduction of proper subscribing-witness testimony to execution is sufficient to shift the burden; here one subscribing witness and the scrivener were called, and a certificate of testimony at the probate was presented); 1898, *Slingloff v. Bruner*, 174 id. 561, 51 N. E. 285; 1898, *Egbers v. Egbers*, 177 id. 82, 52 N. E. 285 (bill to set aside probate; the burden of non-persuasion is said to be on the complainant-contestants, and yet the first duty of production to be on the will's proponents; the opinion is confused); 1899, *Entwistle v. Meikle*, 180 id. 9, 54 N. E. 217; 1900, *Johnson v. Johnson*, 187 id. 86, 58 N. E. 237 (the *prima facie* case made

out by the attesting witnesses' testimony does not fail when one of the witnesses is impeached; "credible," under the statute, meaning merely "competent"); 1901, *Huggins v. Drury*, 192 id. 528, 61 N. E. 652; 1901, *Thompson v. Bennett*, 194 id. 57, 62 N. E. 321; 1903, *Baker v. Baker*, 202 id. 595, 67 N. E. 410 (approving *Egbers v. Egbers*); *Ind.*: 1896, *Blough v. Parry*, 144 *Ind.* 463, 43 N. E. 562 (treating *Kenworthy v. Williams*, 5 id. 375, as overruled, and disapproving the dictum in *Durham v. Smith*, 120 id. 465; the burden is on the contestant, but may shift); 1896, *Young v. Miller*, 145 id. 652, 44 N. E. 754 (the contestant has the burden of establishing insanity; monomania, if shown, raises a presumption of general incapacity and makes a "*prima facie* case"; but when the evidence is closed on both sides, the contestant still has the risk of establishing incapacity, and an instruction requiring a preponderance of evidence from the contestee is erroneous); 1898, *Roller v. Kling*, 150 id. 159, 49 N. E. 948 (action to set aside a probated will; the burden of convincing the jury by preponderance of evidence is on the applicant, though evidence of prior persistent insanity may raise a presumption in his favor); 1901, *Morell v. Morell*, 157 id. 179, 60 N. E. 1092; *Ky.*: 1893, *Johnson v. Stevens*, 95 *Ky.* 128, 23 S. W. 957; *La.*: 1894, *Bey's Succession*, 46 *La. An.* 773, 787, 15 So. 297; *Mass.*: 1854, *Crowninshield v. Crowninshield*, 2 *Gray* 524 (leading case); 1902, *Richardson v. Bly*, 181 *Mass.* 97, 63 N. E. 3; *Mich.*: 1892, *Prentiss v. Bates*, 88 *Mich.* 567, 50 N. W. 637, 93 id. 234, 53 N. W. 153, 17 *L. R. A.* 494 (leading case); 1896, *Moriarty v. Moriarty*, 108 id. 249, 65 N. W. 964; *Miss.*: 1896, *Sheehan v.*

(b) For *deeds*, however, it is common to find the fact of insanity treated in the nature of an affirmative plea of avoidance, placing the ultimate risk of non-persuasion on the contestant, though the duty to produce evidence may shift.³

(c) *Suicide* is generally conceded to be a circumstance from which (with others) insanity may be inferred (*ante*, § 228); but it ought not to create a presumption or shift the duty of producing evidence, though the judicial language is here sometimes ambiguous.⁴

§ 2501. **Same: (2) Criminal Causes.** In proving the commission of a *crime*, the criminal intent being material, the accused's sanity is, by the orthodox view, a part of the case of the prosecution; and the burden of proving it, in the sense of the risk of non-persuasion (*ante*, § 2485), is on the prosecution; the measure of persuasion required being, as in other elements of a crime, persuasion beyond a reasonable doubt (*ante*, § 2497); and, as an incident of this view, the general presumption of sanity suffices for the prosecution's duty to produce evidence, and the duty of producing evidence of insanity is thrown upon the accused. A variation of this view, held by a few Courts, fixes a mere preponderance of evidence as the measure of persuasion required, instead of persuasion beyond a reasonable doubt. But another view, based on judicial experience in dealing with the issue of insanity in criminal trials, and adopted by an increasing number of Courts, is that the accused has the burden of proving insanity, in the sense that he has the risk of persuading the jury to that effect, at least by a preponderance of evidence, and also, of course, has the duty of producing evidence.¹

Kearney, — Miss. —, 21 So. 46 ("Now, when the proponent of a will offers the will and the record of its probate, a presumption is thereby raised that the alleged testator had testamentary capacity, and this presumption satisfies the burden of proof in that respect; and the contestant must fail unless he overcomes this by proof on his part. But there is no shifting of the burden of proof, properly understood"); *Mo.*: 1892, *Maddox v. Maddox*, 114 Mo. 35, 46, 21 S. W. 499; 1897, *Gordon v. Burris*, 141 id. 602, 43 S. W. 642 (after proof of execution, the contestant must produce "substantial evidence" of the invalidating ground in order to get to the jury); 1898, *Fulbright v. Perry Co.*, 145 id. 432, 46 S. W. 955 (proponent raises a presumption of sanity by testimony to execution and by that of the subscribing witnesses to sanity); *Nebr.*: 1896, *Murray v. Hennessey*, 48 *Nebr.* 608, 67 N. W. 470 (the burden of establishing capacity rests on the proponent of the will for probate, and also a preliminary duty to offer some evidence of this; after opposing evidence, the general burden of establishing remains on the proponent); *N. H.*: 1894, *Patten v. Cilley*, 67 N. H. 520, 42 *Atl.* 47 (burden of non-persuasion is on the executor, no matter how specific the issues, and carries the right to close in argument); *N. Y.*: 1862, *Delafield v. Parish*, 25 N. Y. 9, 29, 73, 97; *Or.*: 1903, *Mendenhall's Will*, 43 *Or.* 542, 73 *Pac.* 1033; *U. S.*: 1903, *Leach v.*

Burr, 188 U. S. 510, 23 *Sup.* 393; *Va.*: 1903, *Gray v. Rumrill*, — *Va.* —, 44 S. E. 697; *Wash.*: 1902, *Higgins v. Netherby*, 30 *Wash.* 239, 70 *Pac.* 489.

³ 1867, *Myatt v. Walker*, 44 *Ill.* 485; 1896, *Taylor v. Buttrick*, 165 *Mass.* 547, 43 N. E. 507; 1893, *Jones v. Jones*, 137 N. Y. 610, 612, 33 N. E. 479; 1898, *Artrip v. Rasnake*, 96 *Va.* 277; 31 S. E. 4; 1903, *Eakin v. Hawkins*, 52 *W. Va.* 124, 43 S. E. 211.

⁴ Compare the following: 1838, *Duffield v. Morris*, 2 *Harringt.* 375, 382 ("it stands as a fact, together with all the other acts of the deceased's life," but creates no presumption); 1897, *Grand Lodge v. Wieting*, 168 *Ill.* 408, 48 N. E. 59 ("the act of self-destruction, the manner and mode thereof, and all attending circumstances" may be considered); 1901, *Brashears v. Orme*, 93 *Md.* 442, 49 *Atl.* 620; 1901, *Modern Woodmen v. Kozak*, 63 *Nebr.* 146, 88 N. W. 248; 1893, *Connecticut M. L. Ins. Co. v. Akens*, 150 *U. S.* 468, 475, 14 *Sup.* 155 (death by self-destruction being shown, the plaintiff is "entitled to the benefit of the presumption that a sane man would not commit suicide"); 1875, *Hathaway's Adm'r v. Ins. Co.*, 48 *Vt.* 336, 353 (admissible); 1894, *Bachmeyer v. M. R. F. L. Assoc.*, 87 *Wis.* 325, 340, 58 N. W. 399. Cases are collected in a note to 59 *Am. Dec.* 496.

¹ These different views are represented re-

§ 2502. **Undue Influence and Fraud; (1) Testamentary Execution.** In the proof of *undue influence*, negating the capacity of a *testator*, there is a difference of judicial opinion, as in the case of insanity (*ante*, § 2500), but here it goes back to the main burden of persuasion; *i. e.* by one opinion, the voluntariness of the testator's act is a part of the proponent's case, and with the jury he has the risk of non-persuasion; by the other view, the fact of undue influence is treated as in the nature of a defensive plea of the contestant, and therefore to be proved as a part of his case.¹

§ 2503. **Same: (2) Confidential Relations of Grantee or Other Beneficiary.** Where the grantee or other beneficiary of a deed or will is a person who has maintained intimate relations with the grantor or testator, or has drafted or

spectively in the following cases, although their language is not always precise:

(1) *First view*: 1896, *Jones v. People*, 23 Colo. 276, 47 Pac. 275 (the duty of going forward is on the defendant, but the general burden of persuasion is on the State); 1897, *State v. Lee*, 69 Conn. 186, 37 Atl. 75; 1892, *Armstrong v. State*, 30 Fla. 170, 196, 11 So. 618; 1896, *Ford v. State*, 73 Miss. 734, 19 So. 665 (but the Court says the sanity-presumption suffices if the defendant does not offer, not "any testimony," but "sufficient to raise a reasonable doubt"); 1898, *Coffey v. State*, — id. —, 24 So. 315; 1898, *Snider v. State*, 56 Nebr. 309, 76 N. W. 574 (presumption of sanity ceases when any evidence to the contrary is offered); 1892, *Faulkner v. Terr.*, 6 N. M. 464, 36 Pac. 905 (burden of persuasion is on the prosecution, but of producing evidence on the defendant); 1895, *Davis v. U. S.*, 160 U. S. 469, 16 Sup. 353 (leading opinion, by Harlan, J.: "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence, or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial, and applies to every element necessary to constitute the crime. Given to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question, from the time a plea of not guilty is entered until the return of the verdict, is whether, upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged").

(2) *Second view*: 1896, *Nino v. People*, — N. Y. —, 43 N. E. 853; 1897, *People v. Koerner*, 154 id. 355, 48 N. E. 730.

(3) *Third view*: 1893, *People v. Bemmerly*, 98 Cal. 299, 304, 33 Pac. 263; 1897, *People v. Allender*, 117 id. 81, 48 Pac. 1014; 1898, *People v. Barthleman*, 120 id. 7, 52 Pac. 112; 1855, *Graham v. Com.*, 16 B. Monr. 587 (leading opinion, by Stites, J.); 1895, *Phelps v. Com.*,

— id. —, 32 S. W. 470; 1898, *Portwood v. Com.*, 104 id. 496, 47 S. W. 339; 1897, *State v. Scott*, 49 La. An. 253, 21 So. 271, *Breaux, J.*, diss. (overruling prior precedents, in which the defendant had been required to prove beyond a reasonable doubt); 1896, *Genz v. State*, 58 N. J. L. 482, 34 Atl. 816; 1897, *Clawson v. State*, 59 id. 434, 36 Atl. 886; 1898, *Winters v. State*, 61 id. 613, 41 Atl. 220; 1896, *Kelch v. State*, 55 Oh. St. 146, 45 N. E. 6 (same; disapproving a charge which required the jury to be "satisfied" of the insanity, and treating this as requiring more than a mere "preponderance" making insanity probable but leaving it open to doubt); 1895, *Com. v. Berchine*, — Pa. —, 32 Atl. 110; 1892, *King v. State*, 91 Tenn. 617, 647, 20 S. W. 169.

Compare also the following: 1897, *Scheerer v. Agee*, 113 Ala. 383, 21 So. 79; 1897, *Ryder v. State*, 100 Ga. 528, 28 S. E. 246; 1903, *State v. Shuff*, — Ida. —, 72 Pac. 664; 1892, *Hornish v. People*, 142 Ill. 620, 626, 32 N. E. 677; 1896, *State v. Wright*, 134 Mo. 404, 35 S. W. 1145; 1896, *State v. Lewis*, 136 id. 84, 37 S. W. 807; *State v. Bell*, ib. 120, 37 S. W. 823.

¹ The following cases represent both views: 1838, *Barry v. Butlin*, 2 Moore P. C. 480; 1896, *McLellan's Estate*, 28 N. Sc. 226; 1892, *Bulger v. Ross*, 98 Ala. 267, 271; 1903, *Latour's Estate*, 140 Cal. 414, 73 Pac. 1070; 1901, *Mallow v. Walker*, 115 Ia. 238, 88 N. W. 452; 1902, *Marshall v. Hanby*, ib. 318, 88 N. W. 801; 1897, *King v. King*, — Ky. —, 42 S. W. 347; 1897, *Bush v. Delano*, 118 Mich. 321, 71 N. W. 628 (repudiating the language in *Maynard v. Vinton*, 29 id. 139, 26 N. W. 401, and *Severance v. Severance*, 90 id. 417, 52 N. W. 292); 1896, *Sheehan v. Kearney*, — Miss. —, 21 So. 41 (*Whitfield, J.*: "It is not only necessary that the testator shall have testamentary capacity, but that capacity shall be exercised freely and voluntarily. If either its existence or the freedom of its exercise is wanting, the instrument is not the alleged testator's will. Both are essential parts of the proponent's case. The issue is single, — will or no will"); 1896, *Morton v. Heidorn*, 135 Mo. 608, 37 S. W. 504; 1897, *McFadin v. Catron*, 138 id. 197, 38 S. W. 932; 1898, *Salter v. Ely*, 56 N. J. L. 357, 39 Atl. 365.

advised the terms of the instrument, a presumption of undue influence or of fraud on the part of the beneficiary has often been applied. But it is not possible to say that any single circumstance or group of facts is the invariable mark of such a presumption, or that there is any uniform rule capable of application apart from the facts of each case.¹

§ 2504. **Same: (3) Fraudulent Conveyances against Creditors.** Conveyances by debtors are attended by circumstances which are often said to raise a presumption of an intent to defraud creditors; but here the distinction between circumstances constituting *per se* a fraud under the substantive law and circumstances merely evidential of fraud makes the subject inseparable from the whole law of fraudulent conveyances. It is to be noted that at least three distinct presumptions may be involved: (a) the presumption of the grantee's title, from his possession (*post*, § 2515), (b) the presumption of the debtor's fraudulent intent, from his retention of possession,¹ and (c) the presumption of the buyer's good faith, from his payment of value.²

§ 2505. **Marriage; (1) Consent, from Cohabitation or Ceremony.** The conduct of a man and a woman as husband and wife, *i. e.* their "habite" or cohabitation, together with their local repute as married, are not only admissible in evidence (*ante*, §§ 268, 1602, 2083), but also are regarded as sufficient to create a presumption that a *marriage* took place, — whether by mere consent or by ceremony, according as the local law requires.¹

¹ Cases illustrating the various situations are as follows: *Eng.*: 1838, *Barry v. Butlin*, 2 Moore P. C. 480 (leading case); 1894, *Tyrrell v. Panton*, Prob. 151 (commenting on *Barry v. Butlin*); *Can.*: 1893, *Adams v. McBeath*, 3 Br. C. 513; 1884, *McEwan v. Milne*, 5 Ont. 100; 1901, *Collins v. Kilroy*, 1 Ont. L. R. 503; *U. S.*: 1891, *Little v. Knox*, 96 Ala. 179, 11 So. 443 (attorney purchasing from an estate managed by him); 1892, *Garrett v. Heflin*, 98 id. 615, 618, 13 So. 326 (residuary legatee who wrote the will himself); 1898, *Coghill v. Kennedy*, 119 id. 641, 24 So. 459 (drafter of a will); 1901, *McQueen v. Wilson*, 131 id. 606, 31 So. 94; 1903, *Harraway v. Harraway*, 136 id. 499, 34 So. 836 (husband and wife); 1890, *Richmond's Appeal*, 59 Conn. 226, 22 Atl. 82 (will); 1901, *Lewis v. McGrath*, 191 Ill. 401, 61 N. E. 135 (gift); 1901, *Blanchard v. Blanchard*, ib. 450, 61 N. E. 481 (deed); 1902, *Michael v. Marshall*, 201 id. 70, 66 N. E. 273 (will); 1896, *Teegarden v. Lewis*, 145 Ind. 98, 44 N. E. 9 (action by an administrator for money of the deceased received as a gift, through undue influence, by the defendants, his daughter and son-in-law, by whom he was supported and with whom he lived; held, that "one who challenges the mental capacity of a testator or donor has the burden of establishing the absence of the particular capacity in issue," and that though ordinarily a presumption of undue influence would be created in the plaintiff's favor by a fiduciary position of the defendants, yet the caretaking by a child of the parent does not create that presumption, and did not here, although the father was aged, feeble, and of unsound

mind); 1898, *Slayback v. Witt*, 151 id. 376, 50 N. E. 389 (parent and child; this relation ordinarily overturns the presumption); 1901, *Good v. Zook*, 116 Ia. 582, 88 N. W. 376 (clerical adviser); 1893, *Hill v. Miller*, 50 Kan. 659, 663, 32 Pac. 354 (a brother in fiduciary relations with aged and infirm grantor); 1897, *Bush v. Delano*, 113 Mich. 321, 71 N. W. 628 (the burden of persuasion is on the contestant, but the legatee's drawing of the will shifts the duty of going forward); 1862, *Delafield v. Parish*, 25 N. Y. 9, 35 (will); 1893, *Barnard v. Gautz*, 140 id. 249, 256, 35 N. E. 430 (deed of an aged woman to a son and son-in-law); 1898, *Ten Eyck v. Whitbeck*, 156 id. 341, 50 N. E. 963 (deed); 1901, *Doheny v. Lacy*, 168 id. 213, 61 N. E. 255; 1898, *Barney's Will*, 70 Vt. 352, 40 Atl. 1027 (confidential relations by a beneficiary drawing the will and excluding "near, needy, and deserving relatives"; the burden on the beneficiary-proponent to disprove undue influence).

¹ 1898, *Gilmore v. Swisher*, 59 Kan. 172, 52 Pac. 426; 1893, *First National Bank v. Lowrey*, 36 Nebr. 290, 293, 54 N. W. 568; 1886, *Bindley v. Martin*, 28 W. Va. 773, 789. Compare § 1086, *ante*.

² 1895, *Peterson Co. v. Steiner*, 108 Ala. 629, 18 So. 688; 1893, *Treusch v. Ottenburg*, 4 C. C. A. 629, 54 Fed. 867.

The opinion of Pigott, J., in *Finch v. Kent*, 24 Mont. 268, 61 Pac. 653 (1900), contains a useful analysis.

¹ The cases already cited in the sections above noted almost all declare this; the following also emphasize the rule of presumption:

(2) Where one of the parties to a cohabitation was at its inception incapable (for example, by existing coverture) of a valid marriage, and the impediment is subsequently removed, and the parties continue to cohabit, in a jurisdiction where a ceremonial marriage is not required, the *renewal of marriage consent* as husband and wife may be presumed; although there has here been occasionally an unjust and quibbling hesitation in some Courts, based on refinements of speculation as to the party's knowledge of the removal of the impediment, and the like.²

(3) Where a *ceremonial marriage* is essential, the performance of the ceremony with the appearances of validity may create a presumption as to the lawfulness of the form, the authority of the celebrant, the issuance of a license, and the like; although here much may turn on the circumstances of each case and the additional evidence offered or available.³

§ 2506. **Same :** (2) **Capacity, as affected by Intervening Death, Divorce, or Marriage.** Supposing a party to a marriage to appear to have been a party to a former marriage with another person, the validity of the later marriage will depend upon whether the prior marriage had been in the meantime somehow dissolved, or whether it was itself void; this will raise the question, for example, whether there has been a death or divorce intervening, or whether the other party to the prior marriage was incapable. In thus determining the validity of the later marriage, will one or another of the above facts be presumed to have existed, so as to throw upon the opponent of the later marriage the burden of producing evidence (or even the risk of non-persuasion) of the non-existence of those facts? In issues of bigamy and of legitimacy, there is a special temptation thus to aid the later marriage. The situation may be additionally complicated by the invocation of the so-called presumption of innocence (*post*, § 2511) and of the presumptions of death or of life

1876, *De Thoren v. Attorney-General*, L. R. 1 App. Cas. 686; 1898, *Moore v. Heineke*, 119 Ala. 627, 24 So. 374 (presumption here removed by a subsequent separation); Cal. C. C. P. 1872, § 1963, par. 30; 1903, *Ferrell v. State*, — Fla. —, 34 So. 220; 1896, *Griffeth v. Griffeth*, 162 Ill. 368, 44 N. E. 820; 1853, *Nossaman v. Nossaman*, 4 Ind. 648, 651 (presumption rebutted by the absence of a record of license in the proper office, such a record being required); 1843, *Young v. Foster*, 14 N. H. 114; 1897, *Stevens v. Stevens*, 56 N. J. Eq. 488, 38 Atl. 460; 1850, *Clayton v. Wardell*, 4 N. Y. 230; 1897, *Durning v. Hastings*, 183 Pa. 210, 38 Atl. 627; 1902, *Rhode Island H. T. Co. v. Thorndike*, 24 R. I. 105, 52 Atl. 873; 1896, *State v. Sherwood*, 68 Vt. 414, 35 Atl. 352 (to show a previous marriage, relied upon to show a later one no bigamy, the presumption was not applied).

² Some of the cases on both sides are as follows: 1867, *The Breadalbane Case* (*Campbell v. Campbell*), L. R. 1 Sc. App. 182 (leading case); 1876, *De Thoren v. Attorney-General*, L. R. 1 App. Cas. 686; 1898, *Poole v. Peopie*, 24 Colo. 510, 52 Pac. 1025; 1876, *Blanchard v. Lambert*, 43 Ia. 228; 1894, *Barnes v.*

Barnes, 90 id. 282, 57 N. W. 851; 1898, *Reed v. Moseley*, 76 Miss. 1, 23 So. 451; 1890, *Collins v. Voorhees*, 47 N. J. Eq. 315, 555, 20 Atl. 676, 22 Atl. 1054 (leading case); 1899, *Atlantic C. R. Co. v. Goodin*, 62 N. J. L. 394, 42 Atl. 333; 1902, *Adger v. Ackerman*, 52 C. C. A. 563, 115 Fed. 124, 129 (*Breadalbane Case* followed).

³ With the following, compare the cases cited *ante*, § 1644 (certificate of marriage), *ante*, § 2085 (proof by eye-witnesses), and *post*, § 2535 (presumption of office): 1849, *Piers v. Piers*, 2 H. L. C. 331; 1817, *Warner v. Com.*, 2 Va. Cas. 95 (good opinion); 1897, *Lancet v. State*, 98 Wis. 136, 73 N. W. 575.

In still other issues a rule of presumption relating to marriage may be recognized: 1861, *Erskine v. Davis*, 25 Ill. 251, 256 (ejectment, by one showing a deed from H. C., said to be a *feme sole*; proof of her singleness, held sufficient to raise a presumption of continuance, not overcome by proof of coverture six years later; obscure); 1893, *Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669 (necessaries furnished to wife; plaintiff must prove not only the marriage but also the separation without fault of the wife). Compare the citations *ante*, § 382, note 7.

(*post*, § 2531). Whether the successive shiftings of the burdens should be worked out with mathematical nicety according to the various presumptions applicable, or whether all should be merged in a general presumption in favor of the later marriage, is a knotty question; and no successful generalization is yet accepted.¹ But it may be noted that the peculiar force of a presumption as merely affecting the opponent's duty to produce some evidence (*ante*, § 2490) is not always observed in the judicial discussion of the problem.

§ 2507. **Negligence and Accident; (1) Contributory Negligence.** The fact of contributory negligence, sufficient in law to defeat a plaintiff, is regarded by the orthodox rule as a part of the defendant's burden (or risk of non-persuasion), except in a few important jurisdictions; like so many other instances of that burden, however, this is in reality a question of pleading (*ante*, § 2485). Yet even by the orthodox rule, the second burden, or duty of producing evidence, may be shifted by facts which raise a presumption of negligence, and these facts may appear (*ante*, §§ 2489, 2490) from the testimony adduced by the plaintiff himself, or even from the allegations of his declaration, especially under the modern looseness of pleading. Hence it happens that even in the jurisdictions maintaining the orthodox rule, the burden is sometimes said to be upon the plaintiff in certain exceptional cases of the above sort, — the distinction between the two burdens not being strictly observed.¹

¹ Some of the more complicated and interesting cases are as follows: 1848, *Lapsley v. Grierson*, 1 H. L. C. 498; 1881, *R. v. Willshire*, L. R. 6 Q. B. D. 366; 1891, *Banks v. State*, 96 Ala. 78, 11 So. 404 (adultery of a woman; after the defendant's proof of a formal marriage to the man, it is for the prosecution to show his prior marriage and her knowledge); 1896, *Hunter v. Hunter*, 111 Cal. 261, 43 Pac. 756 (the defendant married M. in 1858, being then a minor; was taken away after a few days by her parents; on July 3, 1862, married the plaintiff; in 1883 heard that M. was living, and procured in 1894 a judgment by default annulling the marriage with M.; in 1894 brought but afterwards dismissed an action against the now plaintiff to have the second marriage declared void; in the present suit for the same purpose by the plaintiff (the judgment of divorce and the defendant's action against the plaintiff being held not to be conclusive as to the fact of M.'s being her lawful husband at the time of the second marriage), held, that as the second marriage during M.'s coverture involved a crime or wrong, the burden was upon the plaintiff to show that the first marriage had not been ended in 1862 by M.'s death or divorce); 1892, *Erwin v. English*, 61 Conn. 502, 23 Atl. 753; 1893, *Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525 (bill for partition; issue whether defendants were legitimate children of N. B., by M. H., married in 1876; N. B. had in 1872 married B. A., and had separated, B. A. being alive in 1876; held, that the second marriage raised a presumption of divorce from the first; and that the petitioner's evidence sustained their burden and

restored it to respondent to give evidence of the divorce); 1903, *Potter v. Clapp*, 203 id. 592, 68 N. E. 81 (collecting the Illinois cases); 1874, *Squire v. State*, 46 Ind. 459 (bigamy); 1895, *Wenning v. Teeple*, 144 id. 189, 41 N. E. 600; 1876, *Blanchard v. Lambert*, 43 Ia. 228; 1895, *Leach v. Hall*, 95 id. 611, 64 N. W. 791; 1903, *Casley v. Mitchell*, — id. —, 96 N. W. 725; 1859, *Harrison v. Lincoln*, 48 Me. 205; 1881, *Hyde Park v. Canton*, 130 Mass. 505; 1890, *State v. Plym*, 43 Minn. 385, 45 N. W. 848 (bigamy; whether there was a duty for the prosecution directly to evidence the first wife's continued life; leading opinion, by Mitchell, J.); 1901, *Alabama & V. R. Co. v. Beardsley*, 79 Miss. 417, 30 So. 660; 1898, *Rash's Estate*, 21 Mont. 170, 53 Pac. 312 (action for a widow's share of an estate; the plaintiff married the intestate in 1858, left him in 1864, married X in 1872; the intestate married Y in 1894, and died in 1895; the last marriage was presumed legal, and the plaintiff required to prove it illegal by showing that no prior divorce existed); 1899, *Reynolds v. State*, 58 Nebr. 49, 78 N. W. 483 (bigamy; the defendant married F. in 1895 and C. in 1897; F. was previously married to P.; held, no presumption of law as to the innocence of F. and therefore as to P.'s death); 1900, *Palmer v. Palmer*, 162 N. Y. 130, 56 N. E. 501; 1899, *Moore v. Moore*, 102 Tenn. 148, 52 S. W. 778.

¹ Some of the illustrative cases under both rules are as follows: 1836, *Wakelin v. London & S. W. R. Co.*, L. R. 12 App. Cas. 41 (orthodox rule); 1894, *Morrow v. Canadian P. R. Co.*, 21 Ont. App. 149 (orthodox rule); 1893,

§ 2508. **Same:** (2) **Loss by a Bailee.** Where goods have been committed to a bailee, and have either been lost or been returned in a damaged condition, and the bailee's liability depends upon his negligence, the fact of negligence may be presumed, placing on the bailee at least the duty of producing evidence of some other cause of loss or injury; but the application of this presumption cannot be said to have received definite phrasing for the different kinds of bailees.¹ Where the bailee is a common carrier, acting

Southern P. R. Co. v. Tomlinson, — Ariz. —, 33 Pac. 710 (orthodox rule); 1877, Railroad Co. v. Kenney, 58 Ga. 485, 489 (Bleckley, C. J. : "Concerning one class of cases, viz. that class in which, as in the instance before us, the injured party shared directly in the act which resulted in his own wounding, the rule as to the burden of proof is as follows: After proving the fact and degree of the injury, if the plaintiff will show himself not to blame, the law then presumes, until the contrary appears, that the company was to blame; or if he will show, on the other hand, that the company was to blame, the law then presumes, until the contrary appears, that he was not to blame. So that in order to make a *prima facie* case, and change the onus, he need not go further than to show by evidence one or the other of these two propositions, — either that he was not to blame, or that the company was. The company, taking at this stage the burden of reply, can defend successfully by disproving either proposition"); 1895, Johnston v. R. Co., 95 id. 685, 22 S. E. 694; 1891, North Chicago St. R. Co. v. Louis, 138 Ill. 9, 27 N. E. 451 (burden is on the plaintiff); 1893, Cincinnati I. St. L. & C. R. Co. v. Grames, 136 Ind. 39, 42, 34 N. E. 714 (burden is on the plaintiff); 1895, Engler v. R. Co., 142 id. 618, 42 N. E. 219; 1895, Baltimore Traction Co. v. Appel, 80 Md. 603, 31 Atl. 965 (orthodox rule); 1861, Gahagan v. R. Co., 1 All. 187 (burden is on the plaintiff); 1893, Lillstrom v. R. Co., 53 Minn. 464, 468, 55 N. W. 624 (same); 1894, Union S. Co. v. Conoyer, 41 Nebr. 617, 625, 59 N. W. 950 (same); 1896, Ouverson v. Grafton, 5 N. D. 281, 65 N. W. 677 (same); 1893, Baker v. Gas Co., 157 Pa. 593, 601, 27 Atl. 789 (same); 1896, Stewart v. Nashville, 96 Tenn. 50, 33 S. W. 613 (same); except that "whenever plaintiff's own case, or the evidence of the defendant or of both, raises a presumption of negligence on his part, the burden of repelling it is at once placed on him"; as here, where the plaintiff was blind and unattended and knew of the dangerous place; good opinion by Beard, J., on the policy of the rule); 1895, Gulf, C. & S. F. R. Co. v. Shieder, 88 Tex. 152, 30 S. W. 904 (Denman, J. : "To the general rule imposing upon the defendant the burden of proof on the issue of contributory negligence there appear to be, in the very nature of things, two well-defined exceptions: First, Where the legal effect of the facts stated in the petition is such as to establish *prima facie* negligence on the part of plaintiff as a matter of law, then he must plead and prove such other facts as will rebut such legal pre-

sumption. The plain reason is that by pleading facts which, as a matter of law, establish his contributory negligence, he has made a *prima facie* defense to his cause of action which will be accepted as true against him, both on demurrer and as evidence on the trial, unless he pleads and proves such other facts and circumstances that the Court cannot, as a matter of law, hold him guilty of contributory negligence. When he has done this, he has made a case which must be submitted to the jury. For instance, if plaintiff's petition shows that he was injured by defendant's cars while on the track, under circumstances which in law would make him a trespasser *prima facie*, then the law would raise a presumption of contributory negligence against him, for which his petition would be bad on demurrer; and it would be necessary for him to plead some fact or circumstance rebutting such presumption, — such as that he was, after going upon the track, stricken down by some providential cause, — in order to save his petition, and on the trial the burden would be upon him to establish such cause. Second, When the undisputed evidence adduced on the trial establishes *prima facie* as a matter of law contributory negligence on the part of plaintiff, then the burden of proof is upon him to show facts from which the jury upon the whole case may find him free from negligence; or otherwise the Court may instruct a verdict for defendant, there being no issue of fact for the jury"); 1893, Washington & G. R. Co. v. Harmon's Adm'r, 147 U. S. 571, 580, 13 Sup. 557 (burden on the defendant remains the same, though the plaintiff's evidence may disclose facts tending to help the defendant's burden); 1893, Texas & P. R. Co. v. Volk, 151 id. 73, 78, 14 Sup. 239; 1893, The Charles L. Jeffrey, 5 C. C. A. 246, 55 Fed. 685 (in admiralty, the burden is on the plaintiff); 1893, Welsh v. Argyle, 85 Wis. 307, 311, 55 N. W. 412 (orthodox rule).

¹ In the following illustrations, it will be seen that there may be a further variance as to successive shiftings of the burden: 1896, Higman v. Camody, 112 Ala. 267, 20 So. 480 (after the bailor shows the loss, the bailee must show *vis major* or the like, and then the bailor must show a negligence in not avoiding the *vis major*); 1898, First Nat'l Bank of B. v. First Nat'l Bank of N., 116 id. 520, 22 So. 976 (loss of certificates left with a bank; showing the loss raises a presumption of negligence); 1822, Nicholls v. Roland, 11 Mart. La. o. s. 190; 1897, Buswell v. Fuller, 89 Me. 600, 36 Atl. 1059 (the risk of non-persuasion is on the bailor to show culpable loss, but proof of demand and

under the customary exemptions as to *vis major* and the like, or under express contractual exemptions, it is generally conceded that the carrier has even the first burden (or risk of non-persuasion) of establishing the fact constituting the exemption;² but this involves the analogy of the contract-rule (*post*, § 2537).

§ 2509. **Same:** (3) **Defective Machines, Vehicles, and Apparatus.** With the vast increase, in modern times, of the use of powerful machinery, harmless in normal operation, but capable of serious human injury if not constructed or managed in a specific mode, the question has come to be increasingly common whether the fact of the occurrence of an injury (unfortunately now termed "accident," by inveterate misuse) is to be regarded as raising a presumption of culpability on the part of the owner or manager of the apparatus. "*Res ipsa loquitur*" is the phrase appealed to as symbolizing the argument for such a presumption. In England, a rule of that sort has for a generation been conceded to exist, for some classes of cases at least.¹ In the United States, the presumption has spread rapidly, although with much looseness of phrase and indefiniteness of scope; as against a common carrier, the presumption against a bailee (*ante*, § 2508) has perhaps helped to confirm the rule where injury to goods or passengers is involved.² What its final

refusal without explanation of the loss shifts to the bailee the duty of producing evidence); 1897, *Knights v. Piella*, 111 Mich. 9, 69 N. W. 92 (the risk of non-persuasion is on the bailor throughout; but proof of failure to deliver shifts to the bailee the duty of offering evidence); 1897, *Davis v. Printing Co.*, 70 Minn. 95, 72 N. W. 814 (book-plates); 1896, *Donlan v. Clark*, 23 Nev. 203, 45 Pac. 1; 1871, *Collins v. Bennett*, 46 N. Y. 490 (horse); 1900, *Hildebrand v. Carroll*, 106 Wis. 324, 82 N. W. 145.

² 1895, *Shea v. R. Co.*, 63 Minn. 228, 65 N. W. 458 (the carrier must show no negligence, although the loss occurred from an excepted cause); 1893, *The Beeche Dene*, 5 C. C. A. 207, 55 Fed. 525 (bill of lading with exceptions; vessel libeled for damage to cargo; vessel-owner must prove the case to be within an exception, after the fact of damage is shown); 1897, *The Majestic*, 166 U. S. 375, 17 Sup. 597 (the carrier must show *vis major*).

¹ *Eng.*: 1863, *Byrne v. Boadle*, 2 H. & C. 722 (passer-by injured by a barrel falling from a shop-window; Pollock, C. B.: "There are many accidents from which no presumption of negligence can arise"; but on the facts the occurrence was held "*prima facie* evidence of negligence"); 1865, *Scott v. London & St. K. Docks Co.*, 3 H. & C. 596 (injury to a passer-by, from the falling of goods from a crane; Erle, C. J.: "There must be reasonable evidence of negligence; but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care"; Black-

burn, J.: "Is not the fact of the accident sufficient evidence to call upon the defendants to prove that there was no negligence?"); 1870, *Kearney v. London B. & S. C. R. Co.*, L. R. 5 Q. B. 411, 6 id. 759 (injury to a passer-by from the fall of a brick from a bridge; it was held "incumbent on the defendants to give evidence rebutting the inference"; but perhaps the actual decision was merely that the fact was "some evidence to go to the jury"). *Can.*: 1892, *Dubé v. R.*, 3 Exch. Can. 147, 151 (railway accident).

² Some of the cases are as follows: *Ark.*: 1893, *Arkansas Tel. Co. v. Ratteree*, 57 Ark. 429, 435, 21 S. W. 1059 (falling of a telephone wire so as to frighten a horse); *Cal.*: 1892, *Bush v. Barnett*, 96 Cal. 202, 204, 31 Pac. 2 (common carrier); 1893, *Dixon v. Pluns*, 98 id. 384, 388, 33 Pac. 268 (falling of a workman's chisel from a scaffold); 1895, *Judson v. Giant Powder Co.*, 107 id. 549, 40 Pac. 1020 (powder explosion; cases cited fully); 1901, *Foerst v. Kelso*, 131 id. 376, 63 Pac. 681 (street railway); 1903, *Kahn v. Triest-Rosenberg Cap. Co.*, 139 id. 340, 73 Pac. 164 (boiler explosion); *Conn.*: 1895, *Donovan v. R. Co.*, 65 Conn. 201, 32 Atl. 352; *Ga.*: 1898, *Augusta South R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420; 1903, *Chenall v. Palmer B. Co.*, 117 id. 106, 43 S. E. 443 (fall of a brick arch; leading opinion, by Lamar, J.); *Ill.*: 1901, *Springer v. Ford*, 189 Ill. 430, 59 N. E. 953 (breaking of a passenger-elevator appliance); 1903, *Chicago City R. Co. v. Carroll*, 206 id. 318, 68 N. E. 1087 (passenger on a street railway); *Ia.*: 1897, *Faust v. R. Co.*, 104 Ia. 241, 73 N. W. 623 (owner riding with his stock; ordinarily there is no presumption, but where he rode in another car, it was enough to show that the destroying fire

accepted shape will be can hardly be predicted. But the following considerations ought to limit it: (1) The apparatus must be such that in the ordinary instance no injurious operation is to be expected unless from a careless construction, inspection, or user; (2) Both inspection and user must have been at the time of the injury in the control of the party charged; (3) The injurious occurrence or condition must have happened irrespective of any voluntary action at the time by the party injured. It may be added that the particular force and justice of the presumption, regarded as a rule throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person.

In some jurisdictions there is a rule of substantive law to be distinguished for some classes of injuries. For example, the setting of fire to adjacent property by the emission of sparks from a railway locomotive may be deemed to raise a presumption, by the present rule (either under statute or by judicial decision); but it may also be made *per se* a cause of action, irrespective

was not caused by himself); *Kan.*: 1900, *St. Louis & S. F. R. Co. v. Burrows*, 62 *Kan.* 89, 61 *Pac.* 439 (passenger); *Ky.*: 1902, *Davis v. Paducah R. & L. Co.*, — *Ky.* —, 68 *S. W.* 140; *La.*: 1902, *LeBlanc v. Sweet*, 107 *La.* 355, 31 *So.* 766 (passenger); *Me.*: 1851, *Church v. Cherryfield*, 33 *Me.* 460 (highway-defect); *Md.*: 1894, *Howser v. R. Co.*, 80 *Md.* 146, 30 *Atl.* 906 (passer-by injured by the fall of ties from a freight-car; leading case; useful opinions by Roberts, J., and by McSherry, J., diss.); *Mass.*: 1894, *Uggle v. R. Co.*, 160 *Mass.* 351, 35 *N. E.* 1126 (breaking of ear and guy used by electric railway); 1894, *Carmody v. Gaslight Co.*, 162 *id.* 539, 39 *N. E.* 184; 1903, *Wadsworth v. R. Co.*, 182 *id.* 572, 66 *N. E.* 421 (sawdust falling from an elevated railway structure); 1903, *Cassady v. Old Colony St. R. Co.*, — *Mass.* —, 68 *N. E.* 10 (explosion of electric railroad fuse); *Mo.*: 1895, *Och v. R. Co.*, 130 *Mo.* 27, 31 *S. W.* 962 (passenger; useful opinion); *Nebr.*: 1893, *Union P. R. Co. v. Porter*, 38 *Nebr.* 226, 235, 56 *N. W.* 808 (here a statute makes the carrier absolutely liable for injury to a passenger, irrespective of the former's negligence); 1895, *Spears v. R. Co.*, 43 *id.* 720, 62 *N. W.* 68 (finding a person dead on the railroad); 1896, *Lincoln R. Co. v. Cox*, 48 *id.* 807, 67 *N. W.* 740; 1899, *Chicago R. I. P. R. Co. v. Young*, 58 *id.* 678, 79 *N. W.* 556 (passenger); *N. J.*: 1894, *Excelsior Co. v. Sweet*, 57 *N. J. L.* 224, 30 *Atl.* 553; 1897, *Trenton P. R. Co. v. Cooper*, 60 *id.* 219, 37 *Atl.* 730 (escape of electricity from street-railway rails); 1898, *Newark E. L. & P. Co. v. Ruddy*, 62 *id.* 505, 41 *Atl.* 712 (broken wire in highway); *N. Y.*: 1901, *Griffen v. Manice*, 166 *N. Y.* 188, 59 *N. E.* 925 (passenger-elevator accident by the falling of the weights); *N. C.*: 1894, *Haynes v. Gas Co.*, 114 *N. C.* 203, 207, 19 *S. E.* 344 (guy-wire of electric light, hanging from a tree

and charged from a trolley-wire); *Oh.*: 1896, *Pennsylvania Co. v. McCann*, 54 *Oh.* 10, 42 *N. E.* 768 (under statute); *Or.*: 1902, *Chap-eron v. Electric Co.*, 41 *Or.* 39, 67 *Pac.* 928 (contact with an electric wire); *Pa.*: 1892, *Herstine v. R. Co.*, 151 *Pa.* 244, 252, 25 *Atl.* 104 (shock by careless coupling); 1893, *Fleming v. R. Co.*, 158 *id.* 130, 27 *Atl.* 858 (rock falling on a train); 1895, *Shafer v. Lacoek*, 168 *id.* 497, 32 *Atl.* 44; 1897, *O'Connor v. Traction Co.*, 180 *id.* 444, 36 *Atl.* 866; 1899, *Alexander v. Steel Co.*, 189 *id.* 582, 42 *Atl.* 286 (workman on a scaffolding); 1902, *Baron v. Reading Iron Co.*, 202 *id.* 274, 51 *Atl.* 979 (boiler explosion); *S. C.*: 1899, *Steele v. R. Co.*, 55 *S. C.* 389, 33 *S. E.* 509 (passenger); *S. D.*: 1894, *Saunders v. R. Co.*, 6 *S. D.* 40, 60 *N. W.* 148; *Tenn.*: 1898, *Mitchell v. N. C. & St. L. R. Co.*, 100 *Tenn.* 329, 45 *S. W.* 337 (blowing a whistle); *Tex.*: 1894, *Mexican C. R. Co. v. Lauricella*, 87 *Tex.* 277, 28 *S. W.* 277; 1895, *Gulf, C. & S. F. R. Co. v. Shieder*, 88 *Tex.* 152, 30 *S. W.* 902; *U. S.*: 1897, *Pittsburg & W. R. Co. v. Thompson*, 27 *C. C. A.* 333, 32 *Fed.* 720 (Ohio statute applied, regarding defective railway cars); 1897, *The Joseph B. Thomas*, 81 *Fed.* 578 (injury at a ship's hatchway); 1902, *Bradford Glycerine Co. v. Kizer*, 51 *C. C. A.* 524, 113 *Fed.* 894 (explosion of nitroglycerine); *W. Va.*: 1897, *Snyder v. Electr. Co.*, 43 *W. Va.* 661, 28 *S. E.* 733 (falling of a wire); *Wis.*: 1889, *Koenig v. Arcadia*, 75 *Wis.* 62, 67, 43 *N. W.* 734 ("there can be no proof so conclusive that the hole was a dangerous defect as that it did actually cause injury"; this is unsound; whether it was the cause may be the disputed question); 1884, *Cummings v. Furnace Co.*, 60 *id.* 603, 18 *N. W.* 742, 20 *N. W.* 665 (highway); 1898, *Carroll v. C. B. & R. Co.*, 99 *id.* 399, 75 *N. W.* 176 (applying the Cummings case rule to the fall of a window).

of actual negligence;³ and the course of legislation in the different jurisdictions has to be discriminated.⁴ So, too, the killing of live-stock by a railroad train has been the subject of statutory rules.⁵

§ 2510. **Same:** (4) **Death by Violence.** Where a person is found dead by violent injury, two questions of presumption as to his conduct may be raised. (a) If the death has been caused (for example) by a railway train, may it be presumed, where no other circumstances appear, that he was *exercising due care* at the time of the injury?¹ This presumption will be of most consequence in those jurisdictions (*ante*, § 2507) which place on the plaintiff the first burden of proof (risk of non-persuasion) as to contributory negligence. (b) If death by any cause but suicide or extreme negligence has been *insured* against, where is the burden of proof as to the accidental nature of death? Here, on the contract-principle (*post*, § 2537), it would seem that the first burden of proof (risk of non-persuasion) is on the insurer to show the excepted cause.²

§ 2511. **Crimes:** (1) **Innocence, Malice, Intent, etc.** (a) The "*presumption of innocence*" is a term which has been the subject of two special fallacies, namely, (1) that it is a genuine addition to the number of presumptions, and (2) that it is *per se* evidence. 1. As to the first of these fallacies, it is to be noted that the "*presumption of innocence*" is in truth merely another form of expression for a part of the accepted rule for the burden of proof in criminal cases, *i. e.* the rule that it is for the prosecution to adduce evidence (*ante*, § 2487), and to produce persuasion beyond a reasonable doubt (*ante*,

³ That such statutes are constitutional is noticed *ante*, § 1354. For the rule as to the admissibility of *other fires*, see *ante*, § 454.

⁴ Some of the illustrations are as follows: *Ala.* : 1896, *Louisville & N. R. Co. v. Malone*, 109 *Ala.* 509, 20 *So. 33*; 1902, *Louisville & N. R. Co. v. Marburg L. Co.*, 132 *id.* 520, 32 *So. 745*; *Conn. Gen. St.* 1887, § 1096 (injury by locomotive fire; communication of fire by locomotive is *prima facie* evidence of negligence); *Ga.* : 1892, *East Tennessee V. & G. R. Co. v. Heskens*, 90 *Ga.* 11, 15 *S. E.* 828 (under Code § 3033); 1892, *East Tennessee V. & G. R. Co. v. Hall*, *ib.* 17, 16 *S. E.* 91 (same); 1897, *Gainesville J. & S. R. Co. v. Edmondson*, 101 *id.* 747, 29 *S. E.* 213 (that the fire was set by the defendant must first be proved); *Ill.* : 1903, *Cleveland C. C. & St. L. R. Co. v. Hornsby*, 202 *Ill.* 138, 66 *N. E.* 1052 (applying *Rev. St. c. 114*, § 123); *Ia.* : 1897, *Hemmi v. R. Co.*, 102 *Ia.* 25, 70 *N. W.* 746; *Minn.* : 1895, *Solum v. R. Co.*, 63 *Minn.* 233, 65 *N. W.* 443; *N. C.* : 1898, *Hygienic P. I. M. Co. v. R. Co.*, 122 *N. C.* 881, 29 *S. E.* 575; 1902, *Raleigh Hosiery Co. v. R. Co.*, 131 *id.* 238, 42 *S. E.* 602; *N. D.* : 1897, *Mathews v. R. Co.*, 7 *N. D.* 81, 72 *N. W.* 1085; 1899, *McTavish v. R. Co.*, 8 *id.* 333, 79 *N. W.* 443 (in spite of the overthrow of the presumption by evidence of proper construction, the fact of repeated fires may suffice for going to the jury); *Tex.* : 1899, *Gulf C. & S. F. R. Co. v. Johnson*, 92 *Tex.* 591, 50 *S. W.* 563; *U. S.* : 1900, *McCullen v. C. & N. W. R. Co.*, 41 *C. C. A.*

365, 101 *Fed.* 66; 1900, *Garrett v. Southern R. Co.*, *ib.* 237, 101 *Fed.* 102; *Va.* : 1896, *Patteson v. R. Co.*, 94 *Va.* 16, 26 *S. E.* 393 (repudiating *Bernard v. R. Co.*, 85 *id.* 792); 1897, *Kimball v. Borden*, 95 *id.* 203, 28 *S. E.* 207.

⁵ 1892, *Birmingham M. R. Co. v. Harris*, 98 *Ala.* 326, 330, 13 *So.* 377 (analyzing preceding rulings and the statutory changes); 1895, *Savannah F. & W. R. Co. v. McConnell*, 94 *Ga.* 352, 21 *S. E.* 568; *N. C. Code* 1883, § 2326 (killing or injury of live-stock by railroad engines or cars, raises a presumption of negligence).

For the question whether a presumption applies in the case of an *injured employee*, see the following cases : 1892, *Hoosier Stone Co. v. McCain*, 133 *Ind.* 231, 237, 31 *N. E.* 956; 1898, *Hesse v. C. S. & H. R. Co.*, 58 *Oh.* 167, 50 *N. E.* 354; 1897, *Peirce v. Kile*, 26 *C. C. A.* 201, 80 *Fed.* 865.

¹ The following illustrate the question : 1886, *Wakelin v. London & S. W. R. Co.*, *L. R.* 12 *App. Cas.* 41; *Cal. C. C. P.* 1872, § 1963, par. 4 (it is presumed "that a person takes ordinary care of his own concerns"); 1903, *Cogdell v. R. Co.*, 132 *N. C.* 852, 44 *S. E.* 618; 1896, *Sullivan v. R. Co.*, 175 *Pa.* 361, 34 *Atl.* 798. 1903, *Baltimore & P. R. Co. v. Landrigan*, 191 *U. S.* 461, 24 *Sup.* 137. Compare the doctrine of *judicial notice by the jury* (*post*, § 2570), where a related question arises.

² 1900, *Jenkin v. Ins. Co.*, 131 *Cal.* 121, 63 *Pac.* 180; 1893, *Sutherland v. Ins. Co.*, 87 *Ida.* 505, 508, 54 *N. W.* 453; 1894, *Keene v. Aa. Ass.*, 161 *Mass.* 149, 150, 36 *N. E.* 891.

§ 2497). As to this latter part, the measure of persuasion, the "presumption" says nothing. As to the former part, the "presumption" implies what the other rule says, namely, that the accused (like every other person on whom the burden of proof does not lie) may remain inactive and secure, until the prosecution has taken up its burden and produced evidence and effected persuasion; *i. e.*, to say in this case, as in any other, that the opponent of a claim or charge is presumed not to be guilty is to say in another form that the proponent of the claim or charge must evidence it. But in a criminal case the term does convey a special and perhaps useful hint, over and above the other form of the rule about the burden of proof, in that it cautions the jury to put away from their minds all the suspicion that arises from the arrest, the indictment, and the arraignment, and to reach their conclusion solely from the legal evidence adduced. In other words, the rule about burden of proof requires the prosecution by evidence to convince the jury of the accused's guilt; while the presumption of innocence, too, requires this, but conveys for the jury a special and additional caution (which is perhaps only an implied corollary to the other) to consider, in the material for their belief, *nothing but the evidence, i. e.*, no surmises based on the present situation of the accused, — a caution particularly needed in criminal cases.¹ So far, then, as the "presumption of innocence" adds anything, it is merely a warning not to treat certain things improperly as evidence. 2. As to the second fallacy, it seems to have been mainly propagated by the passage of Professor Greenleaf,² declaring that "this legal presumption of innocence is to be regarded by the jury, in every case, as *matter of evidence*, to the benefit of which the party is entitled." But it cannot be regarded as "matter of evidence." No presumption can be evidence; it is a rule about the duty of producing evidence (*ante*, § 2490). This is, in itself, only a matter of the theory of presumptions, and to that extent may be regarded as a mere question of words, — of the way of phrasing a rule upon the substance of which there is no dispute. But when this erroneous theory is made the ground for ordering new trials because of the mere wording of a judge's instruction to a jury, the erroneous theory is capable of causing serious harm to the administration of justice.³

¹ 1877, *Scintillæ Juris*, 28: "The truth is that, although the law pays a prisoner the compliment of supposing him to be wrongly accused, it nevertheless knows very well that the probabilities are in favor of the prosecutor's accusation being well founded. . . . Those who think thus [that a prisoner is more likely to be acquitted than a civil defendant, because of the reasonable-doubt rule] have failed to notice that it is more important to a man to look innocent than to be *prima facie* thought so. No [civil] defendant is brought through a hole in the floor; he is not surrounded by a barrier, nor guarded by a keeper of thieves; he is not made to stand up alone while his actions are being judged; and his latest address is not presumably the jail of his county." Compare Stephen, *History of the Criminal Law*, I, 397.

² Evidence, § 34.

³ A glaring instance of this fault is to be found in the decision of *Coffin v. U. S.*, 156 U. S. 432, 162 id. 664, 15 Sup. 394, 16 Sup. 943 (1896), where the opinion of the Court, proceeding upon the above phrase of Greenleaf as a leading authority, declares this "presumption" to be "evidence in favor of the accused." This opinion received apparent sanction in the later case of *Allen v. U. S.*, 164 id. 492, 7 Sup. 154 (1896). But in *Agnew v. U. S.*, 165 id. 36, 51, 17 Sup. 235 (1897), its particularly objectionable sentence declaring that "legal presumptions are treated as evidence" is referred to as "having a tendency to mislead"; in this case the trial Court had refused to give an offered instruction copying that sentence, and the refusal was held proper; so that the *Agnew* decision may perhaps be taken as a recantation to this extent of the unfortunate heresy put forward in the *Coffin*

(b) The various acts constituting the outward part of a crime are sometimes said to constitute a presumption of *malice* or *criminal intent*. But most of these instances are to-day understood to be either "conclusive presumptions," *i. e.* rules of substantive law defining the criminal act (*ante*, § 2492), or else mere inferences of fact (*ante*, § 2491) not affecting the accused with a duty to produce evidence.⁴

§ 2512. **Same:** (2) **Self-defence, Alibi, etc.** It is generally said that in criminal prosecutions the burden of proof is on the prosecution for all the facts that are material to the crime; so that, whether or not a particular fact is one which would in a civil action be of the nature of an affirmative excuse, it is nevertheless in a criminal prosecution a part of the burden (in both senses) for the prosecution. The absence of any affirmative pleadings by the accused, and the general policy of caution in favor of accused persons, seem to have been the theoretical and practical reasons for this result. Nevertheless, some inroads have of recent times been made upon this ortho-

case. It is to be observed that the opinion in the *Agnew* case (in 1897) was published subsequently to a notable lecture on the Presumption of Innocence, apropos of the *Coffin* case, delivered by Professor Thayer, at Yale University (in 1896), in which the history of the presumption was carefully examined, its meaning acutely expounded, and the fallacies of the opinion in the *Coffin* case exposed in detail; this lecture was reprinted in the learned lecturer's Preliminary Treatise on Evidence (1898), Appendix B, p. 551.

The fallacy of *Coffin v. U. S.* is substantially repudiated in the following cases: 1899, *State v. Soper*, 148 Mo. 217, 49 S. W. 1007 (there is not a "two-ply presumption" in favor of one who is charged with wife-murder; repudiating *State v. Leabo*, 84 id. 168); 1900, *State v. Kennedy*, 154 id. 268, 55 S. W. 293 (refusal to instruct on the presumption of innocence is not error where an instruction on reasonable doubt has been adequately given); 1896, *People v. Ostrander*, 110 Mich. 60, 67 N. W. 1079 (similar). The common phrase about the presumption of innocence is illustrated in the following cases: 1898, *Bryant v. State*, 116 Ala. 445, 23 So. 40; 1897, *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; 1899, *Emery v. State*, 101 Wis. 627, 78 N. W. 145. The following series of rulings shows the influence of the *Coffin* case: 1898, *Bartley v. State*, 53 Nebr. 310, 73 N. W. 744 (the phrase sanctioned; but an instruction omitting it is not held erroneous); 1898, *Bartley v. State*, 55 id. 294, 75 N. W. 832 (the *Coffin* case noted; question left undecided); 1899, *McVey v. State*, 57 id. 471, 77 N. W. 1111 (following *Bartley v. State*).

If a legitimate presumption is raised, so as to create a duty for the accused to produce some evidence to the contrary, and he does not do so, there is no reason why the jury may not be required to find according to the presumption (*ante*, § 2495); *e. g.*, 1897, *Agnew v. U. S.*, 165 U. S. 36, 17 Sup. 235 (fraudulent intent presumed from false accounts, in the absence of evidence to the contrary sufficient to raise a reasonable doubt). But if the

accused does adduce some evidence, and thus the case comes into the hands of the jury free from the presumption, the rule about persuasion beyond a reasonable doubt (*ante*, § 2497) is in force throughout for measuring their belief, and they must be so persuaded, in spite of the rule of presumption; this is sometimes incorrectly expressed by saying that the presumption of innocence overcomes presumptions against the accused: 1903, *Walton v. State*, — Ark. —, 75 S. W. 1 (seduction; chastity being presumed, "the presumption of innocence of the defendant overcomes the presumption of chastity"); 1896, *People v. Sanders*, 114 Cal. 216, 46 Pac. 153 (overcoming the presumption of regularity of official acts); 1897, *Dunlop, v. U. S.*, 165 U. S. 486, 17 Sup. 375 (the rule does not apply where the other presumption "constitutes a link in the chain of evidence against the defendant"). Other examples are found under the presumption about marriage (*ante*, § 2506).

* Cases illustrating a presumption of *malice* from the use of a deadly weapon: 1892, *Gilbert v. State*, 90 Ga. 691, 16 S. E. 652; 1878, *Farris v. Com.*, 14 Bush 362, 368; 1845, *Com. v. York*, 9 Metc. 93, 103; 1855, *Com. v. Hawkins*, 3 Gray 463 (leading opinion, by Shaw, C. J.); 1893, *People v. Wolf*, 95 Mich. 625, 630, 55 N. W. 357; 1898, *Herman v. State*, 75 Miss. 340, 22 So. 872; 1896, *Territory v. Lucero*, — N. M. —, 46 Pac. 18; 1676, *Thomas v. People*, 67 N. Y. 218, 224; 1892, *State v. Whitson*, 111 N. C. 695, 699, 16 S. E. 332; 1873, *State v. Patterson*, 45 Vt. 308. Cases illustrating a presumption of felonious intent from the taking of goods: 1902, *Long v. State*, — Fla. —, 32 So. 870; 1898, *State v. Judd*, 20 Mont. 420, 51 Pac. 1033. These and analogous rules can only be disentangled by a detailed consideration of the substantive law of the crime in question.

There is no real presumption of guilt from flight; compare the cases cited *ante*, § 276, and the following: 1899, *Smith v. State*, 106 Ga. 673, 32 S. E. 851; 1898, *State v. Adler*, 146 Mo. 18, 47 S. W. 794.

dox principle, and in many jurisdictions it is accepted that the burden of proof may for certain sorts of facts be upon the accused. Certainly, the second burden, *i. e.* the duty of producing some evidence (*ante*, § 2487), ought in many instances to be upon the accused. The absence of affirmative pleadings in defence is no insuperable objection to such a result. The judicial experience with certain issues on criminal trials has seemed to justify such exceptions; and the fixing of a particular fact on this or that party as a part of his case is in general only a question of sound policy as based on experience (*ante*, § 2486).

(a) A few Courts seem in general to place on the accused some sort of burden of proof for any fact in the nature of *excuse* or *mitigation*.¹ (b) A few Courts seem to place upon the accused the burden of showing that he acted in *self-defence*.² (c) It is generally conceded that the accused does not have the burden of proving an *alibi*.³ (d) In sundry other instances, a naturally affirmative defence is sometimes apportioned to the accused's burden.⁴

¹ For example: 1899, *Brown v. State*, 62 N. J. L. 666, 42 Atl. 811 (risk of non-persuasion of guilt is always on the prosecution, but the defendant has a duty to produce evidence of any justification; and the opinion is not entirely clear); 1897, *State v. Byrd*, 121 N. C. 684, 28 S. E. 353 (burden is on the defendant to show excuse or mitigation). *Contra*, to some extent: 1898, *Appleton v. People*, 171 Ill. 473, 49 N. E. 708 (under Cr. Code § 155, it is not necessary for a defendant to "satisfactorily establish his defence"); 1898, *Herman v. State*, 75 Miss. 340, 22 So. 872 (the burden of proving an excuse is not on the defendant).

² The judicial language is seldom entirely clear as to the nature of the burden. The following cases illustrate both views: 1892, *Roden v. State*, 97 Ala. 54, 57, 12 So. 419 (assault with intent; the burden is on the defendant); 1893, *Boulden v. State*, 102 id. 78, 83, 15 So. 341 (similar); 1895, *Dent v. State*, 105 id. 14, 17 So. 94 (the burden is on the prosecution); 1896, *Scheerer v. Agee*, 113 id. 383, 21 So. 79 (the risk of non-persuasion beyond reasonable doubt is on the prosecution); 1898, *People v. Milner*, 122 Cal. 171, 54 Pac. 833 (the burden is on the defendant); 1898, *State v. Shea*, 104 Ia. 724, 74 N. W. 687 (the burden is on the prosecution, nor has the defendant a duty of producing evidence); 1899, *Tucker v. State*, 89 Md. 471, 43 Atl. 778 (the burden is on the defendant to persuade by a preponderance); 1897, *Strother v. State*, 74 Miss. 447, 21 So. 147 (the burden is on the prosecution); 1897, *King v. State*, ib. 576, 21 So. 235 (same); 1894, *Gravely v. State*, 38 Nebr. 871, 57 N. W. 751 (the burden is on the prosecution, without shifting); 1894, *State v. Barringer*, 114 N. C. 840, 19 S. E. 275 (the defendant must prove it "to the satisfaction of the jury"); 1895, *Com. v. Mika*, 171 Pa. 273, 33 Atl. 65 (if a killing by the defendant is proved, the prosecution has the burden of raising it to the first degree, and the defence that of reducing it below the second degree); 1899,

State v. Yokum, 11 S. D. 544, 79 N. W. 835 (the burden is on the defendant); 1903, *Rutherford v. Foster*, 60 C. C. A. 129, 125 Fed. 187 (in a civil case, the burden is on the defendant); 1894, *Vance v. Com.*, — Va. —, 19 S. E. 785; 1894, *Myers v. Com.*, 90 id. 705, 19 S. E. 881; 1895, *State v. Zeigler*, 40 W. Va. 593, 21 S. E. 763 (doubtful).

³ 1896, *Towns v. State*, 111 Ala. 1, 20 So. 598 (the defendant must produce evidence, but the prosecution has the risk of non-persuasion beyond reasonable doubt); 1897, *Pickens v. State*, 115 id. 42, 22 So. 551; *James v. State*, ib. 83, 22 So. 565; 1898, *Schultz v. Terr.*, — Ariz. —, 52 Pac. 352 (the defendant has no burden); 1898, *People v. Roberts*, 122 Cal. 377, 55 Pac. 137 (the burden is on the prosecution); 1899, *People v. Winters*, 125 id. 325, 57 Pac. 1067 (the defendant must introduce evidence, but need not persuade by preponderance); 1897, *McNamara v. People*, 24 Colo. 61, 48 Pac. 541 (the burden is on the prosecution); 1897, *State v. Ardoin*, 49 La. An. 1145, 22 So. 620 (similar); 1895, *State v. Harvey*, 131 Mo. 339, 32 S. W. 1110 (similar); 1899, *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026 (the duty of production, but not the risk of non-persuasion, is on the defendant); 1897, *Beck v. State*, 51 Nebr. 106, 70 N. W. 498 (the defendant need not persuade by a preponderance); 1898, *Peyton v. State*, 54 id. 188, 74 N. W. 597 (burden of proof remains on prosecution throughout); 1896, *Borrego v. Territory*, 8 N. M. 446, 46 Pac. 349 (the defendant need not persuade by a preponderance); 1897, *Wright v. Terr.*, 5 Okl. 78, 47 Pac. 1069 (the burden is on the prosecution); 1897, *State v. Thornton*, 10 S. D. 349, 73 N. W. 196 (the defendant has the duty of producing evidence; but the prosecution's case must still be made out to the jury beyond a reasonable doubt).

⁴ For example, in the *illegal sale of liquor*, the defendant must prove a *license*: 1896, *Hornberger v. State*, 47 Nebr. 40, 66 N. W. 23; 1897, *Durfee v. State*, 53 id. 214, 73 N. W. 676 (the

§ 2513. **Same:** (3) **Possession of Stolen Goods.** One of the most troublesome and fruitless controversies has been whether under certain circumstances the accused's possession of stolen goods raises a presumption that he was the thief. It had long been customary in England to use the language of presumptions for such a situation;¹ but whether the language was intended merely to mean that the specific fact alone was sufficient evidence on which the jury *might* reach a conviction if they desired (*ante*, § 2494), or whether it meant that the specific fact alone created a presumption, *i. e.* placed on the accused a duty of producing evidence, so that if he failed to do so (that is, to offer any "explanation") the jury *must* convict (*ante*, § 2490), was seldom made clear. This obscurity has continued in the judicial rulings in the United States;² but among the numerous precedents most seem to repudiate any rule of presumption in the strict sense.³

mere possession, irrespective of explanation, raises a presumption of guilt, and shifts the "burden . . . to establish" lawful possession); 1898, *Parker v. State*, 61 N. J. L. 308, 39 Atl. 651; 1897, *State v. Shelton*, 16 Wash. 590, 48 Pac. 258. In some cases, the burden is clearly stated to be merely the second kind, *i. e.* the duty of producing evidence: 1897, *State v. Lee*, 69 Conn. 186, 37 Atl. 75 (under a statute making an abortion criminal, unless necessary to save life, the necessity must be evidenced by the defendant).

¹ 1836, *R. v. Cockin*, 2 Lew. Cr. C. 235, and note by the Reporter; 1845, *R. v. Dredge*, 1 Cox Cr. 235; 1854, *R. v. Burton*, Dears. Cr. C. 232; 1860, *R. v. Harris*, 8 Cox Cr. 333; 1866, *R. v. Exall*, 4 F. & F. 925 (leading case); 1878, *R. v. Hughes*, 14 Cox Cr. 223.

² 1902, *Weaver, J., in State v. Brady*, — Ia. —, 91 N. W. 801: "The use of the terms 'presumption of guilt' and '*prima facie* evidence of guilt' with reference to the possession of stolen goods has perhaps been too long indulged in by Courts and text-writers to be condemned; but we cannot resist the conclusion that, when so employed, these expressions are unfortunate, and often misleading. In a civil proceeding, when a plaintiff makes a *prima facie* case, the burden is shifted, and, in the absence of any countershowning, he is entitled to recover as a matter of law. This rule is understood by the average intelligent layman as well as by those learned in the law; and when, in a criminal case, an instruction is given that the showing of a specific fact is *prima facie* evidence of guilt, jurors may very naturally conclude that the establishment of such fact has the effect to cast upon defendant the burden of proving his innocence of the charge against him. . . . 'Presumptions' of guilt and '*prima facie*' cases of guilt in the trial of a party charged with crime mean no more than that from the proof of certain facts the jury will be warranted in convicting the accused of the offense with which he is charged."

³ The following cases illustrate the bearings of the question in most jurisdictions; compare the cases cited *ante*, § 152; *Ala.*: 1898, *Bryant*

v. State, 116 Ala. 445, 23 So. 40; 1899, *Hale v. State*, 122 id. 85, 26 So. 236; 1902, *Smith v. State*, 133 id. 145, 31 So. 806; *Ariz.*: 1901, *Taylor v. Terr.*, — Ariz. — 64 Pac. 423; *Cal.*: 1898, *People v. Luchetti*, 119 Cal. 501, 51 Pac. 707 (an explanation entitles the matter to be left to the jury); 1901, *People v. Jay*, 135 id. xix, 66 Pac. 964; 1902, *People v. Wilson*, ib. 331, 67 Pac. 322; *Colo.*: 1897, *Brooke v. People*, 23 Colo. 375, 48 Pac. 502 (the defendant must explain, but not as a rule of going forward; and the prosecution's general burden remains); 1899, *Van Straaten v. People*, 26 id. 184, 56 Pac. 905; *Fla.*: 1895, *Leslie v. State*, 35 Fla. 171, 17 So. 555; 1899, *Williams v. State*, 40 id. 480, 25 So. 143; *Ga.*: 1892, *Cornwall v. State*, 91 Ga. 277, 281, 18 S. E. 154; 1895, *Brooks v. State*, 96 id. 553, 23 S. E. 413; 1898, *Davidson v. State*, 104 id. 761, 30 S. E. 946; 1898, *Jones v. State*, 105 id. 649, 31 S. E. 574; 1898, *Sharpe v. State*, ib. 588, 31 S. E. 541; 1901, *Turner v. State*, 114 id. 45, 39 S. E. 863; *Ida.*: 1901, *State v. Sanford*, — Ida. —, 67 Pac. 492; *Ill.*: 1896, *Keating v. People*, 160 Ill. 480, 43 N. E. 724; 1902, *Williams v. People*, 196 id. 173, 63 N. E. 681; 1903, *Watts v. People*, 204 id. 233, 68 N. E. 563; *Ind.*: 1866, *Doan v. State*, 26 Ind. 495 (it is not his failure to explain "where it is in his power to do so," because if he was able to explain innocently, though he did not choose to, by hypothesis he is not guilty; but his ability to explain *if* he were innocent and his then failure); 1897, *Pfau v. State*, 148 id. 539, 47 N. E. 926; 1898, *Campbell v. State*, 150 id. 74, 49 N. E. 905 (it is a "strong presumption of fact," *i. e.* in the absence of satisfactory explanation, "the jury were legally bound to find him guilty"; but the Court erroneously declares that a "strong presumption of fact" would have the same effect as a rebuttable presumption of law; the preceding authorities reviewed); *Ind. T.*: 1896, *Oxier v. U. S.*, 1 Ind. T. 85, 38 S. W. 331; *Ia.*: 1895, *State v. LaGrange*, 94 Ia. 60, 62 N. W. 664; 1899, *State v. Miner*, 107 id. 656, 78 N. W. 679; 1903, *State v. Williams*, 120 id. 36, 94 N. W. 255; 1903, *State v. King*, — id. —, 96 N. W. 712; *Kan.*: 1894, *State v. Hoffman*, 53 Kan. 700, 708, 37 Pac. 138 ("if

If no rule of presumption is to be accepted, specific limitations are hardly of any consequence, for the sufficiency of the evidence to go to the jury will usually depend on the variant circumstances of each case. But the following considerations have been emphasized, from the point of view of a definite rule: (a) The possession must be *unexplained* by any innocent origin;⁴ (b) the possession must be fairly *recent*;⁵ (c) and the possession must be *exclusive*.⁶ Furthermore, if there is any rule at all, it is generally conceded to apply also on a charge of *knowing receipt* of stolen goods,⁷ and of *burglary* or the like.⁸

In many additional instances, by statute, a rule of presumption or of "*prima facie* evidence" has been declared against persons found in possession of forbidden articles, such as game or liquor;⁹ but these rules involve closely the substantive law of the respective crimes.

unexplained, may be sufficient"); 1899, *State v. Powell*, 61 id. 81, 58 Pac. 968; 1902, *State v. Herron*, 64 id. 363, 67 Pac. 861; *La.*: 1898, *State v. Kelley*, 50 La. An. 597, 23 So. 543 (possession of recently stolen property, not accounted for, raises the presumption); *Mass.*: 1869, *Com. v. Bell*, 102 Mass. 165; 1875, *Com. v. Randall*, 119 id. 107; *Mo.*: 1897, *State v. Wilson*, 137 Mo. 592, 39 S. W. 80; *Nev.*: 1898, *State v. Mandich*, 24 Nev. 336, 54 Pac. 516; *N. D.*: 1900, *State v. Rosencrans*, 9 N. D. 163, 82 N. W. 422; *Okl.*: 1897, *Johnson v. Terr.*, 5 Okl. 695, 50 Pac. 90; 1898, *Douthitt v. Terr.*, 7 id. 55, 54 Pac. 312 (it is "a circumstance" only); *Or.*: 1896, *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797 (it depends on "the character of the property, the nature of the possession, and its proximity in time with the theft"); *U. S.*: 1901, *Considine v. U. S.*, 50 C. C. A. 272, 112 Fed. 342; *Vt.*: 1898, *State v. Peach*, 70 Vt. 283, 40 Atl. 732 (unexplained possession may be considered); *Wash.*: 1893, *State v. Walters*, 7 Wash. 246, 257, 34 Pac. 938, 1098 (no presumption; but the Court whimsically treat a charge calling such possession "a criminalizing circumstance tending to show" guilt as if it laid down a rule of law; this is strange distortion of words); 1902, *State v. Bliss*, 27 id. 463, 68 Pac. 87; *Wyo.*: 1903, *Younger v. State*, — Wyo. —, 73 Pac. 551.

⁴ This is noted in many of the cases *supra*.

⁵ 1836, *R. v. Cockin*, 2 Lew. Cr. C. 235 (sacks stolen in February were found in the defendant's possession some twenty days after; Coleridge, J.: "If I was now to lose my watch, and in a few minutes it was to be found on the person of one of you, it would afford the strongest ground for presuming that you had stolen it. But if a month hence it were to be found in your possession, the presumption of your having stolen it would be greatly weakened; because stolen property usually passes through many hands"); 1845, *R. v. Hall*, 1 Cox Cr. 231 (possession of a shirt, six months after it was missed; Pollock, C. B., and Coleridge, J.: "There is a certain period after which I should think it very unfair to assume theft from mere possession, even where the property is proved *abundante* to have been stolen"); 1898, *State v. Foulk*, 59 Kan. 775, 52 Pac. 864.

⁶ 1896, *Moncrief v. State*, 99 Ga. 295, 25 S. E. 735 (the possession of the house must be exclusive); 1892, *State v. Owsley*, 111 Mo. 450, 455, 20 S. W. 194 (goods found in a house of the defendant's wife where he did not live; not sufficient). Compare the following: 1900, *Sparks v. State*, 111 Ga. 830, 35 S. E. 654 (what constitutes possession, examined).

⁷ 1864, *R. v. Langmead, Leigh & C.* 427 (Blackburn, J.: "I should have said that recent possession was evidence either of stealing or receiving according to circumstances. . . . When it has been shown that property has been stolen and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver, according to the circumstances"); 1899, *State v. Guild*, 149 Mo. 370, 50 S. W. 909 (overruling *State v. Bulla*, 89 id. 595, 1 S. W. 764).

⁸ 1898, *Roberson v. State*, 40 Fla. 509, 24 So. 474 (if a breaking and entering at the time of taking is shown); 1899, *Lester v. State*, 106 Ga. 371, 32 S. E. 335 (admissible, if the fact of breaking and entering is first shown); 1902, *State v. Brady* — Ia. —, 91 N. W. 801 (burglary; local rulings reviewed); 1902, *State v. Brundige*, 118 id. 92, 91 N. W. 920 (breaking and entering with intent to steal); 1903, *State v. Swift*, 120 id. 8, 94 N. W. 269; 1893, *State v. Moore*, 117 Mo. 395, 404, 22 S. W. 1086; 1898, *State v. Hodges*, 144 id. 50, 45 S. W. 1093 (forged articles); 1902, *State v. Yandle*, 166 id. 589, 66 S. W. 532; 1897, *Johnson v. Terr.*, 5 Okl. 695, 50 Pac. 90; 1896, *Wilson v. U. S.*, 162 U. S. 613, 16 Sup. 895 (fruits of any crime; here money and clothes of the deceased); 1900, *Henderson v. Com.*, 98 Va. 794, 34 S. E. 881. Compare the following: 1894, *People v. Hart*, 10 Utah 204, 207, 37 Pac. 330 (mere recent possession with no other circumstance, insufficient, on a charge of burglary; misapplying the rule of § 2273, *ante*, that failure to testify creates no inference); 1897, *Kibler v. Com.*, 94 Va. 804, 26 S. E. 858 (no presumption from possession of the fruits of a crime).

⁹ *E. g.*: *Mass. Pub. St.* 1882, c. 94, § 4 (possession of timber with the marks cut out, etc.,

§ 2514. **Same:** (4) **Capacity (Infancy, Intoxication, Coverture).** Capacity is naturally a part of the first burden of proof for the prosecution, although the second burden might well be aided, in the appropriate classes of cases, by a presumption of capacity (*ante*, § 2487). For *infancy*, the so-called conclusive presumption of incapacity of criminal intent under the age of seven is of course genuinely a rule of substantive law that the infant "cannot be guilty of felony," as Blackstone correctly puts it.¹ The rule that incapacity is presumed between the ages of seven and fourteen, for sundry crimes,² and for rape in particular,³ is more correctly stated as a presumption of capacity above the age of fourteen. For *insanity*, the incidence of the burdens has already been considered (*ante*, § 2501). For *intoxication*, no doubt the second burden (of producing some evidence) is on the accused;⁴ though the first burden (or risk of non-persuasion) remains on the prosecution.⁵ For *coverture*, the coercion of the husband, which in Blackstone's correct phrase may be "an excuse for criminal misconduct" of the wife, may be presumed from the husband's presence; this then creates for the prosecution a duty of adducing evidence of the wife's willing participation; the risk of non-persuasion remaining throughout upon the prosecution.⁶

§ 2515. **Ownership; (1) Possession of Land and Personalty.** Where title to land becomes material, the fact of present possession alone may serve to create a presumption of ownership;¹ the emphasis being on the occupation, or appearance of ownership, and not on the documentary sources of claim;² and the rule serving merely to shift to the opponent the second burden, or duty of producing some evidence to the contrary.³ The same rule serves in

raises a presumption of the possessor's unlawful cutting). For instances of the *admissibility* of this class of evidence, see *ante*, §§ 149, 153, 154.

¹ Commentaries, III, 23. For rape and kindred crimes, the age of fourteen was taken: 1839, *R. v. Philips*, 8 C. & P. 736; 1839, *R. v. Jordan*, 9 id. 118; but a distinction may be made as to assault with intent: 1824, *Com. v. Green*, 2 Pick. 380.

² 1848, *State v. Goin*, 9 Humph. 174.

³ 1893, *Sutton v. People*, 145 Ill. 279, 286, 34 N. E. 420 (rape; defendant must offer evidence that he is under 14 years of age).

⁴ 1894, *State v. Hill*, 46 La. An. 27, 14 So. 294.

⁵ 1898, *Davis v. State*, 54 Nebr. 177, 74 N. W. 599 (burden of proof remains on prosecution throughout).

⁶ 1886, *Com. v. Flaherty*, 140 Mass. 454, 5 N. E. 258; 1887, *Com. v. Hill*, 145 id. 305, 307, 14 N. E. 124; 1891, *State v. MaFoo*, 110 Mo. 7, 19 S. W. 222; 1880, *Goldstein v. People*, 82 N. Y. 231; 1886, *Franklin's Admr's Appeal*, 115 Pa. 534, 538, 6 Atl. 70.

¹ The inference rests on the general principle of Relevancy examined *ante*, § 148. To the following cases, add those cited *ante*, § 1789, where this presumption comes into play: Cal. C. C. P. 1872, § 1963, par. 11, 12 (it is presumed "that things which a person possesses are owned by him," and "that a person is the owner of prop-

erty, from exercising acts of ownership over it, or from common reputation of his ownership"); 1903, *Cahill v. Cahill*, 75 Conn. 522, 54 Atl. 201 (land); 1893, *Teass v. St. Albans*, 38 W. Va. 1, 22, 17 S. E. 400 (land); Sedgwick & Wait, *Trial of Title to Land*, § 717.

Distinguish the presumption of a *lost grant* from long-continued possession (*post*, § 2522).

² 1897, *Hewes v. Glos*, 170 Ill. 436, 48 N. E. 922 (deed from grantor, without possession by grantor or grantee, raises no presumption of ownership); 1899, *Glos v. Huey*, 181 id. 149, 54 N. E. 905 (similar); 1895, *Newcastle v. Haywood*, 68 N. H. 179, 44 Atl. 132 (similar).

³ This is connected with other rules of substantive law, such as the rule that in ejectment the claimant must recover on the strength of his own title and not the weakness of his opponent's.

There are also occasional rules as to the shifting of the second burden in evidencing the various elements under an *adverse possession*: 1842, *Brown v. King*, 5 Metc. 173 (writ of entry; a title by disseisin being set up, held, that mere possession by the claimant did not suffice to put the burden of proof on the titular owner to show that possession to be permissive; the burden of showing adverseness was on the claimant throughout); 1894, *Skinner v. Skinner*, 38 Nebr. 756, 766, 57 N. W. 534 (the exclusive possession of land with the titular owner's knowledge may create a presumption of his permission); 1866,

the evidencing of ownership of personalty, particularly in cases of larceny or robbery, where a real dispute of ownership is rare.⁴

§ 2516. **Same: (2) Possession of Negotiable Instrument.** Subject to some discriminations, the same presumption may be applied to the possession of a negotiable instrument, especially to one indorsed in blank or to bearer.¹

§ 2517. **Payment: (1) Lapse of Time.** The discharge of a claim by payment is often said to be presumed after a lapse of time depending on the circumstances of the particular case; the inference being based on the principle of Relevancy already examined (*ante*, § 159). But the multiplied statutes of limitation have reduced the occasions for invoking any other rule, and it is not frequent that a real rule of presumption is intended to be laid down.¹

§ 2518. **Same: (2) Possession of Instrument or Receipt.** A receipt is only an ordinary admission of payment, and is therefore not conclusive (*ante*, § 2432); but it is of course the strongest evidence, and some Courts seem to give it the force of a real presumption.¹ The *obligor's possession of the instrument* after maturity is usually said to raise a presumption of payment;

Leport v. Todd, 32 N. J. L. 124 (a plaintiff in ejectment resting on adverse possession has the burden of showing that a possession originally permissive became adverse).

⁴ Add some of the cases cited *ante*, § 1789: 1896, *People v. Oldham*, 111 Cal. 648, 44 Pac. 312 (robbery or larceny); 1901, *Howard v. People*, 193 Ill. 615, 61 N. E. 1016 (robbery); 1867, *Sullivan v. Goldman*, 19 La. An. 12 (presumption of plaintiff's continued ownership of a horse, held not overturned by presumption of ownership from defendant's possession); 1866, *Vining v. Baker*, 53 Me. 544 (trover); 1851, *Magee v. Scott*, 9 Cush. 148; 1865, *Currier v. Gale*, 9 All. 522; 1892, *Com. v. Blanchette*, 157 Mass. 486, 489, 32 N. E. 658 (obtaining goods by false pretences); 1900, *Liscomb v. R. Co.*, 70 N. H. 312, 48 Atl. 284 (gift of decedent); 1877, *Rawley v. Brown*, 71 N. Y. 85 (replevin).

For the application of this rule to property in possession of *husband or wife*, see the following cases: 1893, *Farwell v. Cramer*, 38 Nebr. 61, 66, 56 N. W. 716; 1886, *Kingsbury v. Davidson*, 112 Pa. 383, 4 Atl. 33.

Sometimes a reverse presumption may be invoked, of *possession from ownership*: 1896, *Edgeworth v. Wood*, 58 N. J. L. 463, 33 Atl. 940 (that a wagon was owned by defendant shows *prima facie* that his servant was in control).

¹ The following cases illustrate the scope of the rule: 1894, *National Bank v. Emmitt*, 52 Kan. 603, 35 Pac. 213; 1897, *Jones v. Jones*, 102 Ky. 450, 43 S. W. 412 (rule not applied to an unindorsed note held adversely to the payee's representatives); 1901, *Battersbee v. Calkins*, 128 Mich. 569, 87 N. W. 760; 1898, *Saunders v. Bates*, 54 Nebr. 209, 74 N. W. 578; 1898, *New England L. & T. Co. v. Robinson*, 56 id. 50, 76 N. W. 415; 1893, *Halsted v. Colvin*, 51 N. J. Eq. 387, 398, 26 Atl. 928.

¹ Examples of the use of such a term are as follows: 1786, *Oswald v. Leigh*, 1 T. R. 270

(the defendant showed that he "had an estate in the plaintiff's neighborhood, and was constant and regular in all his payments"); 1829, *Sellen v. Norman*, 4 C. & P. 80 (presumption of wages paid, "if a servant has left a considerable time"); 1864, *McCormick v. Evans*, 33 Ill. 328 (after twenty years; here, money due under a contract to convey); 1879, *Locke v. Caldwell*, 91 id. 417, 421 (presumption not raised for a mortgage debt, where the statutory time of limitation had not run); 1898, *Hollenbeck v. Ristine*, 105 Ia. 488, 75 N. W. 355 (account stated); 1877, *Jarvis v. Albro*, 67 Me. 310, 313 (mortgage); 1894, *Cox v. Brower*, 114 N. C. 422, 423, 19 S. E. 365 (legacies; nor is it material that the legatees were non-residents, the domestic Courts being open to them); 1897, *Young v. Doherty*, 183 Pa. 179, 38 Atl. 587 (action on a note; the plaintiff's failure to mention it in the defendant's testator's lifetime, though "given to boasting of his means and the people in his debt," and his failure to bring suit on it, not received to show a presumable payment); 1898, *Devereux's Estate*, 184 id. 429, 39 Atl. 225 (the insolvency of the debtor alone does not rebut the presumption); 1893, *King v. King*, 90 Va. 177, 17 S. E. 894 (after twenty-seven years, a tender being originally made, and the parties living near each other).

¹ 1897, *Ramsdell v. Clark*, 20 Mont. 103, 49 Pac. 591; 1872, *Guyette v. Bolton*, 46 Vt. 228, 234. *Contra*: 1897, *Terryberry v. Woods*, 69 Vt. 94, 37 Atl. 246 (on a plea of payment, proof of a receipt does not shift the duty of going forward).

Such a presumption is sometimes applied to include *prior instalments* of the same obligation. Cal. C. C. P. 1872, § 1963, par. 10 (it is presumed "that former rent or installments have been paid when a receipt for later is produced"); 1853, *Hodgdon v. Wright*, 36 Me. 326, 336, *semble*; 1823, *Brewer v. Knapp*, 1 Pick. 337.

the inference being based on the principle of Relevancy already considered (*ante*, § 156); but there are various limitations laid down, in particular, concerning the obligor's opportunity of surreptitious access to the obligee's papers.²

§ 2519. **Execution and Contents of Document:** (1) **Letters and Telegrams.** The act of writing a letter or sending a telegram, and the addressee's receipt of the letter or telegram, give rise to questions both of the admissibility and the sufficiency of evidence. The same evidence is also sometimes said to raise a presumption. It is probable that no real presumption is meant to be predicated in the majority of these instances. For example, the receipt by Doe of an answer, through the mail or the telegraph, to his prior communication to Roe, is usually treated as sufficient evidence of Roe's *authorship* of the answer (*ante*, §§ 2153, 2154); and the mailing or depositing of Doe's letter or telegram to Roe is usually treated as sufficient evidence of Roe's *receipt* of it (*ante*, § 95); but it is seldom, except in the latter class of cases, that a burden of proof is deemed to be affected.¹

§ 2520. **Same:** (2) **Execution of Deeds (Delivery, Date, Seal, Consideration).** (a) In view of the importance, in early times, of the formality of *delivery* for a deed (*ante*, §§ 2405, 2408, 2426), it was natural that the evi-

² With the following examples compare the cases cited *ante*, § 156: 1816, *Gibbon v. Featherstonhaugh*, 1 Stark. 225 (drawee's possession of a bill, held to be sufficient evidence); 1816, *Brembridge v. Osborne*, ib. 374 (possession of a note, said to "turn the scale"); 1816, *Shepherd v. Currie*, ib. 454 (possession of an order to deliver goods to bearer, held to shift the burden); 1894, *Excelsior Mfg. Co. v. Owens*, 58 Ark. 556, 563, 25 S. W. 868 (presumption applied to a note possessed after maturity); Cal. C. C. P. 1872, § 1963, par. 9, 13 (it is presumed "that an obligation delivered up to the debtor has been paid," and "that a person in possession of an order on himself for the payment of money, or the delivery of a thing, has paid the money or delivered the thing accordingly"); 1894, *Grimes v. Hilliary*, 150 Ill. 141, 149, 36 N. E. 977 (maker having access to payee's papers as member of the family; no presumption); 1893, *Erhart v. Dietrich*, 118 Mo. 418, 428, 24 S. W. 128 (son taking care of demented payee-father; presumption not applied); 1893, *Smith v. Gardner*, 36 Nebr. 741, 55 N. W. 245 (maker's possession of a note does not raise a presumption, but is merely sufficient evidence); 1832, *Alvord v. Baker*, 9 Wend. 323 (like *Shepherd v. Currie*, *supra*); 1898, *Poston v. Jones*, 122 N. C. 536, 29 S. E. 951 (presumption applied to a note); 1902, *Vann v. Edwards*, 130 id. 70, 40 S. E. 853 (bond found after the death of the payee's administrator in the maker's possession, presumed paid); 1893, *Collins v. Lynch*, 157 Pa. 246, 256, 27 Atl. 721 (joint occupation of land by husband and wife; presumption not applied); 1899, *Wilkinson's Est.*, 192 id. 117, 43 Atl. 466 (check and note of deceased husband found in a wife's possession; that she was executrix, held

to raise no presumption that she had taken them from his possession after death and therefore that they were paid); 1898, *Bates v. Cain's Estate*, 70 Vt. 144, 40 Atl. 36 (possession of a note by a joint promisor is not presumptive of sole payment by him); 1893, *First National Bank v. Harris*, 7 Wash. 139, 143, 34 Pac. 466 (presumption applied to a maker's possession of a note after its issue into circulation).

¹ The cases are collected in the places above cited. Compare also § 2135, *ante* (authentication as a rule of presumption). The following cases illustrate the judicial looseness of language: 1828, *McCourry v. Suydam*, 10 N. J. L. 245 (mailing a notice of trial raises a presumption and "stands for proof" of service; but an affidavit of non-receipt "destroys the presumption"); 1897, *State v. Howell*, — id. —, 38 Atl. 748 (notice of claim; the above language quoted, with the extraordinary addition: "Of course, if there is such a presumption as is assumed, it is one of fact for the jury," and then declining to hold that a refusal to charge such a presumption is erroneous, but recommending attention to "the foregoing deliverance in this Court"; if they had recommended a page from the Sibylline books, they could not have left the trial judge in greater perplexity); 1899, *Fairfield P. Co. v. Ins. Co.*, — Pa. —, 44 Atl. 317 (no presumption of receipt ordinarily from the mailing of a letter; but the opinion inconsistently says that (1) there is no presumption except for notices of commercial paper, and (2) there is no presumption for a notice of insurance loss, if there is rebutting evidence; is there then a presumption, or no presumption, where there is no rebutting evidence?).

dence of it should be strictly insisted on.¹ But there came gradually to be conceded some sort of rule of sufficiency or presumption, based on evidence of the signing only;² the inference being based on principles of Relevancy already considered (*ante*, §§ 92, 102). But the diminished importance of delivery as a formality has also been marked by other rules, more genuinely rules of Presumption, and resting on a somewhat different principle of Relevancy (*ante*, §§ 148, 157); the *grantee's possession* may raise a presumption of delivery,³ and the *registration* of the deed may also raise it.⁴

(b) The *date* of the *signing* may be presumed from the purporting date of the document,⁵ as also the date of the *delivery*;⁶ though this might not always be made a rule of presumption.

(c) The *official seal* on a document is not only evidence of the authenticity of the seal and the authority of the person affixing it, but is commonly held to create a presumption of these facts (*ante*, §§ 2161-2169), and sometimes even an *official signature* alone is given the same effect (*ante*, § 2167). Whether a *certified copy* of an official or registered document can raise a presumption that the original bore a seal is a question which has led to difference of judicial opinion (*ante*, § 2108).

(d) Whether a *negotiable instrument* raises a presumption of a *consideration*,⁷ and whether a subsequent *recorded deed* raises a presumption of *purchase for value without notice* of a prior unrecorded deed,⁸ are questions which are inextricably entangled with the substantive law.

§ 2521. **Same: (3) Ancient Documents.** The authentic execution of a

¹ *Ante*, 1726, Gilbert, Evidence, 99 ("unless the delivery be proved, there is no perfect proof of the deed, and there is no proof of the delivery but by a witness who saw the delivery").

² 1792, *Grellier v. Neale*, Peake 146 (proof of handwriting raises a presumption of sealing and delivery); 1840, *Burling v. Paterson*, 9 C. & P. 570, 572 (the witness could recollect seeing the signing only; an inference of sealing and delivery was allowed). This was applied also to an act of *criminal publication*: 1839, *R. v. Lovett*, 3 State Tr. 1177, 1181 (seditious libel; proof of handwriting is presumptive evidence of publication). Conversely, a *forging* may be presumed from an uttering: 1899, *State v. Williams*, 152 Mo. 115, 53 S. W. 424.

³ Compare with the following the cases cited *ante*, § 157: 1893, *Campbell v. Carruth*, 32 Fla. 264, 271, 13 So. 432; 1896, *Rohr v. Alexander*, 57 Kan. 381, 46 Pac. 699; 1897, *Jones v. N. Y. L. Ins. Co.*, 168 Mass. 66, 47 N. E. 92 (life insurance policy found among the intestate's papers, evidence of valid delivery). *Contra*: 1897, *Bergere v. U. S.*, 168 U. S. 66, 18 Sup. 4 (possession of papers of grant by a grantee, held not to raise a presumption of delivery by the official having authority to grant).

⁴ 1897, *Davis v. Improvement Co.*, 118 Cal. 45, 50 Pac. 7; 1901, *Egan v. Horrigan*, 96 Me. 46, 51 Atl. 246. Compare the cases cited *ante*, § 1654 (admissibility of the registry of a deed); the substantive law, and statutory regulations, are here much involved.

So, too, the registration may raise a presumption of *execution generally*; compare the cases cited *ante*, §§ 1651, 1676, with the following: 1898, *Anderson v. Cuthbert*, 103 Ga. 767, 30 S. E. 244; 1898, *Flynn v. Sullivan*, 91 Me. 355, 40 Atl. 136.

⁵ 1834, *Smith v. Battens*, 1 Moo. & R. 341; 1834, *Hunt v. Massey*, 5 B. & Ad. 902; 1837, *Goodtitle v. Milburn*, 2 M. & W. 853; 1838, *Sinclair v. Baggaley*, 4 id. 312 (leading opinion); 1840, *Anderson v. Weston*, 6 Bing. N. C. 300; Cal. C. C. P. 1872, § 1963, par. 23 (it is presumed "that a writing is truly dated"); 1898, *McFarlane v. Loudon*, 99 Wis. 620, 75 N. W. 394. Compare the rule for *indorsements of payment* as statements against interest (*ante*, § 1466).

⁶ 1898, *Conley v. Finn*, 171 Mass. 70, 50 N. E. 460 (though acknowledged later); 1895, *Kendrick v. Dellinger*, 117 N. C. 491, 23 S. E. 438; 1873, *Smiths v. Shoemaker*, 17 Wall. 630, 637 (rule held not applicable to a letter whose admissibility depended on its actual date of delivery).

⁷ 1881, *Ames' Cases on Bills & Notes*, II, 641, note 2; 1887, *Perley v. Perley*, 144 Mass. 104, 10 N. E. 726. The presumption of *consideration* from a seal is of course only a rule of substantive law: 1895, *Ames, Specialty Contracts and Equitable Defences*, Harvard Law Review, IX, 49; 1901, *Harriman, Contracts*, 2d ed., § 142.

⁸ 1897, *Gratz v. Land & R. I. Co.*, 27 C. C. A. 305, 82 Fed. 381.

specific document produced is also to be evidenced by the antiquity and custody of the document. With certain conditions, this is universally regarded as sufficient evidence for the jury (*ante*, §§ 2137-2146); and the language of presumption is also frequently applied by Courts to the same group of circumstances.¹

§ 2522. **Same: (4) Lost Grant; Lost Documents in general.** (a) When a specific document not produced is offered to be proved by copy, the fact of loss may be evidenced in various ways, and occasionally the force of a presumption is attributed to some of them (*ante*, § 1196).

(b) When a *title to land* is to be proved, the *execution, contents, and loss* of the appropriate document of grant may be presumed from certain circumstances; the inference resting on a principle of Relevancy already considered (*ante*, §§ 148, 157). Those circumstances are the long-continued *possession* of the land (or an appurtenant right) by a party claiming as owner, the non-claim of possible opponents, and such other varying circumstances of the particular case as increase the probability of an origin of grant for the situation as a whole.¹ The situation is in essence the same as that for which the statutes of limitation have been provided. But these statutes did not wholly obviate the occasion for such a presumption, partly because they were at first limited in the scope of rights barred by them and were extended only by gradual stages, and partly because their originally lengthy periods still left room for a presumption based on a shorter period of possession. For appurtenant rights (such as easements or fisheries), and rights transferable at common law by deed of grant without livery, this presumption had formerly a great vogue; and it remained supplementary to statutes of limitation. But the systematic extension of the principle of acquisition by limitation, the reduction of the required possession to short periods, and (in the United States) the practice of compulsory registration of deeds of conveyance, have left little scope for the presumption. How far it had progressed as a rule of presumption is not always clear; in some opinions it appears as merely a rule of sufficiency of evidence for the jury (*ante*, § 2494), in others it is a genuine presumption (*ante*, § 2490), and in still others it is apparently a rule of substantive law equivalent to a statute of limitation. Its bearings in a given jurisdiction are more or less dependent on the analogies of the local statutes.²

¹ The cases are collected at the place above cited.

¹ 1818, Johnson, J., in *Howell v. House*, 2 Mill Const. 80, 85 ("It has been shown that a title may be presumed from length of possession alone; and why? Because it is improbable that a man of common sense and prudence would set down upon and improve lands to which he had no title, and more so that he who was the rightful owner would quietly stand by and see such a wrong done to himself").

² The following cases will illustrate its treatment by different Courts: *Eng.*: 1774, *Eldridge v. Knott*, Cowp. 214, *Mansfield*, L. C. J.: 1799, *Roe v. Reade*, 8 T. R. 118 (conveyance of a trust estate); 1829, *Doe v. Cooke*, 6 Bing. 174

(surrender of a term); 1867, *Bryant v. Foot*, L. R. 6 Q. B. 161 (customary marriage fee; leading opinions, by Blackburn, J., and Cockburn, C. J.); 1903, *Brocklebank v. Thompson*, 2 Ch. 344, 350; *Can.*: 1879, *Pugsley v. Ring*, 2 Pugs. & B. 303, 316; *U. S.*: 1899, *Gage v. Eddy*, 179 Ill. 492, 53 N. E. 1008; 1830, *Melvin v. Whiting*, 10 Pick. 294 (fishery); 1839, *Valentine v. Piper*, 22 Pick. 85, 93 (shore land; leading opinion by Shaw, C. J.); 1867, *Nichols v. Boston*, 98 Mass. 39, 41 (shore land); 1892, *Claffin v. R. Co.*, 157 id. 489, 499, 32 N. E. 659 (easement to cross a railway); 1894, *Brown v. Oldham*, 123 Mo. 621, 630, 27 S. W. 409; 1844, *New Boston v. Dumbarton*, 15 N. H. 201 (town charter); 1879, *State v. Wright*, 41 N. J. L.

§ 2523. **Same:** (5) **Will (Execution and Revocation).** (a) The execution of a will may be evidenced by the testimonial assertion of the attestors, implied from their signatures, even when they themselves cannot be brought to the stand (*ante*, §§ 1511, 1512). This is often spoken of as a presumption, though probably no more than a rule of sufficiency of evidence is intended.¹

(b) The revocation of a will by destruction may be inferred, on a principle of Relevancy already considered (*ante*, § 160), from the fact that it once existed but cannot be found at the testator's death. Whether this circumstance, with or without others, should create a rule of presumption, or of sufficiency of evidence, has been much debated.² Other inferences, or rules of presumption, concerning an implied intention to revoke, are closely connected with the substantive law of revocation.³

§ 2524. **Same:** (6) **Spoliation or Suppression of Documents.** The opponent's spoliation or suppression of evidential facts (*ante*, § 278), and particularly of a document (*ante*, § 291), has always been conceded to be a circumstance against him, and in the case of a document, to be some evidence that its contents are as alleged by the first party. But that a rule of presumption can be predicated is perhaps doubtful.¹

§ 2525. **Same:** (7) **Alteration of Documents.** It used to be sometimes said that an alteration (*i. e.*, by erasure or interlineation), if apparent on the face of an instrument, placed on the offering party the burden of explanation by evidence. It was also (but inconsistently) said by some that the alteration was to be presumed innocent, *i. e.*, made before execution, unless particular circumstances of suspicion were apparent. For wills, again, it was sometimes maintained that, by exception, alterations should be presumed to have been made after execution. But the modern tendency is to avoid stating the problem in the form of such rules with exceptions, and, in particular, to abandon the so-called presumption against fraud and in favor of innocence, by which the alteration of a deed is presumed to have been made before execution; and to raise no genuine presumption in that regard (*ante*, § 2485). The

478 (tax exemption); 1875, *Carter v. Tinicum Fishing Co.*, 77 Pa. 310, 315 (fishery); 1818, *Howell v. House*, 2 Mill Const. 80, 85 ("I know of no rule which has been established in this State fixing the minimum"); 1820, *Duncan v. Beard*, 2 N. & McC. 400, 406; 1849, *Stockdale v. Young*, 3 Strohn. 501 (land); 1860, *Marr's Heirs v. Gilliam*, 1 Coldw. 488, 501 (pointing out the distinction between this rule and a statute of limitations); 1893, *Dunn v. Eaton*, 92 Tenn. 743, 753, 23 S. W. 163; 1822, *Ricard v. Williams*, 7 Wheat. 59, 109 (opinion by Story, J.); 1859, *Townsend v. Downer's Adm'r*, 32 Vt. 183, 191, 204 (leading opinion, by Aldis, J.).

¹ The cases are collected at the place above cited.

² The following cases illustrate the different views: 1858, *Brown v. Brown*, 8 E. & B. 876; 1868, *Sprigge v. Sprigge*, L. R. 1 P. & D. 608; 1900, *Allan v. Morrison*, App. Cas. 604; 1901, *Scott v. Maddox*, 113 Ga. 795, 39 S. E. 500; 1886, *Re Page*, 118 Ill. 576, 580, 8 N. E. 852;

1895, *Boyle v. Boyle*, 158 id. 228, 233, 42 N. E. 140; 1903, *Hamilton v. Crowe*, — Mo. —, 75 S. W. 389; 1903, *Williams v. Miles*, — Nebr. —, 94 N. W. 705; 1830, *Betts v. Jackson*, 6 Wend. 173 (leading opinion, by Walworth, C.); 1903, *McElroy v. Phink*, — Tex. —, 76 S. W. 753; and a note to *Re Augur* (1899), 9 Yale Law Journal 259.

³ For the mode of proof of a *lost will*, see *ante*, §§ 2052, 2106.

¹ The cases are collected in the places above cited. The following illustrate the use of language of presumption: 1895, *Fox v. Mining Co.*, 108 Cal. 369, 41 Pac. 308 (the method of a trespasser's dealing with ore wrongfully mined was held not to be such as to raise this presumption against him so as to entitle the plaintiff to reckon the value by a particular standard); 1857, *Thompson v. Thompson*, 9 Ind. 323, 331 (presumption not conclusive); 1856, *Hunt v. Collins*, 4 Ia. 56, 62; 1896, *Hay v. Peterson*, 6 Wyo. 419, 45 Pac. 1073 (books of account).

first burden would thus be determined by the pleadings; and the question would usually go to the jury, upon all the evidence, whether the party claiming a specific tenor for the document has proved his case; although the second burden (*ante*, § 2487), *i. e.*, of producing evidence, might be shifted by particular circumstances, under the ruling of the judge as to a sufficiency of evidence or a presumption.¹

¹ The following cases illustrate the rules; the older forms of statement are now seldom found; for the older law, now generally modified or abolished, that any material alteration of an instrument, by any person whatever, after its execution, made the instrument void, see the exhaustive citations in Professor Williston's article, *Discharge of Contracts by Alteration*, 1904, *Harv. L. Rev.*, XVIII, 105; *England*: 1818, *Johnson v. Duke of Marlborough*, 2 Stark. 313 (date of a bill of exchange); 1844-6, *Cooper v. Bockett*, 4 Moore P. C. 419, 449 (will; leading opinion, by Lord Brougham); 1851, *Doe v. Catmore*, 16 Q. B. 745 (deed); 1851, *Doe v. Palmer*, ib. 747, 755 (will); 1851, *Simmons v. Rudall*, 1 Sim. N. S. 115 (will); 1860, *Williams v. Ashton*, 1 Johns. & Hem. 115 (will; good opinion by Page-Wood, V. C.); 1868, *Cadge's Goods*, L. R. 1 P. & D. 543 (will); *Canada*: 1874, *Doe v. Daniel*, 15 N. Br. 372 (will); 1893, *Re Lawson*, 25 N. Sc. 454 (will); 1870, *Northwood v. Keating*, 17 Grant U. C. 347, 18 id. 643 (mortgage); 1899, *Graystock v. Barnhart*, 26 Ont. App. 545 (registered deed); *United States*: *Ata*: 1898, *Ward v. Cheney*, 117 Ala. 238, 22 So. 996 (assignment used by the plaintiff to show title; whether interlineations were apparent and suspicions were sufficiently explained, held a question for the trial Court); *Cal.*: C. C. P. 1872, § 1982 ("The party producing a writing as genuine which has been altered, or appears to have been altered, after its execution, in a part material to the question in dispute, must account for the appearance or alteration. He may show that the alteration was made by another, without his concurrence, or was made by the consent of the parties affected by it, or otherwise properly or innocently made, or that the alteration did not change the meaning or language of the instrument. If he do this, he may give the writing in evidence, but not otherwise"); *Colo.*: C. C. P. 1891, § 357; *Conn.*: 1872, *Hayden v. Goodnow*, 39 Conn. 164 (the party producing does not necessarily account for alterations; each case depends on its own circumstances); *D. C.*: 1894, *Peugh v. Mitchell*, 3 D. C. App. 321 (action to annul a deed for alteration, the material alterations being in a different hand and ink; not presumed made before execution); *Ga.*: 1892, *Bedgood v. McLain*, 89 Ga. 793, 796, 15 S. E. 670 (defendant claiming under sheriff's deed interlined by the sheriff; presumed to exist before execution); 1893, *Westmoreland v. Westmoreland*, 92 id. 233 (deed offered to show color of title; alterations presumed prior to execution, on the facts); 1896, *Winkles v. Guenther*, 98 id. 472, 25 S. E. 527 (Code § 3835 applied); 1903, *Heard v. Tappan*, 116 id. 930,

43 S. E. 375; *Haw.*: 1890, *Kahai v. Kamai*, 8 Haw. 694; *Ida.*: 1897, *Mulkey v. Long*, 5 Ida. 213, 47 Pac. 949 (held sufficient to show that the alteration in a note had not been made since it came into the offeror's hands); *Ill.*: 1899, *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 54 N. E. 214 (deed offered in a chain of title; no presumption declared as to time of alterations; the question being one of fact, and the party producing the document being called upon to explain; precedents reviewed); 1901, *Merritt v. Boyden*, 191 id. 136, 60 N. E. 907; *Ia.*: 1890, *Hagan v. Merchants' Ins. Co.*, 81 Ia. 321, 46 N. W. 1114 (action on an insurance policy; held that the mere fact of alteration furnished no presumption as to the time of making it or the authority for it, and that the burden of producing evidence that it was made after delivery was on the defendant); 1895, *McGee v. Allison*, 94 id. 527, 63 N. W. 323 (the burden is on the party attacking the instrument); 1903, *Rambousek v. Supreme Council*, 119 id. 263, 93 N. W. 277; *Mass.*: 1840, *Davis v. Jenney*, 1 Metc. 221 (bill of exchange); 1850, *Wilde v. Armsby*, 6 Cush. 314 (contract of guarantee); 1856, *Ely v. Ely*, 6 Gray 439 (mortgage; good opinion by Dewey, J.); *Mich.*: 1873, *Comstock v. Smith*, 26 Mich. 306 (deed; good opinion by Graves, J.); *Mo.*: 1898, *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300 (specific performance of an agreement to sell land; burden placed on the plaintiff); *Nebr.*: 1894, *Courcamp v. Weber*, 39 Nebr. 533, 537, 58 N. W. 187 (foreclosure with a note bearing material alterations; plaintiff required to show their authenticity); 1896, *Stough v. Ogden*, 49 id. 291, 68 N. W. 516 (the question is "in the end, one of fact for the jury, upon all of the evidence adduced"; here, an action on a note according to the altered form); 1903, *Brown v. Kennedy*, — id. —, 93 N. W. 1073; *Nev.* Gen. St. 1885, § 3450; *N. H.*: 1840, *Hills v. Barnes*, 11 N. H. 395 (note); *N. J.*: 1871, *Hunt v. Gray*, 35 N. J. L. 227 (the mere fact that a writing of contract shows a change does not of itself create a presumption of alteration after execution); 1802, *Ward v. Wilcox*, 64 N. J. Eq. 303, 51 Atl. 1094 (will; the burden is on the contestant); *N. Y.*: 1884, *Crossman v. Crossman*, 95 N. Y. 145 (will); *Pa.*: 1893, *Nesbitt v. Turner*, 155 Pa. 429, 436, 26 Atl. 750 (action against a woman as bond-surety; the date was altered from time during coverture to time after coverture; the burden placed on the plaintiff to show alteration before execution); *S. D.*: 1897, *Moddie v. Breiland*, 9 S. D. 506, 70 N. W. 637 (after proof of signature, the duty of producing evidence that the alteration was before delivery rests on the maker, and, *semble*, also the burden of persuasion); 1897, *Foley-*

§ 2526. **Gifts and Trusts (Wife's Separate Estate, Child's Advancement, Child's Services, etc.).** The pecuniary transactions between members of a family are sometimes made the subject of presumptions, based on the probable motive and intent. It can hardly be said that these rules are uniform, or are universally recognized. Examples of them are the presumption of a *gift* (instead of a trust) of separate estate handed by a wife to her husband;¹ of an *advancement* (in anticipation of succession after death) in a transfer from a parent to a child;² of a gift, or mere performance of duty, in *services rendered by a child* to a parent;³ of *community-ownership* of property acquired during marriage;⁴ of *intent to defraud creditors* in a transfer to a wife by an insolvent husband;⁵ and of *fraudulent concealment* by a husband in an ante-nuptial agreement *barring dower*.⁶

§ 2527. **Legitimacy.** That a child born of a married woman during wedlock is presumed to be the child of her then husband is uniformly conceded. The only doubt has been whether and how far this presumption is conclusive; *i. e.*, to what extent it is a fixed rule of substantive law defining the legal quality of legitimacy. Here there have been stages of doctrine.¹ At the outset of the law, it appears to have allowed no dispute, except by the fact

Wadsworth Co. v. Solomon, ib. 511, 70 N. W. 639 (apparently the same, but putting it that the alteration — here in a contract — is presumed to be made before execution, unless there are circumstances of suspicion; opinion by a different judge); *Tex.*: 1896, House v. Robertson, — *Tex.* —, 34 S. W. 640 (alteration in a deed, presumed to be before execution, under Civ. Stats. § 2257); *U. S.*: 1826, U. S. v. Amedy, 11 Wheat. 392, 408 (certified copy of an act of incorporation); 1896, Rosenberg v. Jett, 72 Fed. 90 (bill to foreclose a mortgage; claim of homestead set up; the burden placed on the defendant to show that the words "and homestead," interlined in the mortgage, were inserted after execution); *Utah*: *Rev. St.* 1893, § 3411; *Va.*: 1902, Consumers' Ice Co. v. Jennings, 100 Va. 719, 42 S. E. 879 (contract); *Wash.*: 1893, Wolferman v. Bell, 6 Wash. 84, 32 Pac. 1017 (action on a note; no presumption or burden prescribed); 1893, Yakima N. Bank v. Knipe, ib. 348, 33 Pac. 834 (action on a note bearing an alteration; received, the defendant to show change since execution); 1900, Blewett v. Bash, 22 id. 536, 61 Pac. 770; *Wis.*: 1896, Klatt v. Lumber Co., 92 Wis. 622, 66 N. W. 791 (the possibility of alteration of a document since original signing does not exclude it; compare § 2134, *ante*); 1897, Rollins v. Humphrey, 98 id. 66, 73 N. W. 331 (alteration held not suspicious); 1899, Maldaner v. Smith, 102 id. 30, 78 N. W. 140 (action by the assignee of a mortgage to foreclose; "or order" was interlined in the deed; presumption of innocence applied).

¹ 1893, Clark v. Patterson, 158 Mass. 388, 391, 33 N. E. 589 (bonds); 1892, Bennett v. Bennett, 37 W. Va. 396, 406, 16 S. E. 638.

² 1892, Culp v. Wilson, 133 Ind. 294, 296, 32 N. E. 928 (conveyance); 1894, Phillips v. Phillips, 90 Ia. 541, 543, 58 N. W. 879; 1895,

West v. Beck, 95 id. 520, 64 N. W. 599 (paying a son's debt); 1897, Finch v. Garrett, 102 id. 381, 71 N. W. 428 (deed). So, also, in a transfer to a nominal purchaser for a consideration paid by a near relative: Ames, Cases on Trusts, 1st ed., 276-286, 293.

³ 1893, Donahue v. Donahue, 53 Minn. 560, 55 N. W. 602; 1898, Kloke v. Martin, 55 Nebr. 554, 76 N. W. 168; 1892, Ulrich v. Ulrich, 136 N. Y. 120, 123, 32 N. E. 606.

⁴ 1896, Boody's Estate, 113 Cal. 682, 45 Pac. 859 (with a requirement for clear evidence to countervail).

⁵ 1898, Stockslager v. M. L. & S. Institution, 87 Md. 232, 39 Atl. 742.

⁶ 1897, Hessick v. Hessick, 169 Ill. 486, 48 N. E. 712 (bill for partition by heirs, making the widow a defendant and alleging an ante-nuptial agreement as barring dower, etc.; held, that on proof by the defendant that the sum accepted was disproportionately small, the presumption of fraudulent concealment is raised, and the husband must show knowledge by the wife of his estate's extent).

The large subject of *resulting trusts*, presumed where a transfer is made without consideration, under certain circumstances (Ames, Cases on Trusts, 1st ed., 262, 291), belongs also in this place.

¹ These have been carefully examined, for England, in an exhaustive treatise by Sir H. Nicolas (1836), on *Adulterine Bastardy*; Mr. Hubback has also considered them in his treatise (1840) on *Succession*, part II, c. 5, and Mr. Hargrave, in his Note 189 to Coke on Littleton.

The best opinions on the policy of the rule are those of Lord Erskine, in the Banbury Peerage Case, *infra* (at pp. 466, 470), and of Martin, J., in Matthews' Estate, N. Y., *infra*.

of the husband's absence "beyond the four seas" of England during the appropriate period: but after a gradual relaxation during five centuries the conclusive feature has in English law been almost entirely removed, so that it seems now to occur only when actual intercourse of the husband has been established; *i. e.*, the fact of "non-access" may always be disputed.² In the United States, the Courts have probably not all reduced the rule to this attenuated form.³

§ 2528. **Chastity; Child-bearing.** It is sometimes said that there is a presumption of *chastity*, or of chaste character.¹ But commonly in such cases the result is really determined by the incidence of the first burden of proof (*ante*, § 2485); for example, it falls to a party impeaching a witness' or complainant's character for chastity to prove the unchastity, and it falls to a party alleging the seduction of a woman of chaste character to prove that character.²

There is in the law of real property a rule by which, for the purpose of dealing with estates of remainder and the like, a woman past some limit of age (usually fifty years or more), is regarded as *incapable of bearing children*, or before that age will not be considered as incapable; it is often spoken of as a conclusive presumption; but no fixed age is taken as the standard.³

² The following are the leading modern English cases: 1810, *Banbury Peerage Case*, in App. to *LeMarchant's Gardner Peerage Case*, 435, 489; 1825, *Gardner Peerage Case*, *Le Marchant's Rep.* 232; 1827, *Morris v. Davies*, 3 C. & P. 215, 217; 1903, *Gordon v. Gordon*, P. 141 (the passage from *Nicolas* approved, and said "to represent accurately the law").

³ Besides the following cases, compare the rules of evidence as to the parentage of a *bastard* (*ante*, §§ 137, 166, 2063); a collection of cases is made in a note to 56 *American Decisions* 451: 1892, *Bullock v. Knox*, 96 Ala. 195, 198, 11 So. 339 (white wife and husband, child a mulatto; legitimacy may be questioned); *Cal. C. C. P.* 1872, § 1963, par. 31; 1859, *Baker v. Baker*, 13 Cal. 87, 99; 1902, *Mills' Estate*, 137 id. 298, 70 Pac. 91; 1883, *Hopkins v. Chung Wa*, 4 Haw. 650; 1889, *Orthwein v. Thomas*, 127 Ill. 554, 562, 21 N. E. 430; 1902, *Bethany Hospital Co. v. Hale*, 64 Kan. 367, 67 Pac. 848; 1895, *Scanlon v. Walshe*, 81 Md. 118, 31 Atl. 498; 1897, *Rabeke v. Baer*, 115 Mich. 328, 73 N. W. 242 (action against B. for the seduction of plaintiff, who married R. before the child was born; B.'s admission of his paternity, received); 1839, *Randolph v. Easton*, 23 Pick. 242, 243; 1897, *Matthews' Estate*, 153 N. Y. 443, 47 N. E. 901 (decree of Surrogate's Court as to "children" entitled to share; H. S. having been proved a child, the burden was upon those opposing her interest to show illegitimacy); 1899, *Bell v. Terr.*, 8 Okl. 75, 56 Pac. 853 (non-access must be proved by "distinct, strong, satisfactory, and conclusive evidence"); 1891, *Robb's Estate*, 37 S. C. 19, 38, 16 S. E. 241 (recognition by parents, with other facts, may after lapse of time raise the presumption without specific evidence of marriage); 1902, *Adger*

v. Ackerman, 52 C. C. A. 568, 115 Fed. 124; 1903, *Bunel v. O'Day*, 125 Fed. 303; 1886, *Pittsford v. Chittenden*, 58 Vt. 49, 52.

In Louisiana, the rule has an independent history: 1895, *McNeely v. McNeely*, 47 La. An. 1321, 17 So. 928 (holding that the provision of Code Arts. 188, 191, allowing the presumption of legitimacy to be contested where the child is born 300 days after separation, merely fixes the extreme period which must elapse before the presumption becomes disputable at all; and for children born later it is essential for the disputability that suit be brought; so that if the parent dies without beginning suit the presumption continues indisputable).

¹ 1894, *Bradshaw v. People*, 153 Ill. 156, 38 N. E. 652; 1895, *State v. Bauerkemper*, 95 Ia. 562, 64 N. W. 609; 1873, *People v. Brewer*, 27 Mich. 134, 138. *Contra*: 1901, *Harvey v. Terr.*, 11 Okl. 156, 65 Pac. 837.

² Compare the rules of evidence applicable where chastity becomes material (*ante*, §§ 75, 79, 205-213, 924, 2061).

³ 1864, *Groves v. Groves*, 9 L. T. R. N. S. 533; 1881, *Re Taylor's Trustees*, 21 id. 795 (here fifty-two years, and during twenty-four a widow); 1871, *Re Widdows' Trusts*, L. R. 11 Eq. 408 (a widow of fifty-five years four months, and a spinster of fifty-three years nine months); 1872, *Re Millner's Estate*, L. R. 14 Eq. 245 (a wife of forty-nine years nine months, never having borne children, married twenty-six years, presumed childless by that marriage); 1876, *Maden v. Taylor*, 45 L. J. Ch. 569, 573 (a spinster over sixty); 1881, *Davidson v. Kimpton*, 18 Ch. D. 213, 217 (a spinster of fifty-four years); 1898, *Re Hocking*, 2 Ch. 567; 1901, *Re White*, 1 Ch. 570; 1903, *Ricards v. Safe Deposit & T. Co.*, — Md. —, 55 Atl. 384 (incapacity of child-bearing,

§ 2529. *Identity of Person (from Name, etc.).* In regard to the supposed presumption of *identity of person* from *identity of name*, three things are to be premised. (a) "A concordance in name alone is always some evidence of identity; and it is not correct to say with the books that, besides proof of the facts in relation to the persons named, their identity must be shown, implying that the agreement of name goes for nothing; whereas it is always a considerable step towards that conclusion."¹ (b) In the greater number of cases the ruling is merely that identity of name, with or without other evidence, is or is not sufficient evidence to go to the jury or sufficient to support a verdict, on the general principle of sustaining the duty of producing evidence (*ante*, § 2494). The oddness of the name, the size of the district and length of the time within which the persons are shown to have coexisted, and other circumstances, affect this result differently in different cases. (c) Often a genuine presumption is enforced by the Courts, in the sense that the duty of producing evidence to the contrary is thrown upon the opponent (*ante*, § 2487). But these rulings cannot be said to attach a presumption to a definite and constant set of facts; they apply the presumption upon the circumstances of the particular case.

It is thus necessary, in ascertaining the state of the law in a given jurisdiction, to examine the facts in each case. There is, moreover, some difference in the strictness with which the evidence of identity is treated for different sorts of documents or persons. There was perhaps a greater traditional strictness shown in dealing with the identity of a person named as the signer of an *answer* or *affidavit* in chancery,² or as the object of a *conviction* for

not allowed to be investigated, on the ground that "it would be exceedingly unsafe to permit property-rights to depend upon so precarious a basis"; "the single fact to which the law looks is death"; 1883, *Apgar's Case*, 37 N. J. Eq. 502 (collecting the cases in a note).

¹ 1840, *Hubback, Succession*, 444. This principle of Relevancy has already been considered (*ante*, §§ 411-413); other instances are found under the Hearsay rule (*ante*, §§ 1494, 1791).

² *England*: 1701, *Hurly's Trial*, 14 How. St. Tr. 433 (the deposition of a witness Carty before L. C. J. Pyne was offered, but its authenticity was denied: "Court: Calaghan Carty, pray were you examined before any of the judges as to that matter? Carty: No, my lord, never in my life. Sol.-Gen.: Never in his life. There is no proving it but by my lord chief-justice, and to prove that this is the man; for a man may come in the name of another person and swear, and the man he personates know nothing of the matter. Court: . . . If the person does not own it now, it must be proved upon him"); 1729, *Anon.*, 3 Mod. 116 (perjury; whether the return of commissioners in chancery that the person named made oath is sufficient with other evidence of identity; the Court was divided); 1761, *R. v. Morris*, 1 Leach 3d ed. 60 (evidence of the handwriting of the answer being the defendant's, with proof of the *jurat*, sufficient); 1809, *Salter v. Turner*, 2 Camp. 87 (an answer

in chancery purporting to be signed by the person charged, sufficient); 1812, *Lady Dartmouth v. Roberts*, 16 East, 334, 340 (an answer in chancery in a suit between other parties; *Le Blanc, J.*: "It seems that no line of distinction is drawn except in criminal proceedings, or in those which are in their nature criminal, as the case of an action for malicious prosecution; in other cases it is sufficient to produce an examined copy of the answer without proving the handwriting of the party"); 1813, *Hodgkinson v. Willis*, 3 Camp. 401 (answer in chancery; "some evidence of the identity" was required, but nothing as to handwriting, etc.); 1817, *Hennell v. Lyon*, 1 B. & Ald. 185 (*Ellenborough, L. C. J.*, receiving *prima facie* an answer sworn in another suit by one Charles Lyon, alleged to be the present defendant: "It is said that the evidence wants a further link to connect it with the defendant, and that it ought to be shown that the Charles Lyon in the answer is the present litigant. I do not know any way by which that circumstance can be supplied, but by the description in the answer itself, which tallies in almost every particular. Still, however, it may be shewn that he is not the same person. The question then is, whether public convenience requires that the proof should be given by the plaintiff or the defendant; and I rather think that public convenience is in favour of the admissibility of this proof. . . . Such appears to

crime,³ or as a party to a marriage evidenced by a register or certificate.⁴ But where an identity of names is found in *deeds, letters, negotiable instruments, or the like, or in tracing title* from ancestors and grantors,⁵ the Courts

have been the the general practice, except in criminal cases"); 1823, *Studdy v. Sanders*, 2 Dowl. & R. 347 (answer in chancery, offered by copy, the names of the signer and the defendants apparently corresponding; no further proof of identity needed; following *Hennell v. Lyon*); 1824, *Burnand v. Nerot*, 1 C. & P. 578 (an office copy of an answer in chancery rejected, on the trial of an issue in the Common Pleas ordered by the Vice-Chancellor; because the office copy does not prove the identity of the party); *Ireland*: 1847, *Garvin v. Carroll*, 10 Ir. L. R. 323, 330 (affidavit in Chancery by "John Garvin"; the name with other evidence, held sufficient, even when offered by copy); *United States*: 1796, *Ellmore v. Mills*, 1 Hayw. 359 (deposition; John Archelaus Elmore and John Ellmore, presumed the same person).

³ Compare the statutes cited *ante*, § 1270, which sometimes include this point: *England*: 1843, *R. v. Tissington*, 1 Cox Cr. 61 (a certificate of former conviction of one G. L. being offered against the defendant, the circumstance that the defendant was in the jail during the exact term mentioned was held not sufficient); 1858, *R. v. Levy*, 8 id. 73 (identity of the defendant with a person alleged to have been convicted of an offence; identity in all particulars of the magistrate's certificate of conviction of that person and of the warrant of commitment, by the same magistrates, under which the defendant was held, admitted); *United States*: 1882, *People v. Rolfe*, 61 Cal. 540, 543 ("Frank H. Rolfe" shown to be a person formerly convicted as "Frank Rollins"); 1897, *Bayha v. Munford*, 58 Kan. 445, 49 Pac. 601 ("ordinarily" in a record of conviction, identity of name suffices); 1885, *State v. McGuire*, 87 Mo. 642 (former conviction of crime; sameness of name is *prima facie* sufficient); 1896, *Eifert v. Lytle*, 172 Pa. 356, 33 Atl. 572 (the issue being whether a witness had been sent to the penitentiary for a certain offence from a certain county, evidence was received that a person of the same name had been sent for the same offence, that the witness "was missing for about a year" thereafter, and that he was the only one of that name in the region).

⁴ Compare the cases on the admissibility of such documents (*ante*, §§ 1644, 1677) and the rule for proof by eye-witnesses (*ante*, § 2082); *England*: 1718, *Draycott v. Talbot*, 3 Bro. P. C. 564, 567 (register-entries of a marriage being shown, the mere correspondence of names must be followed by other evidence of identity, etc., to show marriage); 1779, *Birt v. Barlow*, 1 Doug. 171 (if a register-entry is used, as being the hearsay testimony of the celebrant, some evidence of identity of the persons named in it and the parties in the cause must be additionally offered; but "whatever is sufficient to satisfy a jury is good evidence of this," as the payment of the bell-ringers by these parties,

their presence at a wedding-dinner, the identity of their handwriting, the woman being thereafter called by the man's name, etc.); 1784, *Hemmings v. Smith*, 4 id. 33 (to show that the woman debauched by the defendant was the plaintiff's wife, the fact that fourteen years before a marriage had been celebrated between the plaintiff and a certain woman, and that she was still living with him as wife five years before, was held sufficient to go to the jury); 1830, *R. v. Drake*, 1 Lew. Cr. C. 116, 125 ("on an indictment for bigamy, proof must be given that the person who the prisoner is alleged to have married was in fact such person"); 1848, *Parke, B.*, in *Sayer v. Glossop*, 2 Exch. 409, 411 ("James Glossop"; name held sufficient); 1873, *R. v. Weaver*, L. R. 2 C. C. R. 85 (child named "Jane Watkins" in a birth-register; the name and other circumstances, sufficient to identify); *United States*: 1831, *Wedgwood's Case*, 8 Greenl. 75 (adultery; besides the certificate of marriage of the person named, other evidence of identity is necessary); 1882, *People v. Broughton*, 49 Mich. 339, 13 N. W. 621 ("possibly not sufficient by itself in a criminal case"); 1886, *Durfee v. Abbott*, 61 id. 471, 475, 28 N. W. 521 (baptism record; other evidence is necessary); 1871, *Morrissey v. Ferry Co.*, 47 Mo. 521, 525 (identity of the plaintiff with a person whose birth-entry was offered; identity must be established); 1875, *State v. Moore*, 61 id. 276, 278 (marriage; sameness of name of the woman married and the woman in court, sufficient); 1838, *State v. Wallace*, 9 N. H. 515 (adultery; other evidence is necessary).

⁵ Compare the principles for authentication of documents (*ante*, §§ 2130, 2156); this question is usually presented in that relation:

ENGLAND: 1800, *Barber v. Holmes*, 3 Esp. 190 (to show J. H. living, the occurrence of a J. H. on the muster-roll of a frigate "proves nothing as to the fact of whether J. H. whose name is there found" was the one in issue); 1813, *Smith v. Fuge*, 3 Camp. 456 (shipping-register purporting to be granted on F.'s oath as owner; rejected, because identity of the oath-taker was not shown); 1814, *Middleton v. Sandford*, 4 id. 34 (the attesting witness knew only that a person calling himself T. S. had signed; held, "some evidence of identity was indispensably necessary"); 1816, *Hughes v. Wilson*, 1 Stark. 179 (entry in a custom-house book of a copy of a bill said to have been made by the plaintiff, not received without evidence to show that it was "made or presented" by him or his agent); 1817, *Nelson v. Whittall*, 1 B. & Ald. 19 (to prove execution, identity of name, with the fact that defendant was present in the room at the time, was held sufficient); 1824, *Bulkeley v. Butler*, 2 B. & C. 434 (to prove the genuineness of an indorsement by "Edward Shanahan" of a bill payable to such a person, evidence that it

are more frequently found enforcing a genuine presumption. Beyond this no

was indorsed by a person calling himself E. S., bringing the bill, and presenting a letter of introduction for E. S. signed by proper persons, was held sufficient to go to the jury); 1833, *Whitelocke v. Musgrove*, 1 Cr. & M. 522 (Bayley, B.: "I quite agree that it is not necessary to prove the handwriting of the defendant; but if you do not prove that, you must prove something else to connect the party sued with the instrument. . . . In most cases you can either show some acknowledgment, or prove that the party from his residence or other circumstance answers the description on the face of the note, or you can establish the identity of the party in some other mode"); 1833, *Corfield v. Parsons*, 1 Cr. & M. 730 (to prove that certain statements were the defendant's, the fact that a clerk went to the plaintiff's residence and had the conversation with a person in a dressing-gown who opened the door, was held not erroneously rejected; evidence being given, in opposition, that the plaintiff was then out of town and that his brother also lived there part of the time and wore a dressing-gown); 1839, *Warren v. Anderson*, 8 Scott 384 ("J. C. Anderson" as acceptor of a bill; evidence that a person calling himself "Sir J. C. A., Bart." had entered his name as "J. C. A." at a banking-house, of a similarity of handwriting, and of the drawing of checks so signed, held sufficient to go to the jury); 1841, *Simpson v. Dinsmore*, 9 M. & W. 47 (to identify an apothecary's license, the fact that the plaintiff was in that business, bearing the same surname and christian name, was held sufficient for the jury); 1841, *Jones v. Jones*, ib. 75 (mere coincidence of the name "Hugh Jones," held not sufficient to charge the defendant as maker of a note, where the name "Hugh Jones" was a common one in the region; *semble*, that the additional coincidence of residence would have sufficed; and that, if the name had not been common in the neighborhood, the coincidence of name alone would have sufficed); 1841, *Green-shields v. Crawford*, ib. 314 (to identify "C. B. Crawford," an acceptor of a bill directed to "Charles Banner Crawford, East India House," the fact of the signature being that of a person of that description, without any further evidence to connect it with the present defendant, was held sufficient); 1842, *Smith v. Henderson*, ib. 798 (action against W. H., a pilot; a man rose in Court who answered to the name of H., and was a pilot on board the ship in question; held sufficient to justify a finding of identity; Parke, B.: "Similarity of name and residence, or similarity of name and trade, will do"); 1843, *Sewall v. Evans*, 4 Q. B. 626, 632 (Lord Denman, L. C. J.: "In cases where no particular circumstance tends to raise a question as to the party being the same, even identity of name is something from which an inference may be drawn. If the name were only John Smith, which is of very frequent occurrence, there might not be much ground for drawing the conclusion"; Williams, J.: "That it is a person of the same name is some evidence till another

party is pointed out who might have been the acceptor"); 1844, *R. v. Dalmas*, 1 Cox Cr. C. 96 (conversations between the deceased and one alleged to be the defendant were received, after "a correspondence in dress and in general appearance" had been shown); 1844, *R. v. O'Connell*, ib. 405 (to prove against "C. G. Duffy, late of the Rathmines," an admission in writing of the authorship of a newspaper signed by "C. G. Duffy of the Rathmines and Trinity-street," it was held that "some evidence of identity must be given"; but under St. 6 & 7 Wm. IV, c. 76, § 8, concerning newspaper publishers, the admission was subsequently held receivable without such proof).

CANADA: *Man.*: 1894, *Simpson v. Stewart*, 10 Man. 176, 181 (grantee and testator); *Ont.*: 1859, *Wilson v. Thorpe*, 18 U. C. Q. B. 443 (affidavit in malicious arrest); 1861, *Nicholson v. Burkholder*, 21 id. 108 (grantor and grantee); 1870, *Brown v. Livingstone*, 29 id. 520 (grantee and ancestor); 1873, *Wallbridge v. Jones*, 33 id. 613 (grantee and ancestor); 1875, *Gallivan v. O'Donnell*, 36 id. 250 (same).

UNITED STATES: *Ark.*: 1899, *Driver v. Lanier*, 66 Ark. 126, 49 S. W. 816 ("Felix R. Lanier," in two actions, presumed the same person); *Cal.*: C. C. P. 1872, § 1963, par. 25 ("identity of person from identity of name" is presumed); 1897, *Lee v. Murphy*, 119 Cal. 364, 51 Pac. 549 (mortgagee and notary, "W. H. Lee," in the same county, presumed the same); 1900, *Woolsey v. Williams*, 128 id. 552, 61 Pac. 670 ("William Frederick Williams"; two persons presumed the same, on the facts); *D. C.*: 1893, *Scott v. Hyde*, 21 D. C. 531, 535 (grantee and ancestor; John Willis, presumed the same, there being no evidence of another person); 1902, *Crandall v. Lynch*, 20 D. C. App. 74, 84 (deeds); *Ga.*: Code 1895, § 5178 ("concordance of name alone" is some evidence of identity); 1883, *Mullery v. Hamilton*, 71 Ga. 720 (identity of a legatee said to have survived the testatrix; sameness of name, his conversation and knowledge of family affairs, etc., held sufficient under the circumstances); 1890, *Swicard v. Hooks*, 85 id. 580, 11 S. E. 863 (deed); *Ill.*: 1864, *Brown v. Metz*, 33 Ill. 339 (identity of name of grantor and succeeding grantee; identity of person presumed); 1884, *Heacock v. Lubukee*, 108 id. 641 (a plaintiff relying on a title established in a former suit; identity shown by a correspondence of all the other features of the suits except that the name of the plaintiff was "Lubeke" instead of "Lubukee"); *Ind.*: 1883, *Aultman v. Timm*, 93 Ind. 158 (identity of a maker of a note and an intestate whose property the defendants had received; correspondence of name held *prima facie* sufficient); 1896, *Mode v. Beasley*, 143 id. 306, 42 N. E. 727 (the presumption not held to apply where J. S. testified that he had not signed a petition which bore his name, but two or three thousand in all had signed and they were not so classified as to "reduce the probability of any persons of the same name"); *Ia.*: 1889, *Gilman v. Sheets*, 78

general rules or tendencies seem traceable; except that where the two persons

Ia. 499, 502, 43 N. W. 299 (identity of name of grantee and next grantor, *prima facie* sufficient); *Ky.*: 1805, *Nicholas v. Lansdale*, Litt. Sel. C. 21 (to show the identity of S. N., a plaintiff, said to be dead, the fact of the death of one S. N. who had sailed from Baltimore and died in Madagascar, was held insufficient); 1847, *Cobb v. Haynes*, 8 B. Monr. 137, 138 (William Haynes, defendant and surety on a bond, presumed the same on the facts); 1820, *Cates v. Loftus*, 3 A. K. Marsh. 202 (two land-certificates in the same name; identity presumed); *Mass.*: 1862, *Webber v. Davis*, 5 All. 393, 396 (magistrate's surname with initials of the first names, sufficient); 1899, *United States N. Bank v. Venner*, 172 Mass. 449, 52 N. E. 543 ("United States National Bank" and "United States National Bank of New York, N. Y.," sufficiently shown the same); 1899, *Dolan v. M. R. F. Life Ass'n*, 173 id. 197, 53 N. E. 398 (identity of name, with description of person, *prima facie* evidence of identity of person); *Mich.*: 1881, *Campbell v. Wallace*, 46 Mich. 320, 9 N. W. 432 (foreign judgment; identity of names sufficient); *Minn.*: 1888, *State v. Sannerud*, 38 Minn. 229, 36 N. W. 447 ("Bert Samrud" and "Bernt Sannerud," in a liquor license, sufficient evidence on the facts); *Mo.*: 1833, *Birch v. Rogers*, 3 Mo. 227 (assignment of a note; "Charles R. Rogers" and "C. R. Rogers," some evidence of identity); 1853, *Flournoy v. Warden*, 17 id. 435, 441 (title-deeds of "John Smith"; sameness of names sufficient to go to the jury, and sufficient to create a presumption, *semble*, if no evidence is opposed; the mere fact that there is another person of the same name in the region does not prevent the question from going to the jury); 1853, *Gitt v. Watson*, 18 id. 274, 276 (title-documents; sameness of names puts on the opponent the duty of "showing" that they are not the same); 1885, *Long v. McDow*, 87 id. 197, 202 (grantee and ancestor, "Ira Nash" and "H. San Ari," presumed the same on the facts); *Nebr.*: 1892, *Rupert v. Penner*, 35 Nebr. 587, 594, 53 N. W. 598 ("Arch. T. Finn" and "Archibald T. Finn," in a deed, presumed the same); *N. H.*: 1849, *Jones v. Parker*, 20 N. H. 31 (action on a contract; there were two persons of the name of the promisor; the correspondence of the defendant's name, and other circumstances, held sufficient to "put the burden on the defendant" and sustain a verdict for the plaintiff); 1854, *Mooers v. Bunker*, 29 id. 420, 432 (title; "a jury is not at liberty to presume that a person of even so peculiar a name as Timothy Mooers is the same person as a man of the same name"); *New Jersey*: 1849, *West v. State*, 22 N. J. L. 212, 238 (whether a witness' name was forged; testimony that the "C. S." was not the writing of a certain C. S., received, its weight depending on the subsequent evidence of identity); 1899, *Green v. Heritage*, 63 id. 455, 43 Atl. 698 (judgment debtors, presumed the same); *New York*: 1816, *Jackson v. Goes*, 13 John. 518 (land-patent to "Peter Schultze," said to be the plaintiff's

lessor; the sameness of name taken as *prima facie* evidence of identity of person, *semble*; evidence admitted to show that the patent was really given to another than the plaintiff's lessor); 1825, *Jackson v. King*, 5 Cow. 237 (land-patent to "William Appel," said to be the ancestor of the plaintiff's lessor; *per Curiam*: "I have never known a case where a plaintiff having the name of a patentee or grantee was required to go farther than the production of his deed or patent"; the defendant having "the burthen of disproving" identity; *semble*, that to show the existence of another person of the same name would lift the defendant's burden of going forward); 1828, *Jackson v. Cody*, 9 id. 140, 148 (land-patentee "William Patterson" and grantor "William Peterson," presumed the same, no other person of the same name and description being shown to exist; so also for "John Blanchard"; but an intimation is made that mere identity of name creates a presumption, which stands till another person of that name is shown not only to have existed but to have been the patentee); 1830, *Jackson v. Christman*, 4 Wend. 278, 283 (an obligor of a bond and a subscribing witness, of the same name, not presumed identical); 1838, *Kimball v. Davis*, 19 id. 437, 442 ("Francis Legge," patentee and grantor, presumed the same); 1839, *Cunningham v. Bank*, 21 id. 561, *semble* (here the name was "S. A. Cunningham" in New York City, and the defendant was Samuel A. Cunningham of that place; the lack of other persons of the name must be shown); 1840, *Brown v. Kimball*, 25 id. 259 (same as *Kimball v. Davis*, *supra*, on error from the Supreme Court; judgment reversed, 11 to 9, apparently on the ground that while the sameness of name raises a presumption, yet suspicious circumstances about the documents, or other evidence, may remove the presumption, and that in this case there was not sufficient evidence of identity to sustain the burden of proof); 1858, *Hatcher v. Rocheleau*, 18 N. Y. 87, 92 ("Joseph Rocheleau," defendant in the case and in a foreign judgment, presumed the same person, in the absence of evidence of two such persons); *Or.*: C. C. P. 1892, § 776, par. 25 (like Cal. C. C. P. § 1963, par. 25); *Pa.*: 1845, *Sailor v. Hertzogg*, 2 Pa. St. 182 ("Jacob Sailor," said to be the defendant's grantor; Gibson, C. J.: "Identity of name is ordinarily, but not always, *prima facie* evidence of personal identity"; and because of the lapse of time, and in spite of the oddness of the name, he required "some preliminary evidence, however small," for going to the jury); 1854, *Balbec v. Donaldson*, 2 Pa. 459 ("Mrs. Eliza Braceland," said to be the plaintiff's mother-in-law; case given to the jury with additional evidence, and no rule laid down); 1865, *Philadelphia v. Miller*, 49 Pa. St. 440, 448 (evidence for the identity of assessed land); 1866, *Burford v. McCue*, 53 id. 427, 431 ("Patrick O'Neil" and "R. P. O'Neil" as grantee and grantor; the identity held not sufficiently evidenced to go to the jury); 1867, *Lyman v.*

of the same name are *father and son*, the name is commonly presumed to have been used of the father.⁶

The identity of *objects or persons* from clothes, features, marks, and the like, may become the subject of a real presumption, though rarely. What is usually signified is either that the evidence is on the whole sufficient to go to the jury (*ante*, § 2494), or that specific facts are admissible.⁷

§ 2530. **Continuity**: (1) in general (**Ownership, Possession, Residence, Insanity, etc.**). It is often said that when a person, or object, or relation, or

Philadelphia, 56 id. 488, 499, 503 (like Philadelphia v. Miller); 1868, Glass v. Gilbert, 58 id. 266, 290 (same); the question how uncertain a description must be to avoid an assessment is the main one in these preceding three cases); 1871, McConeghy v. Kirk, 68 id. 200 ("John J. Kirk" as indorser of a note to "J. J. Kirk"; the correspondence held *prima facie* evidence of identity); 1871, Brotherline v. Hammond, 69 id. 128, 133 ("Daniel Kladder" and "Daniel Kritler"; the identity not sufficiently evidenced to go to the jury); 1884, Sittler v. Gehr, 105 id. 577, 601 ("Conrad Gehr," claimed as identical with the defendant's ancestor in 1739; the rule in Sailor v. Hertzogge, *supra*, approved; here the lapse of time was held to require additional evidence before going to the jury); 1895, Mason F. J. Co. v. Paine, 166 id. 352, 31 Atl. 98 (one uttering an admission must be identified); R. I.: 1852, Kinney v. Flynn, 2 R. I. 319 ("Bridget Flynn," said to be the defendant's wife; mere sameness of name not sufficient to show that the person was unavailable through interest); 1897, Liscomb v. Eldredge, 20 id. 335, 38 Atl. 1052 ("Harriet Richmond Eldredge," presumed identical with "Harriet R. Eldredge"); U. S.: 1892, Taussig's Ex'ts v. Glenn, 2 C. C. A. 314, 51 Fed. 381 (identity of a stock subscriber); Vt.: 1857, Bogue v. Bigelow, 29 Vt. 179, 182 ("Aaron I. Boge," said to be the plaintiff's ancestor "Aaron Jordan Bogue"; Redfield, C. J.: "In tracing titles . . . it is always regarded as *prima facie* evidence of identity, while in cases involving charges of crime . . . some further proof is required"); 1873, Cross v. Martin, 46 id. 14, 13 (grantee and grantor, E. G., but living in different States and thirty years apart; "parties in successive deeds constituting a chain of title, of the same name, are presumptively the same person"); Va.: 1847, Pollard v. Lively, 4 Gratt. 73, 76 ("Benjamin Pollard," grantee and ancestor, presumed the same; evidence of the existence of two persons, received in rebuttal); W. Va.: 1897, Sweetland v. Porter, 43 W. Va. 189, 27 S. E. 352 ("John S. Sweetland" and "J. S. Sweetland," presumed the same); Wis.: 1902, Sandberg v. State, 113 Wis. 578, 89 N. W. 505 ("probably neither rule is universal").

⁶ 1849, Stebbing v. Spicer, 8 C. B. 827 (promissory note payable to J. H., and indorsed by J. H. to the plaintiff; plea, that J. H. did not indorse it; there were two persons, father and son, of that name; the indorsement was by the son; upon the question whether the real payee was the father or the son, held that the

defendant could employ the presumption that it was the father, and the plaintiff had the burden of giving evidence that it was the son, but that there was some evidence to go to the jury upon that point); 1878, Graves v. Colwell, 90 Ill. 612, 615 (ejectment by one claiming through T. C. Sr. against one claiming through T. C. Jr., the grantee in the deed being described as T. C.; held, that the presumption gave the plaintiff a *prima facie* case, that the defendant had removed it by counter-evidence, and that the case was properly before the jury, but in their doubt the legal presumption should prevail); 1838, State v. Vittum, 9 N. H. 519 (indictment for adultery with L. W.; the father presumed). Similarly, the following rule has been declared: 1873, Cross v. Martin, 46 Vt. 14, 18 (grantor and grantee of a deed, E. G., and E. G., Jr., presumed to be father and son).

⁷ The following are not all genuinely rulings of presumption: 1858, R. v. Britton, 1 F. & F. 354, Watson, B. (highway robbery; correspondence of boot-impressions, being "the main evidence," held not sufficient); 1853, Campbell v. State, 23 Ala. 44, 48, 68 (that shoes taken from the feet of the horse ridden by the defendant on the morning of the killing "seemed to fit in every particular" the tracks near the place of killing, admitted); 1867, Com. v. Bentley, 97 Mass. 552 (identity of a bottle of liquor sent and a bottle received and testified to; similarity as to size, wrappings, seal, label, and time of sending, held sufficiently shown to authenticate the bottle testified to); 1876, Com. v. Tolliver, 119 id. 312, 316 (identity of bank bills charged as stolen; partial correspondence with bills found on the defendant, held sufficient to go to the jury); 1883, Com. v. Nefus, 135 id. 534 (in authenticating a cipher-letter alleged to have been written by the defendant, the fact that his cipher-key fitted it, and that it contained expressions peculiar to the defendant and his situation, were regarded as sufficient); 1889, Com. v. Finnerty, 148 id. 165, 19 N. E. 215 (authenticating beer-bottles found in a yard as the defendant's; similarity of marks to those of bottles within her building, and absence of liquor in adjacent houses, sufficient); 1895, People v. Cleveland, 107 Mich. 367, 65 N. W. 216 (the condition and doings of one of three robbers, of whom defendant was alleged to be one, after the robbery, admitted as a means of identifying the defendant).

The rules of admissibility of evidence of Identity have been already considered (*ante*, §§ 410-416).

state of things, is shown to have existed at a given time, its continuance is presumed. In reality, however, a genuine rule of presumption is seldom found; the rulings usually declare merely that certain facts are admissible,¹ or that they are sufficient evidence for the jury's finding (*ante*, § 2494).²

§ 2531. **Same: (2) Life and Death.** It is not possible to say that there is a genuine presumption of *life*, with a uniform application. The state of the pleadings will show whose duty it is to prove life at a certain time; and upon his showing life at a preceding time, the Court will usually leave it to the jury to say whether he has proved his case, but may sometimes apply a genuine presumption, shifting the duty of producing evidence, upon the circumstances of the particular case.¹

¹ The rulings plainly of this sort are placed under the various topics of Relevancy (*ante*, §§ 51-464).

² The following are instances under different subjects:

Ownership (compare § 382, *ante*): 1894, *Brown v. Castellaw*, 33 Fla. 204, 214, 14 So. 822 (title by tax-deed, presumed to continue two years later); 1898, *Coleman & Burden Co. v. Rice*, 105 Ga. 163, 31 S. E. 424 (title sometime previous to a judgment, presumed to continue); 1901, *State v. Dexter*, 115 Ia. 678, 87 N. W. 417 (personality; ownership not presumed at an earlier time); 1893, *Lind v. Lind*, 53 Minn. 48, 54 N. W. 934 (ownership of land in 1874, presumed to continue to death in 1888); 1893, *Chapman v. Taylor*, 136 N. Y. 663, 32 N. E. 1063 (ownership of bonds, presumed to continue from 1881).

Possession (compare § 382, *ante*): 1893, *Hollingsworth v. Walker*, 98 Ala. 543, 13 So. 6 (possession of land, presumed to continue during a gap of two years).

Authority (compare § 377, *ante*): 1893, *Hensel v. Maas*, 94 Mich. 563, 568, 54 N. W. 381 (authority as agent to sell land six months before, presumed to continue).

Insanity (compare §§ 233, 1671, *ante*): 1895, *People v. Schmitt*, 106 Cal. 48, 39 Pac. 204 (different phrasings cited); 1892, *Armstrong v. State*, 30 Fla. 170, 204, 11 So. 618 (permanent insanity, presumed to continue); 1894, *Taylor v. Pegram*, 151 Ill. 106, 119, 37 N. E. 837 (similar); 1903, *Kirsher v. Kirsher*, 120 Ia. 337, 94 N. W. 846; 1896, *Rodgers v. Rodgers*, 56 Kan. 483, 43 Pac. 779 (the presumption of insanity from an adjudication for commitment in 1883, held overthrown in 1886 by the other evidence); 1815, *Lessee v. Hoge*, 1 Pet. 183 (general insanity, presumed to continue).

Residence (compare §§ 89, 94, 377, 382, *ante*): 1893, *Botna v. S. Bank v. Silver C. Bank*, 87 Ia. 479, 54 N. W. 472 (residence presumed to continue; here, for nine days); 1872, *Ripley v. Hebron*, 60 Me. 379, 393 (in establishing a continuous residence of a pauper for five years, as legally required, an interval of some weeks' absence appeared; held, that the burden of explaining this absence remained on the party alleging the settlement); 1841, *Kilburn v. Bennett*, 3 Metc. 199 (assumpsit for

taxes; residence before the assessment date being shown, it was the defendant's duty to show a removal before the date arrived); 1893, *Price v. Price*, 156 Pa. 617, 626, 27 Atl. 291 (domicile presumed to continue fifteen years till death); 1877, *Rixford v. Miller*, 49 Vt. 319 (plea of Statute of Limitations; reply, non-residence of defendant; evidence offered of non-residence at the time of origin of the cause of action; the duty held to fall on the defendant to show cessation of non-residence).

Sundry instances (compare § 437, *ante*): 1840, *Scales v. Key*, 11 A. & E. 819, 822 (a custom of election shown to exist in 1689, presumed in law to continue, there being no evidence to the contrary); Cal. C. C. P. 1872, § 1963, par. 32 (it is presumed "that a thing once proved to exist continues as long as is usual with a thing of that nature"); 1863, *Murphy v. Orr*, 32 Ill. 489 (a decree of chancery presumed to continue in force, until shown to be overturned); 1898, *McCraw v. McGraw*, 171 Mass. 146, 50 N. E. 526 (divorce; confirmed habits of intoxication five years before, presumed to continue); 1848, *Mullen v. Pryor*, 12 Mo. 307 (action by an indorsee against an indorser, alleging insolvency of the maker of the note; upon a showing of insolvency at maturity, the presumption of continuance applied).

¹ 1802, *Wilson v. Hodges*, 2 East 313 (death of a debtor before return of the *capias*: Ellenborough, L. C. J., said that "where the issue is upon the life or death of a person once shown to be living, the proof of the fact lies on the party who asserts the death"); 1869, *Phené's Trusts*, L. R. 5 Ch. D. 139 (whether N. P. M., a legatee, had survived the testator, F. P., so as to be entitled to share in the estate; F. P. died on Jan. 5, 1861, and N. P. M. was last heard of in New York on June 16, 1860; held that the burden of proving N. P. M.'s life on Jan. 5, 1861, was on his representative, and was here not sustained); 1867, *Whiting v. Nicholl*, 46 Ill. 230 (instructive case; apparently sanctioning a real presumption); 1900, *Chicago & Alton R. Co. v. Keegan*, 185 id. 70, 56 N. E. 1088 (deed by E., of June 15, 1865, under power of attorney from A. dated April 3, 1860; A. presumed to have been alive at the former date); 1844, *Gilleland v. Martin*, 3 McLean, 490 (declaring a real presumption upon proof of life within seven years).

But there is a genuine presumption, of long standing and of universal acceptance, to aid proof of *death*. It is generally said to arise from the fact of the person's continuous absence from home, for seven years, unheard of by the persons who would naturally have received news from the absentee. The phrasings differ, however; sometimes the absence is stated to be from the jurisdiction; sometimes the element of non-receipt of news is not noticed;² moreover, the practice is not uniform in defining the precise point, or combination of facts, at which the burden of producing evidence shifts to the opponent. But the general presumption is unquestioned.³ The rule of the

² As in some of the statutes *infra*.

³ The early history of the presumption is given in Thayer's Preliminary Treatise, 319. *England*: 1763, Rowe v. Hasland, 1 W. Bl. 404, Lord Mansfield, C. J. (ejectment; to prove a branch of a family to be extinct, evidence was received, as to a person alive sixty years before, that he "has not been heard of for many years"; which would be sufficient "to put the opposite party upon proof that he still exists"); 1802, Bailey v. Hammond, 7 Ves. Jr. 590 (bequest of money on the death of a brother, who had not been heard of for twenty years; bequest paid over); 1805, Doe v. Jesson, 6 East 80, 84 (ejectment; the plaintiff's lessor claimed under a deceased brother; she was required by law to enter within ten years of his death and the removal of her disability; he was last heard from in 1778; the presumption of death applied in 1785; her disability ceased in 1792; thus an ejectment in 1804 was too late; but it was apparently not held necessary for the jury to apply the presumption; the case at most decides that the burden of conviction, not the duty of going forward, was on the lessor; there was "fair ground for the jury to presume" death after seven years from being last heard of, in the absence of later evidence of life); 1821, Doe v. Deakin, 4 B. & Ald. 433 (ejectment; T., born in 1759, had been absent from his relatives from 1787 to 1804, when he returned and shortly departed again; since then he had not been seen in the neighborhood; the jury were told that this was "*prima facie* evidence from which they might presume T.'s death"; the defendant contended "that this was not even *prima facie* evidence"; *per Curiam*: "The evidence unanswered was sufficient to found a presumption of T.'s death," approving the seven-year presumption laid down in Doe v. Jesson); 1844, Watson v. England, 14 Sim. 28 (a young person abroad, not presumed dead after seven years); 1844, Dowley v. Winfield, ib. 277 (presumption in a similar case, apparently enforced); 1877, Prudential Assurance Co. v. Edmonds, L. R. 2 App. Cas. 487 (presumption applied; the element as to "not being heard from," examined).

United States: Ark. Stats. 1894, § 2903 (absence "for five years successively" raises a presumption); Cal. C. C. P. 1872, § 1963, par. 26 (it is presumed "that a person not heard from in seven years is dead"); 1897, Posey v. Hanson, 10 D. C. App. 497, 506; Del. Rev. St. 1893, c. 82, § 6 (on absence from the State "for

seven years together, and no evident proof be made of his life in any inquest," "he shall be accounted dead"); 1898, Watson v. Adams, 103 Ga. 733, 30 S. E. 574; 1867, Whiting v. Nicholl, 46 Ill. 230 (dower); 1897, Hitz v. Algreen, 170 id. 60, 48 N. E. 1068 (mere absence is not sufficient; diligent inquiry at the last place of residence and among those likely to hear from him is necessary); 1897, Hoyt v. Beach, 104 Ia. 257, 73 N. W. 493; Ky. Stats. 1899, § 1639 (the fact of a resident's leaving the State and not returning for seven successive years, raises a presumption of death; compare id. § 1609); 1900, Mutual B. L. I. Co. v. Martin, 108 Ky. 11, 55 S. W. 694 (the seven years dates from the last hearing from the person); 1831, King v. Fowler, 11 Pick. 302 (writ of right, one claiming under S. K. produced deeds from one of the six children of S. K., and offered evidence that the other five had not been heard of for over seventy years; the jury were instructed that the plaintiff was "entitled to recover"; held, that "the legal result was such as the jury have found," "especially as there was no evidence to rebut that evidence," on the part of the defendant); 1840, Loring v. Steineman, 1 Metc. 204, 211 (administration of an estate); 1881, Bowditch v. Jordan, 131 Mass. 321 (a plaintiff proving title through D.; evidence that D. sailed for foreign parts in 1840, and nothing had since been heard of the vessel, "justified and required the inference of her death"); Miss. Annot. Code 1892, § 1737; 1896, Manley v. Patterson, 73 Miss. 417, 19 So. 236 (rule held not to apply to children of seven years and under who were under the control of adults and had not volition as to their movements); Mo. Rev. St. 1899, §§ 265, 3144; N. Y. C. C. P. 1877, § 841 (remaining without the United States, or absenting himself anywhere, for seven years together, is sufficient); N. D. Rev. C. 1895, § 5701; 1897, Francis v. Francis, 180 Pa. 644, 37 Atl. 120 (W. had gone to live in a colony in Patagonia, and was there heard from in 1876, but not since; held, that no absence from his last known domicile was shown, and thus a party claiming that his wife in Pennsylvania in 1884 was single, at the time of making a will, had raised no presumption); S. D. Stats. 1899, § 6543; 1903, Latham v. Tombs, — Tex. Civ. App. —, 73 S. W. 1060 (absence of news is essential); 1894, Scott v. McNeal, 154 U. S. 34, 41 (here the presumption was not allowed to prevent the overthrow of a probate decree based on it, where the

presumption, however, extends merely to the *fact of death* from and after the end of the period; it is not understood to specify anything further,—for example, the *time of death* within that period,⁴ or the *celibate* or *childless* condition of the person at the time.⁵ ✓

On similar considerations of experience, the *loss of a ship*, in insurance cases or the like, may become the subject of a presumption or a *prima facie* ruling, after a long absence from port without news.⁶ Moreover, there is a distinct presumption of death from *lapse of lifetime*,—not reducible to a fixed period, but exempt from any requirement as to absence from home or lack of news.⁷

supposed deceased afterwards returned alive); 1902, *Fidelity Mutual L. Ass'n v. Mettler*, 185 id. 308, 22 Sup. 662; Va. Code 1887, § 3373 (the departure from the State and failure to return within seven successive years, by a person residing in the State, raises a presumption of death); W. Va. Code 1891, c. 130, § 44 (like the Virginia statute); 1898, *Boggs v. Harper*, 45 W. Va. 554, 31 S. E. 943; 1900, *Wisconsin Trust Co. v. Wisconsin M. & F. I. Co. Bank*, 105 Wis. 464, 81 N. W. 642.

⁴ 1837, *Nepean v. Knight*, 2 M. & W. 894 (ejectment, for property held by long adverse possession, the plaintiff claiming under M. K.; the question being whether the plaintiff's lessor had begun the action, under St. 3 & 4 W. IV, c. 27, within twenty years since his right accrued, *i. e.* since the death of M. K., it was held that the plaintiff had the burden of evidencing this; M. K. having gone to America in 1806 or 1807, and being last heard from by a letter received in May, 1807, and the suit having been begun on Jan. 18, 1834, less than seventeen years later, it was held that there was no presumption that M. K. died not before the end of the seven years, or died at any specific time; and that the plaintiff's burden had therefore not been sustained); 1880, *Corbishley's Trusts*, L. R. 14 Ch. D. 846; 1902, *Re Benjamin*, 1 Ch. 723; 1848, *Doe v. Strong*, 4 U. C. Q. B. 510, 518, 8 id. 291 (good opinions); 1897, *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443 (property went by S.'s will in remainder to his four children; one of them C., married K., and had a son, who disappeared in 1881, C. dying in 1888; C.'s administrator was sued by the other three children for her share, their inheritance depending on whether her son predeceased her; held, that the burden of showing his predecease rested on the plaintiffs, a part of whose case it was; that the seven years' presumption had not begun to operate; and that, thus there was no aid to be had from it in determining that the son had died at any particular time, so that the duty of producing evidence of survival did not shift to the defendant); 1878, *Davie v. Briggs*, 97 U. S. 628, 634 (leading opinion, by Harlan, J.).

So, also, in an action for *death by wrongful act*, the burden of showing the death to have been within the statutory period in said to be on the claimant: 1903, *Poff v. N. E. Tel. & Teleg. Co.*, — N. H. —, 55 Atl. 891.

⁵ 1812, *Doe v. Griffin*, 15 East 293 (eject-

ment; the plaintiff's lessor, who claimed through the same collateral ancestor as the defendant, was held to have the burden of proving that the ancestor had died without issue, but was held to have placed upon the defendant the duty of going forward by evidence that the ancestor had never been heard of as married); 1897, *Still v. Hutto*, 48 S. C. 415, 26 S. E. 713 (no presumption that a man, unmarried when last heard from, died childless).

⁶ 1777, *Green v. Brown*, 2 Str. 1199 (insurance; a ship sailing to America in 1739 had never been heard from; the defendant objected "that as captures and seizures were excepted" from the policy, "it lay upon the assured to prove the loss happened in the particular manner declared on," *i. e.* by foundering; but "the Chief Justice said it would be unreasonable to expect certain evidence of such a loss," and left it to the jury); 1809, *Twemlowe v. Oswin*, 2 Camp. 85 (insurance; a ship sailing from Liverpool April 14, 1807, to the Gulf of St. Lawrence and thence to Hayti; evidence that she had not been heard from up to March 1, 1809, was admitted, but held not sufficient); 1815, *Watson v. King*, 1 Stark. 121 (trover; a ship carrying M., one of the owners, last seen in a hurricane on March 7, 1814, near Jamaica, sailing from England; several others of the fleet foundered, and this one had never been heard from up to Dec. 14, 1815; *Ellenborough, L. C. J.*, told the jury "it might be assumed that at that time M. was dead; but that it was for their consideration whether he was dead on the 8th of June, 1814," when his share of the ship was sold); 1816, *Houstman v. Thornton*, Holt N. P. 242 (insurance; a ship leaving Havana in August, 1815, bound to Holland or Flanders; up to Easter, 1816, she had not been heard from; *Gibbs, C. J.*, "There is no fixed rule of law upon this subject"; and he left the case to the jury, expressing an opinion that the ship was lost); 1826, *Koster v. Reed*, 6 B. & C. 19 (insurance; a ship sailing from Leghorn to Lisbon in April, 1821; evidence that she never arrived; held, that the fact that she had been rumored of as foundered was equivalent to "never having been heard of," and that in any case there was sufficient evidence to go to the jury).

⁷ 1901, *Young v. Shulenberg*, 165 N. Y. 385, 59 N. E. 135 (a person acknowledging a deed in 1817, presumed dead).

In evidencing the *lack of news*, under the

§ 2532. **Same: Survivorship.** Where two or more persons have perished in the same calamity, there is no presumption of law that either survived the other, or that all perished at the same time.¹ The burden of proving that one survived another will commonly be on any claimant for whom that fact is essential to his own chain of title.² If there is evidence, from the age, sex, or physical condition of the persons who perished, or from the nature of the accident and the manner of death of the parties, which tends to show that some one did in fact survive the others, the whole question is one of fact, to be decided in each case by the jury, according to the incidence of the first burden of proof (*ante*, § 2485); but without any rule of presumption.

But in escaping the artificial rules prescribed by the Continental law, and by a few of our own Codes,³ our Courts have left many difficulties unsolved, and have created new artificialities capable of doing inordinate violence to a testator's intentions. For example, the supposed logic which has sometimes permitted the identical devisee of two co-perishing testators to be, after all, judicially deprived of the estate is as unnecessary in legal principle as it is shocking to good sense;⁴ and a fairer solution for this frequent problem is a present desideratum in the law.⁵

§ 2533. **Seaworthiness.** In actions on insurance policies, the insurer will usually have the first burden of proof (*ante*, § 2485) of the unseaworthiness of the vessel, though the circumstances of the loss may afford *prima facie* evidence (*ante*, § 2494), or even raise a presumption, of the fact of unseaworthiness.¹ Yet there may be issues in which the vessel-owner will have the first burden of proof of seaworthiness.²

above rules, the use of rumors or reports, or their absence, is not a violation of the *Hearsay rule*: 1858, *State v. Wentworth*, 37 N. H. 217 (the fact that on inquiry no one in a certain neighborhood knew of a man whose existence was material); and cases cited *ante*, § 1789; the doubt expressed in *Nehring v. McMurrian*, 1900, 94 Tex. 45, 57 S. W. 943, was unnecessary.

¹ 1860, *Wing v. Angrave*, 8 H. L. C. 183; 1866, *Hartshorne v. Wilkins*, 6 N. Sc. 276; 1902, *Middeke v. Balder*, 198 Ill. 590, 64 N. E. 1002 (collecting cases); 1897, *Schaub v. Griffin*, 84 Md. 557, 36 Atl. 443; 1878, *Newell v. Nichols*, 75 N. Y. 78; 1897, *Re Wilbor*, 20 R. I. 126, 37 Atl. 634, 51 L. R. A. 863; 1903, *Young Women's Christian Home v. French*, 187 U. S. 401, 23 Sup. 184.

² The various classes of cases, and the special modifications of principle, have been elaborately treated by Professor C. B. Whittier, in an article which makes further examination of them here unnecessary: "Problems of Survivorship," 1904, *Green Bag*, XVI, 237; the precedents are there fully collected.

³ *E. g.*, Cal. C. C. P. 1872, § 1963, par. 40.

⁴ As in *Wing v. Angrave* and *Newell v. Nichols*, *supra*. The decision in *Young Women's Christian Home v. French*, *supra*, is a com-

mendable instance of a refusal to accept such a result.

⁵ In view of these sinister possibilities of judicial decision, and of the contingencies created by the transmarine voyage annually taken by thousands of families, it may be suggested that the only safe form of will, for a married pair having identical testamentary wishes, must consist in a devise to a trustee, in trust, first, to accumulate the income for six months, next, to transfer the estate to the wife (or husband) *if living at the expiration of the six months*, and next, if not then appearing to be living, to the desired secondary devisees.

¹ 1878, *Pickup v. Thames Ins. Co.*, L. R. 3 Q. B. D. 594 (insurance policy; a direction to the jury that a speedy return to port would shift the burden of proof by raising a presumption, held improper; "as a matter of reasoning and inference" only, the jury might so conclude); 1900, *Allan v. Morrison*, App. Cas. 362; 1893, *Broadnax v. R. Co.*, 157 Pa. 140, 150, 27 Atl. 412 (the burden of persuasion is on the party affirming unseaworthiness; speedy return to port, etc., raises a presumption thereof).

² 1894, *The Edwin I. Morrison*, 153 U. S. 199, 210, 14 Sup. 823 (action for goods lost, on a warranty of seaworthiness; the burden is on the owner to prove seaworthiness).

§ 2534. **Regularity:** (1) **Performance of Official Duty and Regularity of Proceedings.** The general experience that a rule of official duty, or a requirement of legal conditions, is fulfilled by those upon whom it is incumbent, has given rise occasionally to a presumption of due performance. This presumption is more often mentioned than enforced; and its scope as a real presumption is indefinite and hardly capable of reduction to rules. It may be said that most of the instances of its application are found attended by several conditions; first, that the matter is more or less in the past, and incapable of easily procured evidence; secondly, that it involves a mere formality, or detail of required procedure, in the routine of a litigation or of a public officer's action; next, that it involves to some extent the security of apparently vested rights, so that the presumption will serve to prevent an unwholesome uncertainty; and, finally, that the circumstances of the particular case add some element of probability.¹

The same principle has sometimes been extended to acts which ought to have been done by a *private person* in the course of business;² but this seems unlikely to be common. Furthermore, it has been often extended to include the *truth of an official certificate* or other assertion;³ but although

¹ The following are illustrations: Cal. C. C. P. 1872, § 1963, par. 15; 1893, *American M. Co. v. Hill*, 92 Ga. 297, 18 S. E. 425 (a verdict as the foundation of a judgment, the minutes being lost; regularity presumed); 1840, *Eyman v. People*, 6 Ill. 4, 8 (use and recognition of a highway; presumed duly laid out); 1840, *Nealy v. Brown*, ib. 10, 13 (same); 1875, *Goldie v. McDonald*, 78 id. 605, 607 (defendant's residence in the county, as affecting service of process, presumed); 1827, *Hathaway v. Clark*, 5 Pick. 490 (notice of adjudication of insanity, not presumed, the record of it being lacking and the papers apparently entire); 1893, *State v. Lord*, 118 Mo. 1, 23 S. W. 764 (regularity of an indictment, presumed); 1894, *State v. Hoyt*, 123 id. 348, 355, 27 S. W. 382 (correctness of a tax-bill, presumed); 1895, *State v. David*, 131 id. 380, 33 S. W. 23 (coroner's mode of taking a deposition; regularity presumed); 1896, *Green v. Barker*, 47 Nebr. 934, 66 N. W. 1632 (chairman of a city board of trustees; his duty as to matters preceding a conveyance, presumed done); 1826, *Bishop v. Cone*, 3 N. H. 513, 516 (legality of a town meeting, presumed); 1895, *Fisher v. Kaufman*, 170 Pa. 444, 33 Atl. 137 (correctness of an old survey in a land-office, presumed); 1895, *Altoona v. Bowman*, 171 id. 307, 33 Atl. 187 (a requirement that municipal ordinances shall not be passed to enactment on the day of introduction or reporting; regularity not presumed); 1896, *Harkrader v. Carroll*, 76 Fed. 474 (proceedings of the land-office in issuing a patent, presumed); 1901, *New River Mineral Co. v. Roanoke C. & C. Co.*, 49 C. C. A. 78, 110 Fed. 343 (that an undated sheriff's return was made within the due period, presumed).

The regularity of a *tax-title* has been a frequent field of controversy under this presumption, depending more or less on the requirements

of the local statute: 1894, *Clarke v. Mead*, 102 Cal. 517, 519, 36 Pac. 862 (tax-deed; presumption made by statutes of regularity of steps in prior proceeding); 1826, *Waldron v. Tuttle*, 3 N. H. 340, 344 ("Very few of those sales have been found to be legal; the presumption is in fact against their validity; . . . in all cases enough of the proceedings should be shown to render it not improbable that the proceedings may have been regular," and this, with possession, may suffice); 1889, *Blackwell, Tax Titles*, 5th ed., §§ 1098, 1140.

² 1802, *Ellenborough, L. C. J.*, in *Williams v. E. I. Co.*, 3 East 199 ("Where any act is required to be done on the one part, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the contrary—that is, in such case, of proving a negative—on the other side"; here, in an action by a ship-owner against a charterer for placing an explosive on board without notice, the burden was placed on the plaintiff to show the defendant's failure to give notice).

³ 1885, *Patterson v. Collier*, 75 Ga. 419, 428 (an executive certificate that a person is not justice of the peace is "conclusive," "without rebutting evidence"); 1898, *Peyton v. Morgan Park*, 172 Ill. 102, 49 N. E. 1002 (the commissioners' certificate of benefit under Rev. St. 1874, c. 24, § 147, raises a presumption); 1896, *Albany Co. S. Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427 (a certificate of acknowledgment creates a presumption, under C. C. P. § 935, when nothing more is offered, of the truth of the facts stated; when disputed by evidence, the jury is to decide; here the question was whether the deeds were in fact signed or executed; the opinion collects the cases); 1898, *Rogers v. Pell*, 154 id. 518, 49 N. E. 75 (a certificate of acknowl-

this consideration serves in part to justify for such statements the exception to the Hearsay rule (*ante*, § 1630), it is only occasionally (as in a certificate of acknowledgment) that the force of a real presumption can be expected.

§ 2535. **Same:** (2) **Appointment and Authority of Officers; Incorporation.** There is a rule of substantive law that for some legal purposes a *de facto* incumbency of a public office suffices; the *de jure* appointment would then not be in issue. But supposing that it is, the rule of evidence, requiring production of documentary originals (*ante*, § 1178), would call for the original document of appointment; unless, under that rule, an exception can be found for them. Such an exception, for reasons already noticed (*ante*, § 1228), is recognized for many classes of cases.¹

Assuming, then, that the *de jure* incumbency of office by a particular person is to be shown, and that the document of appointment need not be produced, there may then come into play a well recognized presumption of incumbency, based on the person's prior *notorious action* as such officer. In strictness, there are here two elements, the course of action and its notoriety;² but the former alone is commonly mentioned. For *public officers*, the scope of the presumption depends more or less on the issue of substantive law involved, because other evidence may be demanded where the title to the office is the essence of the controversy; moreover, the rule of the sufficiency in substantive law of a *de facto* incumbency (above noted) tends to be confused with the present evidential rule of presumption.³ Occasionally the rule is

edgment, on the fact of its venue, goes to the jury "against evidence in rebuttal, whatever it may be"; 1903, *Pine Tree L. Co. v. Fargo*, — N. D. —, 96 N. W. 357 (a city treasurer's credit of assessment-receipts, presumed correct).

Compare the cases cited *ante*, §§ 1847-1844 (conclusive documents) and §§ 1630-1684 (admissibility of official documents), where the statutes often declare such a rule for those documents.

¹ 1789, *R. v. Gordon*, 2 Leach 3d ed. 581 (murder of a constable; production of the appointment not needed); 1805, *Kirwan v. Cockburn*, 5 Esp. 233 (appointment in the army; the commission itself should be produced); 1883, *James v. State*, 41 Ark. 451, 453 (road-overseer; production not required); 1881, *Hall v. Bishop*, 78 Ind. 370, 372 (deputy auditor and assessor; production not required); 1899, *State v. Haskins*, 109 Ia. 656, 80 N. W. 1063 (production not required).

² The latter is nearly the same as using a *reputation* of appointment (*ante*, § 1626); the former rests on a principle of Relevancy (*ante*, § 272).

³ Examples are as follows: *England*: 1791, *Berryman v. Wise*, 4 T. R. 366 (action of slander by an attorney); 1796, *Cross v. Kaye*, 6 id. 663 (attorney as defendant); 1826, *Pearce v. Whale*, 5 B. & C. 38 (attorney suing for services); 1833, *Butler v. Ford*, 1 Cr. & M. 662, 669 (police officers); 1835, *Cannell v. Curtis*, 2 Bing. N. C. 228 (assistant overseer of a parish); 1836, *M'Gahey v. Allston*, 2 M. & W. 206 (vestry-clerk's

action on a bond); 1845, *Doe v. Young*, 8 Q. B. 63 (commissioners of land-tax; Coleridge, J.: "It is an admitted point that acting in an office is proof of being officer. . . . The inference may be carried upwards as well as downwards"; L. C. J.: "If it was within a reasonable time of the act done, that is sufficient"); 1846, *Doe v. Barnes*, ib. 1037, 1042 (church-wardens and overseers of a parish; Patteson, J.: "The fact [of acting] does not of itself prove any title, but only that the person fills the office"; but Denman, L. C. J., and Williams, J., rather take the view that the course of action indicates a title); *United States*: *Ark.*: 1859, *State v. Stroope*, 20 Ark. 202 (road-overseer indicted); 1866, *Hardage v. Coffman*, 24 id. 256 (trover; plea of taking while army-officer; notorious action as such, sufficient); *Cal.* C. C. P. 1872, § 1963, par. 14; 1903, *Monterey v. Jacks*, 139 Cal. 542, 73 Pac. 436 (city trustees); *Ga.*: 1857, *Allen v. State*, 21 Ga. 217, 219 (constable); Code 1895, § 5168 (an "officer *de facto* may be proved by his acts," without producing his appointment); *Ill.*: 1883, *Golden v. Bressler*, 105 Ill. 419, 428 (trustees of a bank appointed by the Governor); *Ia.*: 1855, *Gourley v. Hankins*, 2 Ia. 75, 77 (as between third persons, a *de facto* showing suffices); 1870, *Londogan v. Hammer*, 30 id. 508, 515 (justice of the peace); *Kan.*: 1889, *State v. Crowder*, 41 Kan. 101, 112, 21 Pac. 208 (government detective); *La.*: 1847, *Planters' Bank v. Bass*, 2 La. An. 430, 437; *Me.*: 1852, *Hutchings v. Van Bokkelen*, 34 Me. 126, 132 (arrest by a lieutenant

applied to prove a *private authority*,⁴ but usually only in connection with the authentication of documents (*ante*, § 2124). By an extension of the principle the due *incorporation* of a company is often presumed from its course of action as such, together (in some cases) with a notoriety or repute;⁵ and the statutory admissibility of reputation alone (*ante*, § 1625) would probably be deemed also to create the force of a presumption.

It may be added that many instances, in which this presumption might be brought into question, are otherwise disposed of through the rule of *authentication of documents under seal*, presuming the incumbency of the sealing

ant); 1867, *New Portland v. Kingfield*, 55 id. 172, 174 (overseers of the poor, furnishing pauper-supplies); *Mass.*: 1862, *Webber v. Davis*, 5 All. 393, 396 (magistrate); 1871, *Com. v. Kane*, 108 *Mass.* 423 (indictment for assault upon a police officer); 1893, *Com. v. Wright*, 158 id. 149, 157, 33 *N. E.* 82 (illegal resistance to the police; the person's own testimony to his office, without evidence of public acting; undecided); *Mich.*: 1843, *Scott v. D. Y. M. Society*, 1 *Doug.* 119, 152 (reputation and acting, sufficient; here, of judges); *Mo.*: 1837, *Hart v. Robinett*, 5 *Mo.* 11, 16 (constable and deputy; acting is sufficient); 1858, *Eads v. Woodbridge*, 27 id. 251 (district school trustee; acting is sufficient); 1885, *State v. Holcomb*, 86 id. 371, 377 (murder of a policeman; action and recognition are sufficient); 1890, *State v. Findley*, 101 id. 217, 222, 14 *S. W.* 185 (tax-collector; acting is sufficient); *N. H.*: 1872, *State v. Roberts*, 52 *N. H.* 492, 495 (collector of taxes); *N. J.*: 1798, *Gratz v. Wilson*, 6 *N. J. L.* 419, 420 (judge of the Federal Supreme Court); *N. Y.*: 1830, *Wilcox v. Smith*, 5 *Wend.* 231, 234 (constable; "there must be some color of an election or appointment, or an exercise of the office, and an acquiescence on the part of the public for a length of time which would afford a strong presumption of at least a colorable election or appointment"); 1831, *Ring v. Grout*, 7 id. 341, 344 (repute and conduct; applied to school-trustees; the repute being as to the *de facto* and not the *de jure* exercise of office); 1832, *McCoy v. Curtice*, 9 id. 17 (same); *N. C.*: 1844, *Burke v. Elliott*, 4 *Ired.* 355, 359 (besides the *de facto* exercise, there must be "at least some colourable election and induction into office *ab origine*, or so long an exercise of the office and acquiescence therein of the public authorities as to afford to the individual citizen a presumption strong" of appointment; here, a constable); *Tenn.*: 1809, *State v. Manley*, 1 *Overt.* 428 (acting is sufficient, except where the officer justifies or sues as such); *Tex.*: 1902, *De Lucenay v. State*, — *Tex. Cr.* —, 68 *S. W.* 796 (county judge); *U. S.*: 1819, *Sawyer v. Steele*, 3 *Wash. C. C.* 464, 468 (officers of a revenue cutter, suing for penalty; acting as such is sufficient); 1821, *Jacob v. U. S.*, 1 *Brockenb.* 520, 528 ("acting notoriously" suffices; here, a revenue collector); 1827, *Bank v. Dandridge*, 12 *Wheat.* 64, 70 (cashier of the U. S. Bank, acting and recognized as such, assumed to be properly appointed); 1830, *Ronkendorff v. Taylor*, 4 *Pet.* 349, 359 (assessors; action under

authority is sufficient); *Vt.*: 1827, *Adams v. Jackson*, 2 *Aik.* 145 (constable); 1856, *State v. Abbey*, 29 *Vt.* 60, 64 (justice performing a marriage); 1862, *Briggs v. Taylor*, 35 id. 57, 67 (deputy sheriff); 1898, *State v. Taylor*, — id. —, 39 *Atl.* 447 (constable making an arrest).

⁴ 1837, *Campbell v. Bank*, 2 *Ill.* 423 (authority of an attorney to give a supersedeas bond); 1871, *Druse v. Wheeler*, 22 *Mich.* 439, 444 (trustees of a church, in an action for trespass). *Contra*: 1853, *Bryan v. Walton*, 14 *Ga.* 185, 192 (not applicable to a private trust, *e. g.* a guardian); 1857, *Gilbert v. Boyd*, 25 *Mo.* 27, *semble* (private trustees; rule not applicable).

The following ruling perhaps belongs here: 1898, *Baxter v. Camp*, 71 *Conn.* 245, 41 *Atl.* 803 (whether the defendant's cancellation of his signature to a contract was authorized; his admission of the cancellation, held not to put on him the duty of producing evidence of authority).

⁵ Compare the cases on *judicial notice* of charters (*post*, § 2575); *Del.*: *Rev. St.* 1893; c. 107, § 12 (bank's incorporation, provable in criminal proceedings by reputation or by the issuance of notes as a bank); *Ill.*: 1858, *President, etc. of Mendota v. Thompson*, 20 *Ill.* 197 (here a peculiarly strict rule; the production of the charter, and proof of acts done under and in conformity with it, suffices); 1884, *Louisville N. A. & C. R. Co. v. Shires*, 108 id. 617, 625 (similar); *Rev. St.* 1874, c. 38, § 486, *St.* 1889, June 3 (user is to be *prima facie* evidence of corporate existence, in criminal prosecutions); *Mass.*: 1876, *Merchants' National Bank v. Glendon Co.*, 120 *Mass.* 97 (banking corporation, in an action on a note); *N. H.*: *Pub. St.* 1891, c. 274, § 7 (offences involving counterfeit bank-notes; currency of the notes, "or other proof," is sufficient to show the bank's establishment); *Tenn.*: 1900, *State v. Missio*, 105 *Tenn.* 218, 58 *S. W.* 216 (larceny; example of the doctrine of the sufficiency in substantive law of a *de facto* corporation); *U. S.*: 1827, *Bank of U. S. v. Dandridge*, 12 *Wheat.* 64, 71, per Story, J.; *Vt.*: 1834, *Barnes v. District*, 6 *Vt.* 388, 393 (organization of a school district, proved by action as such and reputation); *Wash.*: 1893, *Yakima Nat'l Bank v. Knipe*, 6 *Wash.* 348, 350, 33 *Pac.* 834 (national bank).

The incumbency of a *corporate officer* will sometimes be noticed: 1870, *State v. Cleavland*, 6 *Nev.* 181, 185 (forgery); 1827, *Bank of U. S. v. Dandridge*, 12 *Wheat.* 64, 70, per Story, J.

officer (*ante*, §§ 2161-2169), and by the doctrine of *judicial notice* of *public officers* (*post*, § 2576).⁶

§ 2536. **Similarity of Foreign Law.** Whether a foreign rule of law is to be adopted as applicable to any part of the litigation before the Court, depends upon principles of substantive law. Supposing the foreign rule to control, then it is to be noted, with reference to ascertaining the terms of the foreign rule, that the Court does not know it judicially,¹ and that it must therefore be proved like any *factum probandum*,² and that in aid of such proof a presumption may within certain limits be resorted to. (1) If it is the law of a State possessing the English common law as the foundation of its system, in particular, *one of the United States*, it is generally said to be presumed to be the same as that of the forum;³ even if it involves the existence of a statutory enactment, the same rule is often applied,⁴ though many Courts draw a distinction here and confine the presumption to the common or judicially-declared law.⁵ (2) If the *foreign State* is not one whose system is

⁶ For the rule of presumption as to the incumbency of the *celebrant of a marriage*, see *ante*, § 2505; the question is complicated by two additional ones, namely, whether a *de facto* clergyman sufficed at common law, and whether the opponent by his conduct has admitted the legality of the celebrant's appointment.

¹ *Post*, § 2573.

² Whether to the Court or to the jury is another question (*post*, § 2558).

³ *Ga.*: 1895, *Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646 ("as to such matters concerning which there is no such recognized variance . . . as will afford a basis for judicial cognizance of such difference"; here the nature of an indorser's contract); *Ia.*: 1896, *Goodwin v. Assurance Soc.*, 97 Ia. 226, 66 N. W. 157; *Nebr.*: 1894, *Fitzgerald v. F. & M. C. Co.*, 41 Nebr. 374, 472 (rate of interest); 1897, *East Omaha St. R. Co. v. Godola*, 50 id. 906, 70 N. W. 491; 1902, *People's Building L. & S. Ass'n v. Backus*, — id. —, 89 N. W. 315 (usury); 1903, *Staunfield v. Jutter*, — id. —, 96 N. W. 642 (waste by mortgagee of property); *Pa.*: 1896, *Musser v. Stauffer*, 178 Pa. 99, 35 Atl. 709; *S. D.*: 1897, *Morris v. Hubbard*, 10 S. D. 259, 72 N. W. 894; *Tex.*: 1895, *Tempel v. Hunter*, 89 Tex. 69, 33 S. W. 222.

Sometimes the rule is applied even to the law of Louisiana: 1868, *Simms v. Express Co.*, 38 Ga. 129, 132.

⁴ *Cal.*: 1895, *Cavallaro v. R. Co.*, 110 Cal. 348, 42 Pac. 918; *Ga.*: 1903, *Wells v. Gress*, — Ga. —, 45 S. E. 418 (warranty of a chattel's quality; the sale being made in Wisconsin, and the Georgia Code sanctioning an implied warranty, it was held that, even supposing that the common law did not imply such a warranty, yet "the legal presumption is that the *lex loci* is the same as our own"); *Ia.*: 1903, *Barringer v. Ryder*, 119 Ia. 121, 93 N. W. 56 (dower rule); *Kan.*: 1901, *Woolcott v. Case*, 63 Kan. 35, 64 Pac. 965; 1903, *Poll v. Hicks*, 67 id. 191, 72 Pac. 847 (Ohio judgment; Ohio statute presumed the same, as to a supersedeas bond);

1903, *Heim B. Co. v. Gimber*, ib. 834, 72 Pac. 859 (contributory negligence, while injured in Missouri; neither decision nor statute of Missouri judicially noticed, *i. e.* they were presumed to be the same); *Mo.*: 1898, *Burgess v. Tel. Co.*, — Mo. —, 46 S. W. 794; *Nebr.*: 1893, *Scroggin v. McClelland*, 37 Nebr. 644, 646, 56 N. W. 208 (period of limitation); 1899, *Fisher v. Donovan*, 57 id. 361, 77 N. W. 778 (law of beneficiary corporations); *Pa.*: 1903, *Adams Paper Co. v. Cassard*, 206 Pa. 179, 55 Atl. 949 (contract of a wife made in New York; the contract being void by statute if made in Pennsylvania, "the Court will presume the wife's disability is the same in New York as here"); *Wis.*: 1903, *Second Nat'l Bank v. Herman and Smith*, 118 Wis. 18, 94 N. W. 664 (sufficiency of notice of dishonor).

The apparent ruling in New Jersey (1902, *Coler v. Tacoma R. Co.*, 64 N. J. Eq. 117, 53 Atl. 680; 1903, *Dittman v. Distilling Co.*, ib. 537, 54 Atl. 570) that a statute of another State will be presumed the same is really a ruling that a corporation chartered in one State may exercise its powers in another State unless the other State expressly prohibits it, and hence the burden of proving this exceptional prohibition is on the party who would profit by it.

⁵ *Ala.*: 1897, *Louisville & N. R. Co. v. Williams*, 113 Ala. 403, 20 So. 938; 1899, *Birmingham Waterworks Co. v. Hume*, 121 id. 168, 25 So. 806; *Ark.*: 1893, *Brown v. Wright*, 58 Ark. 20, 22 S. W. 1022 (but the unwritten law is not presumed to be the same where the common law of England was not the foundation of jurisprudence, as in Texas); *Ga.*: 1898, *Pattillo v. Alexander*, 96 Ga. 60, 30 S. E. 644; *Ill.*: 1893, *Miller v. Wilson*, 146 Ill. 523, 531, 34 N. E. 1111 (statute of frauds, not presumed); 1899, *Schlee v. Guckenheimer*, 179 id. 593, 54 N. E. 802 (assumpsit on contract made in Ohio, but legal in Illinois; presumed valid as at common law in Ohio); *Ia.*: 1895, *Roehl v. Porteous*, 47 La. An. 1582, 18 So. 645; *Mass.*: 1894, *Kelley v. Kelley*, 161 Mass. 111, 112, 36 N. E.

founded on the common law the presumption will probably not be made, unless the principle involved is one of the law merchant common to civilized countries.⁶ It has been suggested that in reality there is no presumption, and that the true process is merely that of refusing to recognize a presumption that the foreign State has a different law;⁷ and no doubt this will sufficiently describe the situation in many cases; but the ordinary mode of stating the question seems correct enough in most instances. The proper phrasing depends upon the state of the burden of proof in the case in hand; though the doctrine of judicial notice of law (*post*, § 2573) tends to be here confused.

§ 2537. **Contracts.** In evidencing the issues of fact arising under a contract right or liability, the first burden of proof (*ante*, § 2485) is almost always determined by the rules of pleading, or is directly deducible therefrom; the chief class of questions here, the *performance of a condition*, is included plainly, in common law tradition, within the sphere of pleading;¹ though in more recent times, under looser methods of procedure, the relaxation of boundaries between affirmative and negative pleas has tended to obscure the old landmarks of discussion. So, too, under the second burden of proof (*ante*, §§ 2487, 2494), so far as there are rules of *prima facie* sufficiency or of presumption, relieving or shifting the duty of producing evidence, they seldom concern facts peculiar to the domain of contracts alone; and any of the preceding presumptions may become applicable.²

§ 2538. **Statute of Limitations.** The first burden of proof (*ante*, § 2485), affecting the loss of a right by limitation, was at common law usually placed upon the plaintiff, *i. e.* to show that the period of limitation had not elapsed

837 (divorce jurisdiction); *Minn.*: 1898, *Par-doe v. Merritt*, 75 Minn. 12, 77 N. W. 552; *N. Y.*: 1894, *Vanderpoel v. Gorman*, 140 N. Y. 563, 568, 35 N. E. 932 (assignment by corporation); 1898, *First National Bank v. Broadway N. Bank*, 156 id. 459, 51 N. E. 398 (statutory change in another State not presumed); *S. D.*: 1898, *Meuer v. R. Co.*, 11 S. D. 94, 75 N. W. 823; *Tex.*: 1899, *Blethen v. Bonner*, 93 Tex. 141, 53 S. W. 1016 (*semble*); *Vt.*: 1897, *State v. Shattuck*, 69 Vt. 403, 38 Atl. 81.

⁶ Compare with the following some of the cases cited *supra*, notes 3-5, on the law of Texas and Louisiana: 1899, *Aslanian v. Dostumian*, 174 Mass. 328, 54 N. E. 845 (common law merchant, if it applies in Turkey, must be shown to do so, by the party wishing to prove it); 1901, *Mexican C. R. Co. v. Glover*, 46 C. C. A. 334, 107 Fed. 356 (Mexican law as to employers' liability, presumed the same as that of Texas). The presumption of *continuance* (*ante*, § 2530) is sometimes here invoked: 1880, *Hynes v. McDermott*, 82 N. Y. 43, 57 (whether the law of France, as proved for 1862, would be presumed to continue until 1871, not decided).

⁷ 1898, *Corson, P. J.*, in *Meuer v. R. Co.*, 11 S. D. 94, 75 N. W. 823. Compare *Story, Conflict of Laws*, 8th ed., 1883, § 637, note by Professor Bigelow.

¹ The following are examples of the com-

moner problems of this sort: *Warranties or conditions in an insurance policy*: 1902, *Hennessy v. Ins. Co.*, 74 Conn. 699, 52 Atl. 490; 1903, *Supreme Tent v. Stensland*, 206 Ill. 124, 68 N. E. 1098 (life); 1896, *Penn. M. L. Ins. Co. v. M. S. B. & T. Co.*, 19 C. C. A. 286, 72 Fed. 413, 441 (the burden is on the insurer to show materiality and fraudulent intent of a false representation; nor does knowledge of the falsity of the same representation in another policy raise a presumption as to knowledge on this occasion); *Exemptions in a bailee's contract*: *ante*, § 2508; *Reservations in a deed*: 1897, *Harman v. Stearns*, 95 Va. 58, 27 S. E. 601 (deed with reservations; the claimant must prove that the land claimed is not within the reservations).

² The following are some of the rare instances: *Shipper's assent to the terms of a bill of lading received*: 1896, *Chicago & N. W. R. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596 (the carrier must show that limitations of his common-law liability are brought to the shipper's notice); 1866, *Boorman v. Express Co.*, 21 Wis. 152, 158 (delivery to the shipper raises a presumption of assent); *Partnership books*: 1897, *Wilson v. Potter*, — Ky. —, 42 S. W. 836 (partnership books are presumed correct; and in attacking them the specific items must be pointed out beforehand).

between the accrual of his right and the institution of his suit;¹ this seems to have been due to the peculiar wording of the earliest statutes, whose analogies were afterwards repeated. But the more natural and just view is to treat the fact as one of defeasance, like a release, and thus to place on the opponent the burden of establishing it; this is the result accepted in probably most jurisdictions to-day, either by statute² or at common law;³ in any event, it is in strictness a question of the law of pleading, not of evidence. Where the plaintiff's declaration exhibits in itself the lapse of the barring period, a further question arises (not necessarily dependent on the rule for burden of proof) as to the mode of taking advantage of this admission; in some cases a demurrer, or its equivalent, may suffice;⁴ in a jurisdiction where the burden is on the defendant, it would be proper to raise thereby a presumption in his favor, shifting to the plaintiff the duty of producing evidence of some exception;⁵ though here again the rules of pleading should furnish the proper mode of determination.

§ 2539. **Malicious Prosecution.** In an action for malicious prosecution, the plaintiff is anomalously required to plead and to prove facts which are otherwise regarded as matters of excuse or privilege, *i. e.* the termination of the prior proceeding in his favor, the lack of probable cause for it, and the malice;¹ this being prescribed for him by the rules of pleading. In the course of sustaining this first burden (*ante*, § 2485), he may sometimes avail himself of rules of presumption or *prima facie* sufficiency (*ante*, §§ 2487, 2497) or be met by counter-presumptions for the defendant; for example, by a rule that the magistrate's discharge,² or the suffering of a non-suit,³ is *prima facie* evidence, or raises a presumption, of lack of probable cause, or that the defendant's receipt of advice from counsel is sufficient evidence of probable cause. But in these and other instances the rule is frequently intended to be one of substantive law, *i. e.* that the fact in question is or is not *per se* probable cause; and the details of substantive law thus become inextricably mingled with the rules of presumption.

§ 2540. **Sundry Burdens and Presumptions.** In sundry multifarious cases, more or less casual, rules of presumption have been recognized;¹ and experi-

¹ 1817, *Hurst v. Parker*, 1 B. & Ald. 92 (trespass to a mine); 1837, *Nepean v. Knight*, 2 M. & W. 894 ("the *onus* is also cast on the lessor of the plaintiff of showing that he has commenced his action within twenty years after his right of entry accrued"); 1897, *Leigh v. Evans*, 64 Ark. 26, 41 S. W. 427 (administrator's account); 1897, *Graham v. O'Bryan*, 120 N. C. 463, 27 S. E. 122.

² Cal. C. C. P. 1872, § 458; 1896, *Thomas v. Glendinning*, 13 Utah 47, 44 Pac. 652 (under Comp. L. 1888, § 3244).

³ 1895, *Goodell's Ex'rs v. Gibbons*, 91 Va. 608, 22 S. E. 504; Wood on Limitations, 1901, 3d ed., by Gould, § 7.

⁴ 1879, *Hutchinson v. Hutchinson*, 34 Ark. 164 (provided also the facts in the complaint negative any ground of avoidance); 1876, *People v. Herr*, 81 Ill. 125 (but not in an action

a penal statute); 1895, *Fulton v. Northern Ill. College*, 158 id. 333, 336, 42 N. E. 138; 1879, *Lewis v. Alexander*, 51 Tex. 578, 588.

⁵ 1879, *Hines v. Potts*, 56 Miss. 346, 352; 1895, *Gross v. Disney*, 95 Tenn. 592, 32 S. W. 632; Wood on Limitations, *ubi supra*.

¹ 1883, *Abrath v. Northeastern R. Co.*, L. R. 11 Q. B. D. 440; 1858, *Barron v. Mason*, 31 Vt. 189 (leading opinion, by Redfield, C. J.).

² *Contra*: 1860, *Israel v. Brooks*, 23 Ill. 526 [575]; *accord*: 1893, *Barhight v. Tammany*, 158 Pa. 545, 28 Atl. 135.

³ 1902, *Cohn v. Saidel*, 71 N. H. 558, 53 Atl. 800 (collecting the cases *pro* and *con*).

⁴ The following are illustrations: 1897, *Kansas City, F. S. & M. R. Co. v. Becker*, 63 Ark. 477, 39 S. W. 353 (a common employment of plaintiff and the defendant's servant having been shown, a presumption arises that they were fel-

ence will doubtless and justly continue to develop new ones. The various burdens of proof of the first class fall properly within the domain of the rules of pleading (*ante*, § 2486).

low-servants); 1895, *Levy v. Chicago N. Bank*, 158 Ill. 88, 42 N. E. 129 (when things are done on the same day, they are presumed to have been done at the same time); 1897, *Crane v. People*, 168 id. 395, 48 N. E. 54 (Rev. St. c. 38, § 12, relating to adultery, applied); 1896, *Mutual Life Ins. Co. v. Wiswell*, 56 Kan. 765, 44 Pac. 996 (the taking of morphine by the insured's own hand does not create a presumption of suicide, and the burden of proof to show suicide remains on the insurer); 1848, *Brown v. Burnham*, 28 Me. 38 (procedure in taking a deposition); 1839, *Randolph v. Easton*, 23 Pick. 242 (a pauper woman's settlement in E. being shown, the defendants showed a marriage; held, that the burden was still upon them to show that the husband had a settlement elsewhere than at E., and not on the plaintiffs to show that he was

settled at E.); 1896, *State v. Mitchell*, 119 N. C. 784, 25 S. E. 733; *State v. Rogers*, ib. 793, 26 S. E. 142 (the sworn examination of a bastard's mother raises a presumption); *Cook v. Guirkin*, ib. 13, 25 S. E. 715 (payment admitted by payee; application of it to other lawful debts alleged in defence; the duty to produce evidence is on the payee); 1897, *Foster v. Crawford*, 80 Fed. 991 (levy of execution on sufficient assets raises a presumption of satisfaction); 1901, *U. S. v. Chun Hoy*, 50 C. C. A. 57, 111 Fed. 899 (under St. May 5, 1892, § 3, a Chinese person has the burden of showing his right to remain in the United States); 1895, *Witz v. Fite*, 91 Va. 446, 22 S. E. 171 (where a higher security is given for the same debt, there is a presumption of merger).

BOOK III: TO WHOM EVIDENCE MUST BE PRESENTED (LAW AND FACT; JUDGE AND JURY).¹

CHAPTER LXXXVIII.

§ 2549. Functions of Judge and Jury; General Principles.

§ 2550. Admissibility of Evidence.

§ 2551. Sufficiency of Evidence.

§ 2552. Negligence.

§ 2553. Reasonableness.

§ 2554. Same: Malicious Prosecution.

§ 2555. Facts Judicially noticed; Trial by Inspection; *Nul Tiel* Record.

§ 2556. Construction of Documents.

§ 2557. Criminal Intent.

§ 2558. Foreign Law.

§ 2559. Local Law.

§ 2549. **Functions of Judge and Jury; General Principles.** As a part of the larger procedure of jury trial, the question arises, To whom must evidence be presented for persuasion? To the judge, or to the jury? Before examining the answer to this question, certain principles, superficially related, must be discriminated. (a) *The judge's control over the burden of proof.* As a part of the rules regulating the burden of proof, the party on whom rests for the time being the duty of coming forward with evidence may be required to offer not merely any evidence whatever, but a sufficient amount to be worth considering, before he is regarded as satisfying this rule; in other words, he cannot go to the jury unless his evidence is sufficient, by this test; and it is the judge that applies the test. In this sense, then, the judge may be called upon to rule whether the evidence is sufficient, *i. e.* sufficient to go to the jury; if it is, they then solely determine whether it is sufficient, *i. e.* to convince them. This has been already examined (*ante*, §§ 2487, 2494). (b) *The judge's discretion*, or final determination of a question either of fact or of law (*ante*, § 16). The ruling of a trial Court on preliminary questions of fact relating to admissibility is often held to be not subject to review, *i. e.* the trial Court is said to have "discretion"; the instances have been mentioned under the various heads of evidence. (c) *The judge's application of a rule defining the legal consequences of a fact.* So far as the substantive law gives certain facts *per se* a legal consequence (as when it makes, for example, the consultation of counsel *per se* sufficient for good faith, in an action for malicious prosecution), the judge applies the rule, and the case is in this respect beyond the control of the jury. This principle becomes especially important in issues of negligence (*post*, § 2552). (d) Finally, the present subject, *i. e.* the respective functions of judge and jury, in the ultimate decision of the different issues that arise; upon this apportionment of function depends the question, To whom is the evidence to be regarded as offered by the parties?

¹ EXPLANATORY NOTE. The explanations made *ante*, § 2499, note 1, apply to this Chapter also.

Taking up the last question, then, we find it usually said that *questions of fact are for the jury*; or in the Latin phrase employed by Coke,² *Ad quæstionem facti non respondent iudices, ad quæstionem juris non respondent juratores*. But this cannot be taken as a trustworthy guide to the solution of any particular controversy on the subject:

1898, Professor *James Bradley Thayer*, Preliminary Treatise on Evidence, 185, 202: "Courts pass upon a vast number of questions of fact that do not get on the record or form any part of the issue. Courts existed before juries; juries came in to perform only their own special office; and the Courts have always continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not, and never was, any such thing in jury trials as an allotment of all questions of fact to the jury. The jury simply decides some questions of fact. . . . The allotment to the jury of matters of fact, even in the strict sense of fact which is in issue, is not exact. The judges have always answered a multitude of questions of ultimate fact, or facts which form part of the issue."³

It is therefore of little service to seek for guidance as to the limits of these questions by defining "law" and "fact"; the inquiry is rather as to the kinds of questions of fact which are to be determined by the judge. Moreover, this inquiry in effect concerns the respective division of functions between judge and jury, — a larger subject, and one not so much a part of the law of evidence as of the law of trial-procedure in general; and the matter is thus complicated by other inquiries as to the general powers of the judge in supervising and controlling the jury, — inquiries which must be distinguished from the specific one whether the evidence on a certain point is to be addressed to the judge or to the jury as the functionary immediately concerned with its determination. It is here possible only to indicate the trend of some of the main subjects of controversy or difficulty.

§ 2550. **Admissibility of Evidence.** The admissibility of a given piece of evidence is for the judge to determine. This general principle is not disputed; its application to the various kinds of evidence — qualifications of witnesses, absence of a hearsay deponent, voluntariness of a confession, condition of a dying declarant, and so on — has already been considered under the various heads of evidence. It follows that, so far as the admissibility in law depends on some incidental question of fact — the absence of a deponent from the jurisdiction, the use of threats to obtain a confession, the sanity of a witness, and the like — this also is for the judge to determine, before he admits the evidence to the jury.¹ This principle, one of the foundation-stones of our

² 1613-14, *Isaack v. Clark*, Rolle, I, 132, 2 Bulstr. 314.

³ On the whole subject of this chapter, the reader should consult the masterly historical and analytical survey by Professor Thayer, in his Preliminary Treatise, c. 5, pp. 183-262; or his Law and Fact in Jury Trials, Harvard Law Review, IV, 147.

¹ 1843, *Bartlett v. Smith*, 11 M. & W. 483 (whether a document is inadmissible through default of stamps; leading case); 1847, *Doe v. Davies*, 10 Q. B. 314, 323; 1881, *Fairbank v. Hughson*, 58 Cal. 314 (qualifications of an

expert); 1855, *Miller v. Metzger*, 16 Ill. 390, 393 (necessity of calling an attesting witness); 1888, *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452 (leading opinion, by C. Allen, J.); 1877, *Holly v. State*, 55 Miss. 424, 430 ("It may in short be stated as a universal rule that the Court always decides whether there has been any evidence upon a particular point, when there exists a legal necessity to produce such evidence in order to warrant the introduction of evidence upon some other point; to this extent the Court decides questions of fact"; here said of an overt act, preceding evidence of

law, has countless applications under the various rules of admissibility.² In more recent times, however, a heterodox practice has appeared, in places, of leaving some questions of admissibility to the jury.³ No doubt the judge, after admitting evidence, leaves it to the jury to give it what weight they think fit, for they are the triers of the credibility and persuasive sufficiency of all evidence which is admitted for their consideration (*post*, § 2551). But to leave the fact to them, to be rejected or accepted according to some legal definition, and not according to its intrinsic value to their minds, is to commit a grave blunder. It is an error of policy (as well as a deviation from orthodox principle) for several reasons; in the first place, it is a needless abdication of the judicial function,—of which humility we have already too much; furthermore, it adds another to the exceptions to the general rules; and finally, it cumbers the jury with legal definitions and offers an additional opportunity for quibbling over the tenor of the instructions.

In the appurtenant corollaries of this function of the judge, it may be noted that he may of course *hear evidence on both sides* for determining the facts on which the rule of admissibility turns;⁴ that during this process the *jury may be retired* out of hearing;⁵ and that the judge's determination on this question ought to be *final*, beyond review by appeal, and is so by the wholesome rule of a few Courts.⁶

§ 2551. **Sufficiency of Evidence.** When evidential facts are once admitted by the judge, their individual and total weight or probative value is for the jury. This signifies, first, that there are no rules of law to bind them on the subject, though Courts occasionally attempt to formulate some,¹ and, secondly, that the judge's own view of the weight of the evidence is not to be stated to the jury; though the latter rule (which obtains by Constitution or

the deceased's threats); 1898, *Semple v. Callery*, 184 Pa. 95, 39 Atl. 6 (good faith of a release of interest).

² The detailed applications of it are more conveniently considered under the various rules; in particular, compare the following places: *ante*, § 487 (testimonial qualifications in general), § 497 (insanity of a witness), § 508 (infancy), § 561 (expertness), § 587 (interest), § 861 (confessions), § 1192 (production of documentary originals), § 1385 (cross-examination), § 1451 (dying declaration), § 1820 (capacity to take an oath), § 1883 (order of evidence), § 2020 (genuineness of handwriting-specimens), § 2060 (accomplice's corroboration), §§ 2271, 2322 (privilege).

³ 1877, *Hartford F. Ins. Co. v. Reynolds*, 36 Mich. 502, 504 (the trial Court allowed to leave to the jury to exclude communications if they believed that the relation of legal adviser existed; "it does not properly belong to a judge to decide upon the truth of matters which have come out during the examination of witnesses who conflict"); 1856, *Bartlett v. Hoyt*, 33 N. H. 151, 165 ("whether a witness is interested upon this or that given state of facts is a question of law for the Court; whether the facts exist as claimed by one party or the other is a question of fact, which, when presented in

the form of the preliminary inquiry as to the competency of witness, may be determined by the Court, or, in the exercise of their discretion, by the jury"). Other examples may be seen in the various passages cited *supra*, note 2, especially in §§ 487, 497, 587, 861, 1385, 1451.

⁴ 1852, *Parke, B.*, in *Cleave v. Jones*, 7 Exch. 421, 425; and cases cited *ante*, § 497 (insanity), § 861 (confessions), § 1385 (cross-examination).

⁵ 1893, *State v. Shaffer*, 23 Or. 555, 558, 32 Pac. 545 (dying declarations); and cases cited *ante*, §§ 861, 1451, 1808.

⁶ 1844, *Foster v. Mackay*, 7 Metc. 531, 537; 1888, *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; and cases cited *ante*, §§ 16, 496, 507, 561, 862, 1194, 1312.

The rule of *reasonable doubt* (*ante*, § 2497) has here no possible application; though such a notion has been advanced: 1898, *Lipscomb v. State*, 75 Miss. 559, 23 So. 210 (the facts must be proved to the judge beyond reasonable doubt; said here as to dying declarations, but the majority do not entirely agree on the doctrine); *contra*: 1888, *Com. v. Robinson*, Mass., *supra*.

¹ This question has been considered *ante*, §§ 29, 1013, 2033, 2034, 2498, in various aspects.

statute in almost every State, but not in the Federal Courts²) is an unfortunate departure from the orthodox common-law rule, and has done much to introduce fruitless quibbles and to impair the general efficiency of jury trial as an instrument of justice.

§ 2552. **Negligence.** The application of the general principle (*ante*, § 2549) suffers a few apparent or real exceptions in certain kinds of issues; and in particular, in an issue of negligence.

When the question is whether a person has been guilty of *negligence*, *i. e.* whether he has used due care under the circumstances, or has acted as a prudent man would have acted, or whatever the form of phrase may be, the evidence is to be addressed to the jury, as upon other issues, because the question is for them to determine. But from this rule must be distinguished three kinds of judicial utterances, closely connected in practice, and superficially though not in truth involving an inconsistency with this principle or a limitation of it. (a) Where for the kind of case in hand a definite *rule of law*, more precise and concrete, has been framed for determining the effect of the person's conduct, this rule of law may, in the hands of the judge, conclude the question, and it may cease to be a question of fact for the jury to the extent that the rule of law applies. Thus, a defendant's conduct in carrying a loaded gun on his shoulder in a city street may be ruled by the Court to be "negligence *per se*," or, in a common phrase, he may be held to have acted "at peril" of answering for the harmful consequences; so that the question of fact for the jury is merely whether he carried the gun in that way, and the question whether he acted with due care ceases to be a question for them, because it is covered by a specific and concrete rule of law. Similar rules are constantly laid down for various situations, — leaving a horse unhitched in a street, running a train at a speed in excess of a statutory limit, storing gunpowder in a populous quarter, and the like. So, also, a concrete rule of this sort may be laid down for a plaintiff whose contributory negligence is pleaded, and it may be ruled that his conduct in thrusting his head out of a railway car-window, or in failing to stop, look, and listen at a railway crossing, is "negligence *per se*." Whether such a rule should be laid down is a question of the detailed substantive law appropriate to the situation; and, wherever such a rule of law appears, the matter ceases, as of course, to that extent, to be a question of fact for the jury.¹ (b) In pursuance of the rules regarding the burden of producing evidence, and of the judicial function thus called into play (*ante*, §§ 2487, 2494), it is in every case for the Court to say whether there was *sufficient evidence to go* to the jury; and so also in a case of negligence. Thus the Court has constantly, in revising the results of a trial, to ask whether there was any evidence of negligence proper to be left to a jury;

² 1886, *Vicksburg R. Co. v. Putnam*, 118 U. S. 545, 553, 7 Sup. 1. The veteran Chief Justice Ruffin, in *State v. Moses*, 2 Dev. 452, 458 (1830), comments on this degenerate rule with his usual keenness; it seems to have

originated in his State. Compare the remarks in Thayer's Preliminary Treatise, 188.

¹ The nature of such rules is explained in Holmes, *Common Law*, 150, 152; and in an article on *An Analysis of Tort Relations*, *Harvard Law Review*, VIII, 389.

and occasionally a more detailed test is attempted for thus exercising this power of revision and determining whether the party has fulfilled the duty of producing sufficient evidence.² (c) Another form of utterance, sometimes and properly treated³ as another way of phrasing the preceding principle, but often treated as if independent of it and as if forming an exception to the first general principle above stated, is that the question of negligence goes to the jury *unless the facts are undisputed and fair-minded or reasonable men could draw but one inference from them*.⁴ So far as this phrase (almost universally used, in one form or another) is intended to mean that the Court would, if the above condition were fulfilled, either declare the evidence of negligence insufficient to go to the jury (if that were the Court's interpretation of the conduct), or set aside, as against the weight of evidence, a verdict finding no negligence and order a new trial or even cause a new verdict to be entered (if that were the Court's interpretation), the phrase is in effect only a more detailed statement of the test to be adopted by the Court in its supervisory right, just alluded to, to say whether there is or is not sufficient evidence for the jury or whether a verdict is or is not against the weight of evidence (*ante*, § 2494). But so far as the phrase is intended to mean that, if the specified condition is fulfilled, the Court will take the question into its own hands and say, as a matter of fact to be decided by the Court itself, that there was or was not negligence, upon facts undisputed and inferences alone conceivable,⁵ then the result seems to be in effect an exception to the general principle first above stated, *i. e.* it defines an excepted case in which the question of negligence is to be determined, for that litigation, by the judge and not by the jury. It is often difficult to ascertain what is the precise nature of the principle involved in this phrasing.⁶

§ 2553. **Reasonableness.** There are many situations in which the issue of *reasonableness* of conduct presents itself; and in general it is recognized as an issue of fact for the jury.¹ There has been a more or less definite change

² See the citations in the next notes.

³ *E. g.*: 1874, per Brett, J., in *Bridges v. R. Co.*, L. R. 7 H. L. 213.

⁴ This is sometimes expressed in the disjunctive, *i. e.* facts undisputed *or* open to one inference only.

⁵ *E. g.*: 1897, *Brawley, J.*, in *Patton v. R. Co.*, 27 C. C. A. 287, 82 Fed. 979.

⁶ The following will serve as illustrations: 1877, *Metropolitan R. Co. v. Jackson*, L. R. 3 App. Cas. 193; 1878, *Dublin, etc. R. Co. v. Slattery*, ib. 1155; 1886, *Metropolitan R. Co. v. Wright*, 11 id. 152; 1898, *Herbert v. R. Co.*, 121 Cal. 227, 53 Pac. 651; 1889, *Terre Haute & I. R. Co. v. Voelker*, 129 Ill. 540, 22 N. E. 20; 1896, *Stroble v. New Albany*, 144 Ind. 695, 42 N. E. 806; 1897, *Young v. R. Co.*, 148 id. 54, 47 N. E. 142; 1903, *Blumenthal v. R. Co.*, 97 Me. 255, 54 Atl. 747; 1895, *Spears v. R. Co.*, 43 Nebr. 720, 62 N. W. 68; 1897, *Goldsboro v. R. Co.*, 60 N. J. L. 49, 37 Atl. 433; 1880, *Stackus v. R. Co.*, 79 N. Y. 464; 1896, *Tillett v. R. Co.*, 118 N. C. 1031, 24 S. E.

111; 1897, *White v. R. Co.*, 121 id. 484, 27 S. E. 1002; 1898, *Ward v. Odell Mfg. Co.*, 123 id. 248, 31 S. E. 495; 1893, *Gates v. R. Co.*, 154 Pa. 566, 572, 26 Atl. 598 (omitting the second clause); 1898, *Boyle v. Mahanoy City*, 187 id. 1, 40 Atl. 1093; 1889, *Kane v. R. Co.*, 128 U. S. 91, 9 Sup. 16; 1891, *Delaware L. & W. R. Co. v. Converse*, 139 id. 469, 11 Sup. 569; 1893, *Washington & G. R. Co. v. Harmon's Adm'r*, 147 id. 571, 580, 13 Sup. 557; 1893, *Richmond & D. R. Co. v. Powers*, 149 id. 43, 45, 13 Sup. 748; 1893, *Gardner v. M. C. R. Co.*, 150 id. 349, 361, 14 Sup. 140; 1893, *Northern P. R. Co. v. Peterson*, 5 C. C. A. 338, 55 Fed. 940; 1897, *Pyle v. Clark*, 25 id. 190, 79 Fed. 744; 1892, *Hanley v. Huntington*, 37 W. Va. 378, 16 S. E. 807; 1893, *Salladay v. Dodgeville*, 85 Wis. 318, 323, 55 N. W. 696 (omitting the first clause); 1893, *Hart v. R. Co.*, 86 id. 483, 490, 57 N. W. 91 (omitting the second clause); 1897, *Morrison v. Madison*, 96 id. 452, 71 N. W. 882.

¹ 1894, *Gerdes v. Iron & F. Co.*, 124 Mo.

from an earlier attitude of the Courts, when such questions were usually treated as questions of law, in the sense that the judge determined whether the conduct under all the circumstances was reasonable, or gave instructions to be applied by the jury to the facts that might be found by them; and instances of this older treatment are to be found to-day.² Moreover, an intermediate form appears, reserving the question for the judge where the facts are undisputed.³ But from these real variations in the attitude toward the present subject are to be distinguished the instances of the Court's resort to the two other principles already noted in speaking of the question of negligence; (a) the question may, by the development of the substantive law, have ceased to be a broad and open one of reasonableness and have become reduced to detailed and concrete rules of thumb, — as in several instances in the law of negotiable instruments;⁴ here there is a rule of law, more or less definite, and the jury are to that extent limited in their inquiry; (b) the Court's supervisory right, upon the present issue as upon others, to declare that there is not evidence sufficient to go to a jury or that a verdict is against evidence (*ante*, § 2494), may be exercised by ordering a nonsuit or setting aside a verdict, without denying the general question to be one of fact for the jury.

§ 2554. **Same: Malicious Prosecution.** The question whether a defendant in a case of *malicious prosecution* or *false arrest* had "reasonable and probable cause" for the suit or arrest, although it may be in the broader sense a question of fact, has nevertheless been retained in the hands of the Court as a matter for its determination.¹ The Court should properly instruct the jury "in the concrete and not in the abstract," by instructions adapted to cover the possible findings of fact.² It is sometimes said that the question is for the judge if the facts are undisputed and are open to but one inference;³ but this fails to recognize the right of the judge, even

347, 25 S. W. 557 (obstructions to highway by merchandise for an unreasonable time); 1898, *Chesterfield v. Ratliff*, — S. C. —, 30 S. E. 593 (discharging firearms "without a reasonable excuse"); 1897, *White v. Pease*, 15 Utah 170, 49 Pac. 416 (delivery of goods within a reasonable time under a sale in fraud of creditors).

² 1824, *Facey v. Hurdum*, 3 B. & C. 213 (reasonable time; here left to the jury); 1832, *Mellish v. Rawdon*, 9 Bing. 416 (*Tindal*, C. J.: "whether there has been, in any particular case, reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury, acting under the direction of the judge, upon the particular circumstances of each case"); 1843, *Burton v. Griffiths*, 11 M. & W. 817 (reasonable time; here left to the jury); 1810, *Chesapeake Ins. Co. v. Starke*, 6 Cr. 268, 278 (whether an abandonment of a vessel was within a reasonable time is for the jury under the Court's direction); 1894, *Joyner v. Roberts*, 114 N. C. 389, 392, 19 S. E. 645 (whether a register of deeds made reasonable inquiry as to age before giving a marriage license is for the Court).

³ 1896, *Comer v. Way*, 107 Ala. 300, 19 So. 966 (time); 1892, *Earnshaw v. U. S.*, 146 U. S. 60, 67, 13 Sup. 14 (notice); 1896, *American Surety Co. v. Pauly*, 18 C. C. A. 644, 72 Fed. 470 (time of sending notice).

⁴ So, too, in other subjects; *e. g.*: 1868, *Ryder v. Wombwell*, L. R. 4 Exch. 32 (necessaries for an infant).

¹ 1841, *Panton v. Williams*, 2 Q. B. 169; 1870, *Lister v. Perryman*, L. R. 4 H. L. 521; 1894, *Olsen v. Lantalum*, 32 N. Br. 526; 1896, *Kirk v. Garrett*, 84 Md. 383, 35 Atl. 1089; 1893, *White v. McQueen*, 96 Mich. 249, 254, 55 N. W. 843 (facts conceded; taken from the jury); 1893-94, *Filer v. Smith*, ib. 347, 102 id. 98, 55 N. W. 999, 60 N. W. 297; 1897, *Hess v. Oregon G. B. Co.*, 31 Or. 503, 49 Pac. 803; 1892, *Mahaffey v. Byers*, 151 Pa. 92, 96, 25 Atl. 93; 1893, *Sanders v. Palmer*, 5 C. C. A. 77, 55 Fed. 217.

² *Hess v. Bank*, *supra*.

³ 1895, *Diers v. Mallon*, 46 Nebr. 121, 64 N. W. 722; 1891, *Wass v. Stephens*, 128 N. Y. 123, 28 N. E. 21.

where the facts are disputed, to submit instructions appropriate to the possible findings.⁴

§ 2555. **Facts Judicially noticed; Trial by Inspection; Nul Tiel Record.** (a) On such matters as the Court *notices judicially* (*post*, § 2567), it would seem that the judge's ruling does not determine the matter, and the jury need not take it from him as a decided point, unless it concern something that would otherwise not come to them as matter of fact.

(b) There was once recognized a form of trial *by inspection*, *i. e.* by the judge's own observation of the fact in court.¹ But this is rather to be considered as a survival, in distorted form, of some of the earlier methods of proof prevailing before jury-trial;² and no recognition would probably be given to it to-day,³ except in the ensuing instance.

(c) A *judicial record*, when its existence in a certain tenor is denied, was said to be tried *by inspection* of the judge, on production of the alleged original record before him; and the plea of *nul tiel record* was coextensive with this class of cases.⁴ A foreign judgment, however, being evidenced by copy only, fell without this rule.⁵

§ 2556. **Construction of Documents.** The construction of all *written instruments* belongs to the Court.¹ It may become necessary to hear evidence of the surrounding circumstances that fill out the meaning of the words, as well as of any local or commercial meanings attached to particular words by usage (*ante*, §§ 2461-2478); and the ascertainment of this is for the jury.²

⁴ 1894, *Schattgen v. Holnback*, 149 Ill. 646, 652, 36 N. E. 969 (if there are disputed facts, it is to be submitted under instructions).

¹ 1768, *Blackstone*, III, 331 ("Trial by inspection . . . [is when the issue] being evidently the object of sense, the judges of the Court, upon the testimony of their own senses, shall decide the point in dispute; . . . when the fact from its nature must be evident to the Court, either from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the Court alone"; the instances given being non-age of an infant, life and identity of a party alleged to be dead, idiocy on appeal to the chancellor, mayhem, and a date as appearing in the almanac); so for non-age: *Co. Litt.* 380 b.

² *Thayer*, *Preliminary Treatise*, 19-24.

³ 1831, *Morton v. Fairbanks*, 11 Pick. 368, 370 (whether certain things were shingles or mere chips; "it was ruled that, as the point was clear upon inspection, it was to be decided by the Court"; ruling held improper). One of the rare instances is the following, which however falls rather under the principle for documents (*post*, § 2556): 1836, *Cromwell v. Tate's Ex'r*, 7 Leigh 301, 303 ("the existence or non-existence of the seal [on a deed] is to be ascertained by an appeal to the senses; and when that is the case, the judges of the Court shall decide"; citing *Blackstone*).

⁴ 1628, *Co. Litt.* 260 a ("If such a record be alleged, and it be pleaded that there is no such

record, it shall be tried only by itself"); 1768, *Blackstone*, *Commentaries*, III, 330 ("Where a matter of record is pleaded in any action — as, a fine, a judgment, or the like — and the opposite party pleads *nul tiel record*, . . . the trial therefore of this issue is merely by the record; . . . it shall not receive any trial by witness, jury, or otherwise, but only by itself"); *accord*: 1824, *State v. Graton*, 3 Hawks 187; 1824, *State v. Isham*, ib. 185; 1833, *Adams v. Betz*, 1 Watts 425, 427.

⁵ 1778, *Walker v. Witler*, 1 Doug. 1, 7, per *Buller, J.* ("It is to be tried by the country . . . and not by the Court"); 1804, *Collins v. Mathew*, 5 East 473; 1820, *Baldwin v. Hale*, 17 John. 272.

The exception for judgments of *another of the United States* "proved the rule": 1818, *Mills v. Duryee*, 7 Cr. 481, 485 (under the constitutional clause requiring full faith for a judgment of another of the United States, *nul tiel record* becomes the proper plea of denial; "it may be proved in the manner prescribed by the Act, and such proof is of as high a nature as an inspection by the Court of its own record"; *Johnson, J.*, diss.); *accord*: 1828, *Hall v. Williams*, 6 Pick. 232, 237 (useful opinion); *contra*: 1835, *Carter v. Wilson*, 1 Dev. & B. 362.

¹ 1806, *Stammers v. Dixon*, 7 East 200, 209; 1866, *Lyle v. Richards*, L. R. 1 H. L. 222, 241; 1873, *Betts v. Venning*, 14 N. Br. 267, 270; 1889, *Hamilton v. Ins. Co.*, 136 U. S. 242, 255, 10 Sup. 945.

² 1903, *State v. Brown*, 171 Mo. 477, 71

But, subject to the amplification or precision of the meaning thus ascertained, it is the duty of the jury to take the construction of the instrument from the Court.³ Where a contract is entirely oral, or partly in writing and partly oral, it is usually said that its terms, if disputed, are to be tried by the jury as a question of fact, subject to instructions as to the legal effect of the words.⁴

§ 2557. **Criminal Intent.** In the definition of crime, certain more detailed rules have from time to time been laid down, as rules of law, defining the nature of malice and of the other states of mind that are to be taken as constituting that criminal intent which is one of the elements of the offence. So far as limited by these rules, the question of intent ceases to be one of fact and is one of law.¹ A chief controversy, which in the course of this development brought into competition and collision the respective functions of judge and jury, was the question whether, in a criminal prosecution for *libel*, the malicious or seditious intent was an inference of law to be made from the words published and the averments and innuendoes, as found by the jury and spread upon the record, or whether it remained as an inference of fact to be found by the jury. The practice of the English judges in the eighteenth century had not been entirely consistent in maintaining the former view,² and the latter view was finally after much popular agitation sanctioned by the Legislature.³

S. W. 1031 ("the interpretation of writings is always for the Court except when they are ambiguous"); 1898, *Ricketts v. Rogers*, 53 Nebr. 477, 73 N. W. 946; 1894, *Meeks v. Willard*, 57 N. J. L. 22, 25, 29 Atl. 318; 1879, *West v. Smith*, 101 U. S. 263, 270 (whether a letter amounted to an admission; "where the effect of the instrument depends not merely on its construction and meaning, but upon collateral facts and circumstances, the inferences of fact to be drawn from the paper must be left to the jury"); 1898, *M'Namee v. Hunt*, 30 C. C. A. 653, 87 Fed. 298; 1903, *Rankin v. Fidelity Ins. T. & S. D. Co.*, 189 U. S. 242, 23 Sup. 553 ("Although [the question of] the construction of written instruments is one for the Court, [yet] where the case turns upon the proper conclusions to be drawn from a series of letters, particularly of a commercial character, taken in connection with other facts and circumstances, it is one which is properly referred to a jury").

³ 1839, *Hutchison v. Bowker*, 5 M. & W. 535, 541 (meaning of the words "fine barley" and "good barley"; *Parke, B.*: "The law I take to be this, that it is the duty of the Court to construe all written instruments; if there are peculiar expressions used in it, which have in particular places or trades a known meaning attached to them, it is for the jury to say what the meaning of these expressions was, but for the Court to decide what the meaning of the contract was"); 1845, *Alderson, B.*, in *Robertson v. Showler*, 13 M. & W. 609, 612 ("The jury are only to find facts, and leave the Court to judge of their meaning").

* 1896, *Nash v. Classen*, 163 Ill. 409, 45

N. E. 277 (a document forming part of a series of acts alleged to indicate an agency-relation); 1893, *Eureka F. Co. v. B. C. S. & R. Co.*, 78 Md. 179, 188, 27 Atl. 1035; 1896, *Gassett v. Glazier*, 165 Mass. 473, 43 N. E. 193 ("where a contract is to be gathered from talk between the parties, and especially from talk on more than one occasion, the question what the contract was, if controverted, must usually be tried by the jury as a question of fact"); 1891, *Spragins v. White*, 108 N. C. 449, 13 S. E. 171 (absolute or conditional effect of an oral agreement to deliver).

For the practice in determining the meaning of a *libel*, see *Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741 (1882).

¹ Distinguish here such legal definitions of "malice," etc., from ordinary presumptions affecting the production of evidence (*ante*, § 2511).

² The arguments and opinions in the great Trial of the Dean of St. Asaph's, 21 How. St. Tr. 946, 968, 978, 1039, 3 T. R. 428 (in which Erskine was of counsel for the defendant, and Lord Mansfield delivered the opinion), contain the data on both sides; the answer of the Judges to the Lords, in 1789, 22 How. St. Tr. 296, 301, finally dealt with the matter.

³ 1792, St. 32 G. III, c. 60, known as Fox's Libel Act. For the law in the United States, see *Thompson on Trials*, § 2025; 1885, *Shaw, C. J.*, in *Com. v. Anthes*, 5 Gray 185 (giving the history in England); 1902, *Jones v. Murray*, 167 Mo. 25, 66 S. W. 981. Distinguish here, also, however, the question (*ante*, § 2494) whether in a civil case there is any evidence

§ 2558. **Foreign Law.** In only a few instances has it been thought that a matter of the sort strictly termed "law" should be left with the jury for determination. It is more generally held that a *foreign law* is a matter of "fact," *i. e.* its existence is to be determined by the jury. But the better view is that it should be proved to the judge, who is decidedly the more appropriate person to determine it.¹

§ 2559. **Local Law.** The doctrine has obtained in a few jurisdictions that the jury, in dealing with the *local law* applicable to the case, have a legal right to repudiate the instructions of the judge and to determine the law for themselves;¹ but this ill-advised doctrine, defiant of the fundamentals of law, has only a narrow acceptance.

upon which a jury might find a libel: 1882, *Capital & Counties Bank v. Henty*, L. R. 7 App. Cas. 741.

¹ The decisions seldom lay down either rule absolutely, owing in part to the desire to retain the principle of the Court's construction of documents (*ante*, § 2556) while recognizing the jury's function of crediting the evidence; but there is no necessity for here conceding anything to the latter; with the following rulings compare those cited *post*, § 2573 (judicial notice of foreign law), and *ante*, §§ 1271, 1953 (expert testimony to foreign law): 1868, *Kline v. Baker*, 99 Mass. 253 (foreign law is matter of fact, except for the construction and effect of a written document forming the entire evidence); 1887, *Gibson v. Ins. Co.*, 144 id. 81, 10 N. E. 729 (same); 1898, *Hancock Nat'l Bank v. Ellis*, 172 id. 39, 51 N. E. 207 (a question of law when consisting entirely of statutes or decisions; of fact, where decisions are conflicting or inferences of fact are to be drawn); 1901, *Cook v. Bartlett*, 179 id. 76, 61 N. E. 266 (the tenor of the law is a question of fact, but the construction of the language in statutes and decisions not conflicting is for the Court); 1857, *Charlotte v. Chouteau*, 25 Mo. 465, 473 (for the Court, so far as it is a statute, or decisions, experts, or writers resorted to for interpretation; but perhaps for the jury

where it is merely unwritten); 1862, *Charlotte v. Chouteau*, 33 id. 194, 200, 201 (unwritten law proved to the jury; English decisions, etc., read to them); 1852, *Pickard v. Bailey*, 26 N. H. 152, 169 (for the Court, where merely preliminary to the legality of a document); 1902, *Mexican N. R. Co. v. Slater*, 53 C. C. A. 239, 115 Fed. 593, 606 (expert testimony to the construction of a foreign statute, held to be "addressed to the judge to aid him in his rulings"); 1888, *Lycoming Ins. Co. v. Wright*, 60 Vt. 522, 12 Atl. 103.

¹ For the jurisdictions in which this view is taken, see *Thompson on Trials*, §§ 2132-2148; for a vindication of its orthodoxy and an examination of the rule in the various jurisdictions, see the opinion of Gray, J., in *Sparf v. U. S.* (1895), 156 U. S. 51, 110, 15 Sup. 273; for an examination of its probable origin, see *Thayer, Preliminary Treatise*, 253; leading opinions are the following: 1838, *Best, C. J.*, in *Levi v. Mylne*, 4 Bing. 189, 195; 1835, *Story, J.*, in *U. S. v. Battiste*, 2 Sumn. 243; 1846, *Shaw, C. J.*, in *Com. v. Porter*, 10 Metc. 263; 1869, *Doe, J.*, in *State v. Hodge*, 50 N. H. 510, 522; 1902, *Hamersly, J.*, in *State v. Gannon*, 75 Conn. 206, 52 Atl. 727; and the earlier authorities are collected in *Mr. Hargrave's note* 276 to *Co. Lit.* 155 *b.*

BOOK IV: OF WHAT PROPOSITIONS NO EVIDENCE NEED BE PRESENTED.

TITLE I: JUDICIAL NOTICE.

CHAPTER LXXXIX.

1. General Principles.

- § 2565. Theory of Judicial Notice.
- § 2566. Anomalous Meanings.
- § 2567. Effect of Judicial Notice; (1) not Conclusive.
- § 2568. Same: (2) Notice must be requested; Pleading a Statute.
- § 2569. Same: (3) Judge's Private Knowledge; Judge may Investigate.
- § 2570. Judicial Notice by the Jury's own Knowledge.

2. Specific Facts Noticed.

- § 2572. Laws: (1) Domestic Statutes and Ordinances.
- § 2573. Same: (2) Foreign Law.

§ 2574. Political Facts: (1) International Affairs; Seals of State.

§ 2575. Same: (2) Domestic Political Organization; Boundaries, Capitals, etc.

§ 2576. Same: (3) Domestic Officials, their Identity and Authority; Genuineness of Official Documents.

§ 2577. Same: (4) Official Acts; Elections, Census, Legislative Proceedings, etc.

§ 2578. Judicial Proceedings: (1) Officers and Rules of Court.

§ 2579. Same: (2) Records of Proceedings.

§ 2580. Notorious Miscellaneous Facts: (1) Commerce, Industry, History, Natural Science, etc.

§ 2581. Same: (2) Times and Distances.

§ 2582. Same: (3) Meaning of Words; Names of Intoxicating Liquors.

1. General Principles.

§ 2565. **Theory of Judicial Notice.**¹ Of the propositions involved in the pleadings, or relevant thereto, proof by evidence may be dispensed with in two situations: (1) where the opponent by a solemn or infra-judicial admission has waived dispute, and (2) where the Court is justified by general considerations in assuming the truth of the proposition without requiring evidence from the party. The former is considered under the head of Judicial Admissions (*post*, §§ 2588-2596). The latter is the process most commonly meant by the term Judicial Notice.

There are various senses in which the term Judicial Notice is used. In the orthodox sense above noted, it signifies that there are certain *facta probanda* (*ante*, § 2), or propositions in a party's case, as to which he will not be required to offer evidence; these will be taken for true by the tribunal without the need of evidence. This general principle of Judicial Notice is simple and natural enough. As to the scope of such facts, they include (1) matters which are so notorious that the production of evidence would be unnecessary; (2) matters which the judicial function supposes the judge to be acquainted with, either actually or in theory; (3) sundry matters not exactly included under either of these heads; they are subject for the most part to the consideration that though they are neither actually notorious nor

¹ The most learned discussion of the subject, Thayer's Preliminary Treatise on the Law of and its history, is found in Professor J. B. Evidence, c. 7.

bound to be judicially known, yet they would be capable of such instant and unquestionable demonstration, if desired, that no party would think of imposing a falsity on the tribunal in the face of an intelligent adversary. It is hardly feasible, however, in enumerating these matters, to follow strictly this or any other classification.

§ 2566. **Anomalous Meanings of the Term Judicial Notice.** The term Judicial Notice has many applications, distinct from those peculiar to the present purpose. Some of these are traditional, and therefore perhaps not to be termed incorrect; others are merely loose ways of naming some process or rule already properly known under another name. The essential thing is to distinguish these applications from the chief one, here involved, *i. e.* the acceptance of a matter as proved without requiring the party to offer evidence of it.

(1) A usage extending far back in our annals is to apply the term where the question is whether a certain pleading, or a certain *averment in a pleading*, or greater particularity of averment, *is necessary*.¹ (2) Whether a Court, for the purposes of ordering a new trial or otherwise, may *give effect to a matter capable of being judicially noticed* — *i. e.* assumed without evidence — but not referred to in the record,² or falsely alleged in the pleading,³ is a question of the power and duty of the Court; but this term has been applied to it. (3) Whether a Court will take judicial notice of the *existence of a foreign State* is really a question whether, as a matter of substantive law and judicial functions, a foreign State will in domestic Courts be treated as existing only so far as the Executive so treats it; here it is conceded that the Executive's recognition is the determining element.⁴ (4) Certain *rules of evidence*, usually

¹ Thayer, *ubi supra*, pp. 281-286; 1899, Nichols v. Bardwell Lodge, 105 Ky. 168, 48 S. W. 426, 1091 (under C. C. P. § 119 and Rev. St. c. 35, § 1); 1897, Wikel v. Board, 120 N. C. 451, 27 S. E. 117 (declaring unnecessary a supplemental plea alleging the repeal of an act); 1897, Douglass v. K. & M. R. Co., 44 W. Va. 267, 28 S. E. 705 (holding it unnecessary to allege the defendant to be a corporation).

In such cases, a ruling that no averment is necessary would usually imply a judicial notice of the fact if it were averred in pleading, and in the ensuing topics are instances of this; but it does not follow that a ruling requiring an averment implies that the fact would not be noticed if duly averred.

² Thayer, *ubi supra*, pp. 283, 288; 1897, Steenerson v. R. Co., 69 Minn. 353, 72 N. W. 713 (the Supreme Court, reviewing a finding of the Railroad Commission as to reasonable rates, conceded some weight to the experience of the Commission; Canty, J.: "[The Commission] should be thoroughly familiar with the many financial and economic problems which enter into the business of constructing and operating railroads. How is a judge, who is not supposed to have any of this special learning or experience, and could not take judicial notice of it if he had it, to review the decision of commissioners, who should have it and should act upon

it? It seems to us that such a judge is not fit to act in such a matter. . . . We see no way of disposing of this question except to hold that on appeal from the commission the Courts should, to the best of their ability, take judicial notice of all such technical learning, knowledge, and information of a general character as should be known and understood by the commission").

³ 1828, Taylor v. Barclay, 2 Sim. 213 (where a pleading alleged that a certain government was recognized by H. M. government, and the Court treated this as incorrect; "notwithstanding there is this averment in the bill [demurred to], I am bound to take the fact as it really exists, and not as it is averred to be"); 1897, People v. Oakland Water-Front Co., 118 Cal. 234, 50 Pac. 305 (declaration alleging title in certain lands; demurrer; a statute incorporating a city declared its title to lands alleged in the declaration as the plaintiff's; the Court took "judicial notice" that this allegation was incorrect; but either it was a question of law, in which case a demurrer does not admit propositions of law, or it was a question whether certain statutory boundaries included the plaintiff's private land, in which case the ruling seems wrong as a matter of judicial notice).

⁴ England: 1894, Mighell v. Sultan of Johore, 1 Q. B. 149, 158 (certificate of the Secretary of State for Colonies as to defendant's being an in-

known under other names, are frequently referred to in terms of judicial notice. Thus, the admissibility of *almanacs* is mainly a question whether an exception to the Hearsay rule can be made in their favor;⁵ but a Court occasionally makes this exception by saying that the almanac is to be judicially noticed; although the term is properly applicable only where the Court declares the day of the month, or other fact, not to need evidence,⁶ and then consults the book to inform itself; the practical difference being that in the former case it goes to the jury, but in the latter not.⁷ Again, it has been said that judicial notice will be taken of the correctness of the *photographic process*;⁸ which is merely another way of saying that properly verified photographs are admissible evidence.⁹ In the same way, to take notice that "mere pasturage upon these western lands is very slight evidence of possession,"¹⁰ is to measure evidence; and the so-called judicial notice of certain *seals*¹¹ is merely a rule that the production of something purporting to be a seal shall be in these cases sufficient evidence of genuineness to go to the jury or shall suffice to raise a presumption of genuineness. Whether a Court will take judicial notice of the contents of *legislative proceedings* may be properly a question of the present sort;¹² but the same form of expression is also occasionally used where the real inquiry is whether, as evidence of the statute's terms, or of its passage, the journals are to be preferred to the official certifi-

dependent sovereign power; "this letter is conclusive"; 1900, *Foster v. Globe Venture Synd.*, 1 Ch. 811 (boundary of a foreign State); in *Taylor v. Barclay*, *supra*, note 3, it was decided merely that the allegation in a declaration that a certain foreign State was recognized as such by the King could be found untrue by reference to the Foreign Office; in *Yrisarri v. Clement*, 1825, 2 C. & P. 223, 225 ("If a foreign State is recognized by this country, it is not necessary to prove that it is an existing State; but if it is not so recognized, such proof becomes necessary"), the latter clause seems misleading; *United States*: the doctrine of the following cases is that a foreign State will or will not be so considered by the Court according as it is or is not recognized by the Executive: 1817, *U. S. v. Hutchings*, 2 Wheel. Cr. C. 543; 1808, *Rose v. Himely*, 4 Cr. 241, 272; 1818, *Gelston v. Hoyt*, 3 Wheat. 246, 324; 1821, *The Nueva Anna*, 6 id. 193; 1839, *Williams v. Suffolk Ins. Co.*, 13 Pet. 415, 421; 1852, *Kennett v. Chambers*, 14 How. 38, 51; 1889, *Re Baiz*, 135 U. S. 403, 431, 10 Sup. 854; 1890, *Jones v. U. S.*, 137 id. 202, 212, 11 Sup. 80 (conclusive); 1897, *Underhill v. Hernandez*, 168 id. 250, 18 Sup. 83; 1891, *U. S. v. Trumbull*, 48 Fed. 99, 104; 1893, *The Itata*, 56 id. 505, 510; *Story on the Constitution*, II, §§ 1566, 1567. In *U. S. v. Palmer*, 3 Wheat. 610, 634 (1818), the ruling seems merely to concede (and properly) that a defendant denying a piratical intent may plead the authority of a revolutionary government having a colorable existence, in which case its actual recognition is immaterial.

⁵ *Ante*, § 1698.

⁶ *Post*, § 2581, where instances are collected.

⁷ The following instances show the correct

treatment: 1792, *Attorney-General v. Cast-plate Glass Co.*, *post*, § 2569; 1898, *Louisville & N. R. Co. v. Brinckerhoff*, 119 Ala. 606, 24 So. 893 (here the Court intimated that an almanac, offered to show the time of sunset, was not improperly excluded, as there was no need of evidence).

So also *mortality tables* are sometimes said to be judicially noticed: 1894, *Lincoln v. Power*, 151 U. S. 436, 441, 14 Sup. 387 (notice taken of Carlisle Tables, in estimating length of life, whether offered in evidence or not); although in strictness they are evidence admissible under an exception to the Hearsay rule (*ante*, § 1698); the following case shows the correct treatment: 1901, *Western & A. R. Co. v. Hyer*, 113 Ga. 776, 39 S. E. 446 (on exceptions, a statement in the brief of evidence that a mortality table was introduced does not authorize the Court to notice it, though it is stated to have been published in a volume of official reports; *Simmons, C. J.*, and *Lewis, J.*, diss.); furthermore, it seems equally incorrect to notice the duration of life without some evidence from tables or the like, but this was done in *Nelson v. Bradford L. & W. Co.*, 75 Conn. 548, 54 Atl. 303 (1903).

Again, certain *official interest tables* are sometimes made evidence by statute (*ante*, § 1672); but this does not signify that they are to be judicially noticed: 1886, *Camp v. Randle*, 81 Ala. 240, 2 So. 287.

⁸ 1874, *Underzook v. Com.*, 76 Pa. 340, 352.

⁹ *Ante*, § 792.

¹⁰ 1897, *Whitney v. U. S.*, 167 U. S. 529, 546, 17 Sup. 857.

¹¹ *Ante*, §§ 2161-2169.

¹² *Post*, § 2577.

cate appended to the enrolled act.¹³ (5) Other loose applications of the term, sometimes dealing with matters of substantive law,¹⁴ sometimes with matters of procedure, will occasionally be found. It is unfortunate that the phrase should be so often loosely employed, especially as the legitimate doctrine "is an instrument of great capacity in the hands of a competent judge, and is not nearly as much used, in the region of practice and evidence, as it should be."¹⁵

§ 2567. **Effect of Judicial Notice**; (1) **not Conclusive**. (a) That a matter is judicially noticed means merely that it is taken as true without the offering of evidence by the party who should ordinarily have done so. But the *opponent is not prevented from disputing* the matter by evidence, if he believes it disputable.¹ It is true that occasionally a Court is found declaring a thing judicially noticed and at the same time refusing to listen to evidence to the contrary;² but usually this is in truth laying down a new rule of substantive law by declaring certain facts immaterial; whenever a Court forbids the production of evidence, it removes the subject from the realm of the law of evidence properly so called.

(b) The process of taking judicial notice often may imply incidentally a ruling as to the respective functions of judge and jury. Does it signify that the settlement of the matter rests with the judge and not with the jury, that the jury are to accept the fact from the judge, and that so far as any further investigation is concerned, it is for the judge alone? Such is the view sometimes found, in decisions³ as well as statutes.⁴ Yet it seems rather that the jury are not concluded; that the process of notice is intended chiefly for expedition of proof; and that since the fact is disputable by the opponent (*supra*, par. a), it remains possible for the jury to negative it. In those

¹³ *Ante*, § 1350.

¹⁴ *E. g.*: 1896, *Southern R. Co. v. Covenia*, 100 Ga. 46, 29 S. E. 219 (the declaration in an action for loss of a child's services alleged the services specifically, and gave the age of the child as 1 year, 8 months, and 10 days; the Court took "judicial cognizance of the fact that a child of this tender age is incapable of rendering such services" as justify recovery).

¹⁵ Thayer, *ubi supra*, p. 309.

¹ 1896, *People v. Mayes*, 113 Cal. 618, 45 Pac. 860; and this seems implied throughout, particularly by the doctrine of § 2569, *post*.

Since judicial notice is an expedient for hastening the trial and eliminating superfluities, it would be proper to prevent the party in whose favor the fact is noticed from offering evidence of it: 1898, *State v. Chingren*, 105 Ia. 169, 74 N. W. 946 (that it is customary to mark up the price of land to be sold, not noticed).

² *E. g.*: 1889, *Com. v. Marzynski*, 149 Mass. 68, 72, 21 N. E. 228 (indictment for illegally selling cigars on Sunday; "the Court has judicial knowledge of the meaning of common words, and may well rule that guns and pistols are not drugs or medicines, and may exclude the opinions of witnesses who offer to testify that they are").

³ *Conn.*: the first case is presumably now not law; 1841, *Kilgore v. Bulkeley*, 14 Conn. 362, 387 (conflicting decisions in another State, submitted to the jury); 1843, *Hale v. N. J. S. N. Co.*, 15 id. 539, 549 (by statute, reports of decisions in other States are to be judicially noticed; a Court therefore may hold the law to be as therein decided without submitting it to the jury); 1847, *Lockwood v. Crawford*, 18 id. 361, 370 (same); 1897, *State v. Main*, 69 id. 123, 37 Atl. 80 (excluding from the jury's consideration certain evidence as to a contagious tree-disease; leading opinion, by Baldwin, J.); *Minn.*: 1893, *Thomson-Houston El. Co. v. Palmer*, 52 Minn. 174, 177, 53 N. W. 1137 (proof of foreign law; official copies of decisions of foreign Court not received, the question being for the Court).

⁴ *Alaska C. Cr. P.* 1900, § 156 (like Or. Annot. C. 1892, § 1374); *C. C. P.* § 233 (like ib. § 242); *Cal. C. C. P.* 1872, § 2102 ("whenever the knowledge of the Court is by this code made evidence of a fact, the Court is to declare such knowledge to the jury, who are bound to accept it"); Or. Annot. C. 1892, § 242 (like Cal. C. C. P. § 2102, adding, "as conclusive"); § 1374 (same); *Utah Rev. St.* 1898, § 3479 (like Cal. C. C. P. § 2102).

classes of facts, however, in which the judge has the function of decision and not the jury (*ante*, §§ 2549-2559), it would be true, so far as any such facts were capable of notice, that the judge's determination is exclusive; but this would not be by virtue of the doctrine of judicial notice.⁵

§ 2568. **Same: (2) Notice must be requested; Pleading a Statute.** Judicial notice being a dispensation of one party from producing evidence, it would seem that the party must, in point of form, make a request for it.¹ Upon this request, the Court is bound, it is sometimes said, to declare the fact noticed,² or at least to make that investigation (*post*, § 2569) which it deems necessary. No doubt, in most instances, the rule of law has the plain consequence of compelling the judge to declare the dispensation; not to do so would be to err, precisely as under any other rule of law. But it must not be supposed that this is universally true; the decisions demonstrate that there are numerous topics, near the line of doubt in their feature of notoriety, of which the Court may, but not must, take notice. No definite distinction is recognized; but it is plain that many of the rulings merely authorize the Court to notice a fact, without requiring it.³

§ 2569. **Same: (3) Judge's Private Knowledge; Judge may Investigate.** (a) There is a real but elusive line between the judge's *personal knowledge* as a private man and his knowledge as a judge. The latter does not necessarily include the former; as a judge, indeed, he may have to ignore what he knows as a man, and contrariwise.¹ The dilemma sometimes thus presented has given rise to much discussion over extreme cases, — particularly the celebrated problem once put by a King of England, whether a judge could lawfully respite a convicted person whom he personally knew to be innocent.² But it

⁵ Thus most of the above rulings in n. 3 are referable rather to the doctrine (*ante*, § 2558) that foreign law should be evidenced to the Court.

¹ 1902, *Amundson v. Wilson*, 11 N. D. 193, 91 N. W. 37.

Distinguish the question (*ante*, § 2566) whether the party must have *pleaded* the fact; this arises frequently for the case of a *statute*; *e. g.*, 1898, *Nichols v. Bardwell Lodge*, 105 Ky. 168, 48 S. W. 426, 1091.

² 1899, *State v. Magers*, 35 Or. 520, 57 Pac. 197 (time of sunset).

³ *E. g.*: 1889, *Hunter v. N. Y. O. & W. R. Co.*, 116 N. Y. 615, 621, 23 N. E. 9 ("Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case"); 1902, *Re Osborne*, 52 C. C. A. 595, 115 Fed. 1 (a court's own records; the Court is not obliged to notice them).

¹ The following joke of Lord Eldon's illustrates this: 1782 (?), Lord Eldon, in *Twiss' Life*, I, 130: "We had an amusing case at York. Stakes for a race had been deposited in the hands of one party, to be paid to the owner of the horse that won; but then there was a condition that each horse was to be ridden by a 'gentleman'; and it was disputed whether the horse that did win was ridden by a 'gentleman'

or not. This action was to ascertain this point. . . . Well, we had a great deal of evidence, and then we came to the summing up of the judge, who addressed the jury in these words: 'Gentlemen of the jury, when I see you in the box, I call you "gentlemen," for I know you are such; custom has authorized me; and from your office there I know you are entitled to be called "gentlemen."' But, out of that box, I do not know what may be deemed the requisites that constitute a "gentleman"; therefore I can give you no direction.' The jury returned a verdict that he was not a 'gentleman.' Well, the next morning he challenged both Law and me, who were conducting the cause against him, for saying that he was no gentleman; we sent him this answer, that we could not think of fighting one who was pronounced by a solemn verdict of twelve of his countrymen to be no gentleman."

² 1406, Y. B. 7 H. IV, 41, pl. 5 (in arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case: "Sir, let us put the case that one man kills another in your presence, you observing it, and another who is not guilty is indicted before you and is found guilty so as to incur the penalty of death; you ought to respite the judgment against him, for you are knowing to the contrary, and should make further report to the King, to give him pardon; no more should

is now well enough understood that there is here no impracticable dilemma. If the judge, as a man and an observer, has any personal knowledge, he may (and sometimes morally must) utilize it by taking the stand as a witness and telling in that capacity what he knows (*ante*, § 1909); this solves the dilemma without either injuring justice or violating principle.³ It is therefore plainly accepted that the judge is not to use from the bench, under the guise of judicial knowledge, that which he knows only as an individual observer.⁴ The former is in truth "known" to him merely in the peculiar sense that it is known and notorious to all men, and the dilemma is only the result of using the term "knowledge" in two senses. Where to draw the line between knowledge by notoriety and knowledge by personal observation may sometimes be difficult, but the principle is plain.

(b) But the subjects of knowledge which raise the foregoing problem are obviously those "facts," in the ordinary sense, which are ascertainable by personal observation; belonging as they do to the jury's ultimate determination, it is obvious that the judge must in their regard be merely an ordinary witness to the jurors. There are, however, facts of "law" which are for the *judge's own ultimate determination*,—such as the tenor of foreign or local law (*ante*, §§ 2558, 2559) and the meaning of a document (*ante*, § 2556).

you give judgment in this case, before causing those to appear by whose hands the King was paid"; Gascoigne, C. J.: "Once the King himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so"); 1578, Plowden's Commentaries, Partridge v. Strange, Plowd. 83 (mentioning, in Saunders' argument, the case in 7 H. IV with apparent approval); 1588, Coke, as counsel in Marriot v. Pascal, 1 Leon. 159, 161 (re-stating the case from the Year-book: "The judge he ought not to carry himself according to his private knowledge which he hath of the said fact, *scil.* to acquit the prisoner, but all that he can do is to respite judgment"; it may be noted that Coke mistranslates the word *veiant* in the original, and the story has been sometimes mistold, through him).

Professor Thayer (Preliminary Treatise, 291) has an interesting note on the earlier literature of this problem.

³ 1696, Sir John Fenwick's Trial, before the House of Commons, 13 How. St. Tr. 663, 667 (Mr. Hawles, Sol. General, on Mr. Newport having cited the above story of Gascoigne: "It is said, though a judge do think in his conscience a person guilty, yet he ought not to make use of that private knowledge; and a case was quoted out of Henry IV. But I think that judge might have behaved himself something better than he did; and sure I am, now he would be blamed. I do not say that a judge upon his private knowledge ought to judge; he ought not. But if a judge knows anything whereby the prisoner might be convicted or acquitted (not generally known), then I do say he ought to be called from the place where he sate, and go to the bar and give evidence of his knowledge; and so the judge in Henry IV's time ought to

have done, and not to have suffered the prisoner to have been convicted and then get a pardon for him; for a pardon will not always do the business").

⁴ 1851, Fox v. State, 9 Ga. 373, 376 (refusing a continuance; the judge's personal knowledge of a witness' lack of credit, held improper to be used; good opinion, by Nisbet, J.); 1854, State v. Edwards, 19 Mo. 675, 676 (conviction of a witness before the same judge in another county; notice not taken); 1809, Rosekrans v. Antwerp, 4 John. 239 (a statute forbade an appearance by attorney in a justice's court, unless the party was prevented by sickness or by absence from the county, of which proof was to be made; "the justice cannot act from his own knowledge and call that knowledge proof"); 1870, State v. Horn, 43 Vt. 20, 23 (marriage certificate by a justice in another domestic State; judge's own knowledge of law of that State not to be used); 1900, Shafer v. Eau Claire, 105 Wis. 239, 81 N. W. 409 (a witness to a bridge's bad condition was excluded by the trial judge, because the offer was "contrary to what I know to be the fact from my own personal knowledge"; held erroneous).

Occasionally, however, this is allowed to slip in: 1880, Wisconsin Central R. Co. v. Cornell Univ., 49 Wis. 162, 164 (condemnation of right of way; the trial judge's "great familiarity with that portion of the State," considered in not reversing the judgment); 1881, Halaska v. Cotzhausen, 52 id. 624, 9 N. W. 401 (action for services as counsel, tried before a judge; the judge's observation of the services as he "saw and knew" them, allowed to be used). The following statute is peculiar: Conn. Gen. St. 1887, § 689 (justice of peace's "personal knowledge" of commission of offences of drunkenness, etc., sufficient).

Since these are to be decided by the judge, he is at liberty to *investigate the facts* for himself, in addition to receiving the evidence which the parties may offer. This is done, however, not by virtue of the doctrine of judicial notice, but by virtue of the judge's exclusive function, as against the jury, to try the fact (*ante*, § 2549). These investigations are frequently to be observed in rulings upon the recognition of a foreign State,⁵ the tenor of foreign law,⁶ and the meaning of words.⁷

(c) Finally, there is a process of *investigation* by the judge *prior to a ruling of judicial notice upon a question of fact* determinable by the jury. For example, when the Court is asked to dispense the party from evidencing the fact that the Mississippi joins the Missouri above the city of St. Louis, or that the first of January, 1904, fell on a Friday, *i. e.* to take judicial notice of these facts, he may resort to a map or a calendar, before making the ruling. This process is common enough;⁸ but it is distinct from the two preceding ones. It is not a search for evidence to establish the fact; because the fact is plainly of a kind within the province of the jury, not of the judge. Nor is it a contribution of personal testimony, for the judge does not know it by his own observation, nor need he take the stand to testify. It is merely an occasional measure, taken in discretion, to satisfy the judge that he is justified in making the desired ruling for dispensing with evidence. He perceives that the fact probably cannot need evidence; he merely seeks to define the precise tenor of the fact about which he will make his ruling. The fact will still be in theory disputable before the jury (*ante*, § 2567); the judicial investigation is made, not in order to establish the fact in their stead, but to make a ruling dispensing one party from offering to them evidence of the fact. This process, moreover, though permissible, is not compulsory upon the judge,⁹ inasmuch as judicial notice at large is itself more or less optional (*ante*, § 2568).

⁵ 1828, *Taylor v. Barclay*, 2 Sim. 213 ("In consequence of the arguments in this case, I have had communication with the Foreign Office, and I am authorized to state that the Federal Republic of Central America has not been recognized"); 1900, *Foster v. Globe Venture Synd.*, 1 Ch. 811 (boundaries of a foreign State); 1897, *Underhill v. Hernandez*, 168 U. S. 250, 18 Sup. 83 (the Court may consult the Department of State for information as to the Executive recognition of a foreign civil war and *de facto* government, and may find the fact upon such information).

⁶ 1898, *Barranger v. Baum*, 103 Ga. 465, 30 S. E. 524 (extradition); 1903, *Wells v. Gress*, — id. —, 45 S. E. 418 (law of another of the United States); and cases cited *ante*, § 2567, note 3.

⁷ 1789, *Answer of the Judges to the House of Lords*, 22 How. St. Tr. 302 (judges may resort to grammars and lexicons); 1792, *Eyre, C. B.*, in *Attorney-General v. Cast-plate Glass Co.*, 1 Anstr. 39, 44 ("On demurrer, a judge may well inform himself from dictionaries or books on the particular subject concerning the meaning of any word. If he does so *at nisi*

prius, and shews them to the jury, they are not to be considered as evidence, but only as the grounds on which the judge has formed his opinion"); 1902, *Hilton v. Raylance*, 25 Utah 129, 69 Pac. 660 (certain works on the Mormon religion having been excluded in the trial below, the Court held that it was entitled to refer to them nevertheless, as a matter of judicial knowledge, "to ascertain the particular meaning" of the Mormon doctrine of "sealing"); and instances cited *ante*, § 2556 (construction of documents) and §§ 1699, 1700 (dictionaries, etc., in evidence).

⁸ 1896, *People v. Mayes*, 113 Cal. 618, 45 Pac. 861 ("he is authorized to avail himself of any source of information which he may deem authentic, either by inquiring of others, or by the examination of books, or by receiving the testimony of witnesses"); and many instances *passim*, *post*, §§ 2572-2582.

⁹ *E. g.*: 1853, *Littlehale v. Dix*, 11 Cush. 364 (magistrate's certificate that a deponent lived more than thirty miles from the place of trial, and no contrary evidence; the Court held not bound to learn what the distance was).

§ 2570. **Judicial Notice by the Jury's Own Knowledge.** In general, the jury may in modern times act only upon evidence properly laid before them in the course of the trial. But so far as the matter in question is one upon which men in general have a common fund of experience and knowledge, through data notoriously accepted by all, the analogy of judicial notice obtains to some extent, and the jury are allowed to resort to this information in making up their minds. This doctrine, of course, has several aspects. From the point of view of the jury's duty, it appears as an exception to the rule that they must act only upon what is presented to them at the trial. From the point of view of the Hearsay rule, it may also be thought of as a partial exception to that.¹ But additionally it must be considered from the present point of view, for it authorizes the party to ask the *jury to refer to their general knowledge* upon the matter in question, and thus in effect and to that extent makes it unnecessary for the party to offer such evidence.

But the scope of this doctrine is narrow; it is strictly limited to a few matters of elemental experience in human nature, commercial affairs, and every-day life.² Thus, the natural instincts of human conduct, with reference to care or negligence at the time of danger, may be considered,³ the dangerousness of smoking a pipe in a barn near the straw,⁴ the conditions affecting the

¹ *Ante*, § 1900 (jurors having personal knowledge must take the stand and state it publicly as witnesses subject to cross-examination). Distinguish, however, the propriety of knowledge acquired at a view (*ante*, § 1168).

² In the palmy days of special juries (Thayer, Preliminary Treatise, pp. 94-97) this class of facts must obviously have been of broad range. But their gradual disuse seems to have been marked by a judicial inclination to disparage a resort to even that special knowledge for which they were first sought: 1836, *R. v. Rosser*, 6 C. & P. 648 (value of a watch; Vaughan, J.: "Any knowledge you may have on the subject you may use; some of you perhaps may be in the trade"; Parke, B.: "If a gentleman is in the trade, he must be sworn as a witness. That general knowledge which any man can bring to the subject may be used without; but if it depends on any knowledge of the trade, the gentleman must be sworn").

³ With the following cases, compare the *presumption of carefulness* (*ante*, § 2510): 1874, *Bridges v. R. Co.*, L. R. 7 H. L. 213 (Pollock, B.: "It appears to me that the jurors were entitled to assume that *prima facie* the deceased would conduct himself with ordinary prudence and discretion"); 1902, *Chicago & E. I. R. Co. v. Beaver*, 119 Ill. 34, 65 N. E. 144 (jury may consider the natural instinct to preserve life and avoid danger); 1894, *Hopkinson v. Knapp Co.*, 92 Ia. 328, 60 N. W. 653 (jury may consider the natural instinct to avoid danger); 1899, *Ellis v. Leonard*, 107 id. 487, 78 N. W. 246 (the natural instinct of self-preservation from danger is not to be considered, if the plaintiff himself testifies); 1885, *Chase v. Maine Central R. Co.*, 77 Me. 262 (death by a train; the jury having

been instructed that they might consider their knowledge of "the habits of thought and mind and the natural instincts of men" to preserve themselves from injury, held, that on the facts the idea was "presented too prominently"); 1896, *Manning v. R. Co.*, 166 Mass. 230, 44 N. E. 135 (injury by the fall of a trolley; to the objection that there was no evidence of negligence, it was said "the jury were at liberty to say, from their experience as men of the world, that under such circumstances such an accident commonly does not happen, unless the stick is carelessly handled; that it is in the power of the holder to see that he does not submit it to such a strain as to make it possible that it should be torn from his hands; and to infer from those general propositions of experience that there was negligence in the particular case"); 1897, *Lamoureux v. R. Co.*, 169 id. 338, 47 N. E. 1009 (ordinary conduct at a railroad crossing may be noticed); 1899, *Leary v. Fitchburg R. Co.*, 173 id. 373, 53 N. E. 817, *semble* ("common experience" as to the mode of alighting from cars, proper to be considered); 1890, *Huntress v. R. Co.*, 66 N. H. 185, 34 Atl. 154 (Doe, C. J.: "When there is no evidence of insanity, intoxication, or suicidal purpose, and no evidence on the question of his care, except the instinct provided for the preservation of animal life, it may be inferred from this circumstantial proof that, for some reason consistent with ordinary care and freedom from fault on his part, his attempt to cross was due to his inadequate understanding of the risk").

⁴ 1898, *Lillibridge v. McCann*, 117 Mich. 84, 75 N. W. 288 (fire set in a barn by smoking a pipe in the straw; no evidence of dangerousness needed).

various kinds of values,⁵ the intoxicating nature of a certain liquor,⁶ and even (though this illustrates how local conditions may affect the application) that a game played with bone-counters was played for money;⁷ but such a matter of private and variable belief as the character of a particular witness cannot be so taken into consideration by the jury.⁸ The range of such general knowledge is not precisely definable;⁹ but in these days when too much

⁵ With the following cases compare those cited *ante*, § 1168 (jury's knowledge acquired at a view): 1881, *Green v. Chicago*, 97 Ill. 370, 372 (jury's "own knowledge of values" may be considered); 1898, *Springfield C. R. Co. v. Hoeffner*, 175 id. 634, 51 N. E. 884 (damages for personal injuries; general knowledge allowed to be used); 1900, *Rock Island & E. I. R. Co. v. Gordon*, 184 id. 456, 56 N. E. 810 (value of land; "your own general knowledge of matters and affairs," being struck from the instruction, was held to be mere surplusage); 1893, *Chicago K. & W. R. Co. v. Parsons*, 51 Kan. 408, 410, 32 Pac. 1083 (personal knowledge as to value of land is not to be considered); 1834, *Parks v. Boston*, 15 Pick. 198, 209 (eminent domain; in judging damages, the jury should "take counsel of their own experience and knowledge of like subjects"); 1839, *Murdock v. Sumner*, 22 id. 156 (value of goods converted); *Shaw, C. J.*: "The jury may properly exercise their own judgment and apply their own knowledge and experience in regard to the general subject of inquiry"; 1888, *Bradford v. Cunard Co.*, 147 Mass. 55, 16 N. E. 719, *semble* ("common experience" is usable in finding values); 1902, *De Gray v. N. Y. & N. J. Telephone Co.*, 68 N. J. L. 454, 53 Atl. 200 (jurors' experience as to the detriment of telephone structures to the value of property, not allowed to be considered); 1881, *Head v. Hargrave*, 105 U. S. 45, 49 ("their own general knowledge and ideas" are available in weighing expert testimony to value); 1818, *Cummings v. Com.*, 2 Va. Cas. 128 (larceny of a bank-note; the defendant's passing it off in payment relieved from any further evidence of value); 1884, *Washburn v. R. Co.*, 59 Wis. 364, 371, 18 N. W. 328 (land damages; the jury may use their general knowledge of "the elements affecting the assessment," but their verdict must be supported by the testimony; leading opinion, by Lyon, J.).

⁶ 1854, *Com. v. Peckham*, 2 Gray 514.

⁷ 1840, *Stevens v. State*, 3 Ark. 66 (gambling; though there was no evidence that the play was for value, yet the jury was allowed to use its "experience" to infer that the bone-counters represented money).

⁸ 1895, *Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448 (jurors may use general experience in judging of witnesses' credibility; good opinion, by Hackney, J.); 1854, *Schmidt v. Ins. Co.*, 1 Gray 529 (jurors may act on information which may "fairly be supposed to be within the common knowledge of all the jurors"; but "any particular knowledge of any facts, such as respecting the general infamous character of any of the defendant's witnesses, . . . not being open to comment on the part of the defendant's counsel or to instruction

on the part of the Court, but which was in possession merely of some one or more, but not the whole of the jury, could not fairly be taken into view by the jury"); 1876, *Wharton v. State*, 45 Tex. 2, 4 (the jury asked the trial judge: "Can we judge a witness just by what he says on the stand, and not by what we know of him privately?" held, that the answer should have been in the affirmative); 1895, *Johnson v. R. Co.*, 91 Wis. 233, 64 N. W. 753 (the jury's knowledge of character of a particular witness is not to be used).

In *Georgia*, this result was at first not accepted: 1881, *Anderson v. Tribble*, 66 Ga. 585, 589 (a charge that a witness' character for veracity, if they knew it, might be considered, was approved); 1881, *Head v. Bridges*, 67 id. 227, 237 (same; the ruling defended in an able opinion by Crawford, J.); 1884, *Howard v. State*, 73 id. 83 (same ruling); 1892, *Chattanooga R. & C. R. Co. v. Owen*, 90 id. 265, 284, 15 S. E. 853 (preceding cases overruled; similar charge disapproved); 1894, *Collins v. State*, 94 id. 394, 19 S. E. 243 (same).

In *South Carolina* the earlier theory of a jury's knowledge long persisted: 1834, *M'Kain v. Love*, 2 Hill 506 (the jury may act, "in some degree, from their own knowledge of the character of the parties and their witnesses; it is for this reason that the jurors are drawn from the vicinage").

⁹ The following illustrate its further scope: 1852, *Houston v. State*, 13 Ark. 66 (larceny of a horse; though there was no evidence of its value, the jury's "knowledge and experience" was held to justify inferences that the defendant would not have borrowed it, as alleged, if valueless, etc.); 1834, *Parks v. Boston*, 15 Pick. 198, 199, 209 (a fact personally known must be testified to; but this does not include the knowledge obtained by a view, nor the common experience of judicial notice); 1898, *McGarrahan v. R. Co.*, 171 Mass. 211, 50 N. E. 610 (the jury may employ "their knowledge and experience of affairs"); 1897, *Illinois Central R. Co. v. Greaves*, 75 Miss. 360, 22 So. 792 (principle acknowledged; but a general instruction, without specifying the matter so to be known, was held improper); 1896, *Wills v. Lance*, 28 Or. 371, 43 Pac. 487 (whether a meteorological wind-record should be believed, against numerous eye-witnesses; jurors may use "such general practical knowledge as they may have upon the subject").

The following ruling would probably not be accepted to-day: 1816, *R. v. Sutton*, 4 M. & S. 532, 537, 542 (riots against weaving machines; the judge told the jury that they might refer to their personal knowledge of the riotous acts; held not improper, because he "did not advise

emphasis is placed, in the selection of jurors, on the blankness of their mental tablets, there can be no harm in the liberal application of the present principle. As a natural part of its doctrine, of course, these matters may be referred to by counsel in their arguments.¹⁰

2. Specific Facts Noticed.

§ 2572. **Laws:** (1) **Domestic Statutes and Ordinances.** A Court may be expected to dispense with evidence of the law of its own sovereignty; for it must be credited with a knowledge of it, or at least with the most competent knowledge where to search for it. No evidence of it need therefore be offered; and the counsel's reference during a trial to the text, or a copy, of the statute, for informing the judge, must be regarded as a judicial license to counsel to employ that evidence which the judge (*ante*, § 2569) would in theory seek for himself.¹

There are, however, certain natural limitations, by which Courts customarily abdicate their responsibility of knowing or of seeking for themselves:

(a) In the first place, the doctrine applies in strictness to *public or general statutes* of the Legislature only.² But the distinction between a public or general act and a *private or special act* is, in the United States at least, not always easy to make. It may be said that a restriction of locality does not prevent an act from being public, provided the law is general in its application to persons; *e. g.*, a law regulating within certain districts the right of fishing,³ or the right of navigation,⁴ or the lumber trade,⁵ or the sale of liquor.⁶ Acts incorporating municipal corporations, even by special charter, are usually regarded as public,⁷ as also acts incorporating State banks,⁸ and acts incorporating railways by general provisions,⁹ though not by special charter.¹⁰ Moreover,

them to rely on that as a source of information on which they were to found their verdict, but only that it might make the proof more satisfactory to their minds if they knew what had passed").

¹⁰ 1895, *State v. Lingle*, 128 Mo. 528, 31 S. W. 20; 1898, *State v. Marsh*, 70 Vt. 288, 40 Atl. 837 (counsel allowed to call the jury's attention to inquest methods, etc.).

¹ 1840, Baron Parke, in *Frost's Trial*, Gurney's Rep. 168, to counsel: "For the future, it would save time if, when you founded an objection upon an Act of Parliament, you had the Act here; for, though we are supposed to keep the statutes in our heads, we do not."

For the *authentic text* of a statute, when its contents are disputed, see *ante*, § 1350 (enrolled copy preferred to legislative journals).

² 1900, *State v. H. & C. Turnpike Co.*, 65 N. J. L. 97, 46 Atl. 700; 1832, *Leland v. Wilkinson*, 6 Pet. 317, 319 (proceedings of the Legislature on petitions for relief by individuals, not to be noticed or read as public laws).

³ 1809, *Burnham v. Webster*, 5 Mass. 266, 269.

⁴ 1853, *Hammond v. Inloes*, 4 Md. 138, 172.

⁵ 1832, *Pierce v. Kimball*, 9 Greenl. 54, 56.

⁶ 1855, *Levy v. State*, 6 Ind. 281, 283; 1888, *State v. Cooper*, 101 N. C. 688, 8 S. E. 134.

⁷ 1877, *Albrittin v. Huntsville*, 60 Ala. 486, 492; 1850, *Alderman v. Finley*, 10 Ark. 423, 428; 1860, *Payne v. Treadwell*, 16 Cal. 220, 232; 1878, *Doyle v. Bradford*, 90 Ill. 416 (statute applied, on special facts); 1894, *Jones v. Lake View*, 151 id. 663, 675, 38 N. E. 688; 1862, *Macey v. Titcombe*, 19 Ind. 135, 137; 1875, *Stier v. Oskaloosa*, 41 Ia. 353, 355; 1871, *Prell v. McDonald*, 7 Kan. 426, 446; 1868, *State v. Sherman*, 42 Mo. 210, 214; 1835, *Briggs v. Whipple*, 7 Vt. 15, 19; 1864, *Swain v. Comstock*, 18 Wis. 463, 468; 1901, *Davey v. Janesville*, 111 id. 628, 87 N. W. 813 (the adoption of a general charter law by a particular city, noticed, as well as amendments thereto).

⁸ 1860, *Davis v. Bank of Fulton*, 31 Ga. 69; 1862, *Gordon v. Montgomery*, 19 Ind. 110; 1855, *Bank of Newbury v. R. Co.*, 9 Rich. L. 495; 1861, *Buell v. Warner*, 33 Vt. 570, 578.

⁹ 1861, *Heaston v. R. Co.*, 16 Ind. 275, 278.

¹⁰ 1876, *Perry v. R. Co.*, 55 Ala. 413, 426; 1839, *Ohio etc. R. Co. v. Ridge*, 5 Blackf. 78; 1872, *Atchison T. & S. F. R. Co. v. Blackshire*, 10 Kan. 477, 487. *Contra*: 1866, *Wright v. Hawkins*, 28 Tex. 452, 471.

The principle is often liberally treated: 1898, *Miller v. Matthews*, 87 Md. 464, 40 Atl. 176 (notice taken of a statute chartering a company to be sole surety on official bonds). But

an act declared by the Legislature itself to be deemed a public act will be so treated;¹¹ and of course an amendment of a private act by a public one,¹² or any amendment of a public one,¹³ will be noticed. Occasionally, too, statutes require all private acts to be noticed.¹⁴

(b) The *ordinances* and regulations of *local boards* and councils are not noticed.¹⁵ The regulations of *executive departments* or bureaus are sometimes, but not always, noticed.¹⁶

§ 2573. **Same:** (2) **Foreign Law.** The laws of other nations and States — not being laws of the forum at all, except by casual adoption — will not be noticed.¹ But here some further discriminations are necessary:

(a) Relatively to each other, the *States of the United States* are independently sovereign, and for the present purpose foreign; hence their laws, equally with the laws of other nations, will not be noticed by the Courts of any one of the United States.²

in theory no private corporate charter need be noticed; 1866, *Winnepiseogee Lake Co. v. Young*, 40 N. H. 420, 428 (corporate name).

¹¹ 1834, *Beaumont v. Mountain*, 10 Bing. 404; 1896, *Missouri, K. & T. R. Co. v. Colburn*, 90 Tex. 230, 38 S. W. 153; 1830, *Beaty v. Knowler*, 4 Pet. 152, 167.

¹² 1880, *Lavalle v. People*, 6 Ill. App. 157.

¹³ 1863, *Parent v. Walmsly's Adm'rs*, 20 Ind. 82, 86; 1879, *Belmont v. Morrill*, 69 Me. 314, 317.

¹⁴ *E. g.*: Conn. Gen. St. 1887, § 1087 ("private or special acts"); 1878, *Doyle v. Bradford*, 90 Ill. 416; 1861, *Eel River D. Ass'n v. Topp*, 16 Ind. 242.

¹⁵ 1857, *Case v. Mobile*, 30 Ala. 538 (city); 1899, *Moore v. Jonesboro*, 107 Ga. 704, 33 S. E. 435 (city); 1857, *Indianapolis & C. R. Co. v. Caldwell*, 9 Ind. 397 (county board); 1859, *Garvin v. Wells*, 8 Ia. 286 (city); 1899, *Watt v. Jones*, 60 Kan. 201, 56 Pac. 16 (city, in civil cases); 1901, *Horne v. Mehler*, — Ky. —, 64 S. W. 918 (city); 1852, *Hassard v. Municipality*, 7 La. An. 495 (city); 1895, *Shaufelter v. Baltimore*, 80 Md. 483, 31 Atl. 439 (city); 1898, *Field v. Malster*, 88 id. 691, 41 Atl. 1087; 1876, *Winona v. Burke*, 23 Minn. 254 (city); 1854, *Mooney v. Kennett*, 19 Mo. 551, 555 (city); 1877, *Porter v. Waring*, 69 N. Y. 250, 254 (city); 1898, *Stittgen v. Rundle*, 99 Wis. 78, 74 N. W. 536. But the following distinction seems sound: 1899, *Scranton v. Danenbaum*, — Ia. —, 80 N. W. 221 (a municipal Court must notice municipal ordinance).

¹⁶ 1893, *Com. v. Crane*, 158 Mass. 218, 33 N. E. 388 (internal revenue regulations as to oleomargarine, not noticed); 1893, *Campbell v. Wood*, 116 Mo. 196, 202, 22 S. W. 796 (surveyor general's instructions to deputies, noticed); 1902, *Larson v. First Nat'l Bank*, — Nebr. —, 92 N. W. 729 (regulations of the Indian bureau in the Interior Department, noticed); 1899, *U. S. v. Gumm*, 9 N. M. 611, 58 Pac. 398 (Interior Department regulations for license to cut timber, noticed); 1894, *Caha v. U. S.*, 152 U. S. 211, 221, 14 Sup. 513 (Interior Department regulations for land-office suits, noticed); 1896, *Dominici v. U. S.*, 72 Fed. 46 (Treasury

Department regulations, etc., noticed); 1893, *The Clara*, 5 C. C. A. 390, 55 Fed. 1021 (marine inspectors' regulations, not noticed); 1899, *Smith v. Shakopee*, 38 C. C. A. 617, 97 Fed. 974 (regulations of Federal lighthouse board, not noticed); 1901, *Whitney v. Spratt*, 25 Wash. 62, 64 Pac. 919 (rules and decisions of U. S. land-office, noticed).

¹ 1718, *Fremoult v. Dedire*, 1 P. Wms. 429 (Holland); 1884, *Board v. Estrella*, 5 Haw. 211, 214 (law of Portugal); 1832, *Strother v. Lucas*, 6 Pet. 763, 768; 1872, *The Pawashick*, 2 Lowell 142; 1875, *Dainese v. Hale*, 91 U. S. 13, 18.

But *Admiralty* law, so far as in effect international and common to all, may be noticed: 1801, *Talbot v. Seeman*, 1 Cr. 1, 37 (French marine decrees as to neutral commerce, noticed as laws); 1871, *The Scotia*, 14 Wall. 170, 188; 1899, *The New York*, 175 U. S. 187, 20 Sup. 67 (Canadian statute adopting Revised International Regulations for Navigation, noticed). *Contra*: 1872, *The Pawashick*, 2 Lowell 142, *semble*.

By statute sometimes the rule is changed: *W. Va. Code* 1891, c. 13, § 4 (foreign law, "statutory or other" is to be noticed).

² In some Courts, a distinction is made between statute and common law; *Ala.*: 1889, *Insurance Co. v. Forcheimer*, 86 Ala. 541, 5 So. 870; *Ark.*: 1901, *Louisiana & N. W. R. Co. v. Phelps*, 70 Ark. 17, 65 S. W. 709 (but here a statute of 1899 changed the law); *Cal.*: 1854, *Cavender v. Guild*, 4 Cal. 250, 253; *Colo.*: 1886, *Polk v. Butterfield*, 9 Colo. 326, 12 Pac. 216; *Conn.*: 1823, *Brackett v. Norton*, 4 Conn. 517, 520; 1827, *Hempstead v. Reed*, 6 id. 480, 486; 1837, *Dyer v. Smith*, 12 id. 384, 390; 1843, *Hale v. S. N. Co.*, 15 id. 539, 549; *Fla.*: 1893, *Sammis v. Wightman*, 31 Fla. 10, 30, 12 So. 526; 1896, *Duke v. Taylor*, 37 id. 64, 19 So. 172 (here the law of organization of corporations); *Ga.*: 1868, *Simms v. Express Co.*, 38 Ga. 129; *Ill.*: 1860, *Chumasero v. Gilbert*, 24 Ill. 293; 1895, *Ferris v. Bank*, 158 id. 237, 41 N. E. 1118 (the authority of a foreign notary to administer an oath); *Ind.*: 1859, *Johnson v. Chambers*, 12 Ind. 102, 105; *Ind. T.*: 1900, *Hockett v. Alston*, — Ind. T. —, 58 S. W. 675 (law of Cherokee

(b) The *Federal laws* of the United States are equally the laws of *each State*, and hence the Courts of one of the United States notice them, whether ordinary public acts of Congress³ or treaties;⁴ and they are of course noticed by the Federal Courts.⁵

(c) Since the judicial powers of the Federal Courts extend to many cases arising under the laws of the various States of the Union, such *State laws* are for the purpose in hand part of the law of the *Federal Courts*, and will therefore be noticed by them;⁶ though the Federal Supreme Court, on the somewhat scholastic theory that it cannot know on appeal what the Court below could not know, declines, on writ of error to a State Supreme Court, to notice what the latter could not notice, *i. e.* the law of a sister State.⁷ Extending this principle, it has been held by State Courts that in cases where appeal may be made to the Federal Courts on questions of Federal law, — *e. g.* the effect of a judgment in another State Court, — the law of such other State may be noticed.⁸

(d) So far as by subdivision or amalgamation the former laws of another sovereignty have to any extent become a part of the law of the forum, such *former law* of the other sovereignty may properly be noticed. This principle

Indian tribes in the Territory, not noticed); 1902, *Sass v. Thomas*, — *id.* —, 69 S. W. 893 (Chickasaw law); 1903, *Rowe v. Henderson*, — *id.* —, 76 S. W. 250 (suit between Chickasaw Indians concerning land in the Chickasaw Nation; the Chickasaw law not noticed); *Kan.*: 1900, *Alexandria A. & F. S. R. Co. v. Johnson*, 61 Kan. 417, 59 Pac. 1063; *La.*: 1902, *Rush v. Landers*, 107 La. 549, 32 So. 95; *Md.*: 1867, *Baltimore & O. R. Co. v. Glenn*, 28 Md. 287, 323; *Mass.*: 1868, *Kline v. Baker*, 99 Mass. 253; 1893, *Chipman v. Peabody*, 159 *id.* 420, 423, 34 N. E. 563; *Minn.*: 1901, *Crandall v. R. Co.*, 83 Minn. 190, 86 N. W. 10; *Mo.*: 1857, *Charlotte v. Chouteau*, 25 Mo. 465, 473; *N. J.*: 1868, *Condit v. Blackwell*, 19 N. J. Eq. 193, 196; *N. C.*: 1857, *Hooper v. Moore*, 5 Jones L. 130, 132; *Okl.*: 1900, *Greensville N. Bank v. Evans*, S. B. Co., 9 Okl. 353, 60 Pac. 249 (laws of Arkansas, as extended by Federal Act to Indian Territory, not noticed; leading opinion); *R. I.*: 1898, *Taylor v. Slater*, 21 R. I. 104, 41 Atl. 1001; *Tex.*: 1859, *Anderson v. Anderson*, 23 Tex. 639; *Vt.*: 1899, *Murtey v. Allen*, 71 Vt. 377, 45 Atl. 752; *Va.*: 1817, *Warner v. Com.*, 2 Va. Cas. 95, 98.

In *Canada*, the intercolonial laws are by statute to be noticed: *Dom. St.* 1893, c. 31, § 7 (specified kinds of British imperial, provincial, and colonial laws, to be noticed); *B. C. Rev. St.* 1897, c. 71, § 8 (like *Can. St.* 1893, c. 31, § 7); *Man. Rev. St.* 1902, c. 57, § 7 (like *Can. St.* 1893, c. 31, § 7, specially mentioning "this Province").

Sometimes a similar statute has done the same for noticing the laws of others of the United States: 1854, *Bates v. McCully*, 27 Miss. 584; 1895, *Lockhead v. B. S. W. & I. Co.*, 40 W. Va. 553, 21 S. E. 1031.

A statute sometimes regulates the mode of evidencing: *Tenn. Code* 1896, § 5586 (a statute

read in evidence in a lower Court will be noticed in a Superior Court, without transcription).

³ 1873, *Morris v. Davidson*, 49 Ga. 361; 1832, *Chesapeake & O. Canal Co. v. B. & O. R. Co.* 4 G. & J. 1, 63; 1872-3, *Mims v. Swartz*, 37 Tex. 13; 1871, *Bird v. Com.* 21 Gratt. 800, 808.

⁴ 1860, *Carson v. Smith*, 5 Minn. 78 (Indian treaty); 1854, *Montgomery v. Deeley*, 3 Wis. 709 (Ashburton treaty).

⁵ 1850, *U. S. v. Reynes*, 9 How. 127, 147 (Louisiana treaties of cession); 1896, *Callen v. Hope*, 75 Fed. 758, 761 (the Treaty of cession of Alaska, March 30, 1867, the protocol of transfer, and the inventories and map attached).

⁶ 1835, *Owings v. Hall*, 9 Pet. 607, 624; 1888, *Liverpool & G. W. S. Co. v. Ins. Co.*, 129 U. S. 397, 445, 9 Sup. 469; 1893, *Loree v. Abner*, 6 C. C. A. 302, 57 Fed. 159 (Pennsylvania before 1788); 1894, *Merchants Exch. Bank v. McGraw*, 8 C. C. A. 420, 59 Fed. 972 (Wisconsin); 1894, *Western & A. R. Co. v. Roberson*, 9 C. C. A. 646, 61 Fed. 592 (Georgia and Tennessee); 1901, *Barry v. Snowden*, 106 Fed. 571. *Contra*: 1898, *Wilson v. Owens*, 30 C. C. A. 257, 86 Fed. 571 (notice of the law of the Chickasaw nation in the Indian Territory, not taken).

⁷ 1885, *Hanley v. Donoghue*, 116 U. S. 1, 6 Sup. 242.

⁸ 1863, *Butcher v. Bank of Brownsville*, 2 Kan. 70 (Pennsylvania judgment); 1871, *Shotwell v. Harrison*, 22 Mich. 410, 414 (certified copy of a Massachusetts deed); 1856, *Ohio v. Hinchman*, 27 Pa. 479, 482 (Ohio judgment; leading opinion, by Woodward, J.); 1876, *Paine v. Schenectady Ins. Co.*, 11 R. I. 411, 415 (New York judgment); 1900, *Trowbridge v. Spinning*, 23 Wash. 48, 62 Pac. 124 (jurisdiction of a city court of St. Louis, Mo., noticed); 1867, *Jarvis v. Robinson*, 21 Wis. 523 (Michigan judgment).

has been applied to the laws of another of the United States from which that of the forum was formed by subdivision,⁹ to the laws of Mexico,¹⁰ to the laws of the British colony of Pennsylvania,¹¹ and to the laws of England before the American Revolution; but is, of course, not applicable to the laws of England since that time.¹²

But in many instances where the law of another of the United States is involved, the *presumption of similarity* of the foreign law (*ante*, § 2536) may render assistance. The Courts have failed to work out a theory of the relation between that presumption and the present principle of judicial notice.¹³ There is much apparent inconsistency, and yet both principles have a legitimate bearing.

§ 2574. **Political Facts:** (1) **International Affairs; Seals of State.** The external political facts of international affairs, as distinguished on the one hand from the common international law (*ante*, § 2573) and on the other hand from the domestic political facts of the forum of the Court (*post*, § 2575), cannot be said to be made the subject of judicial notice.¹ In the chief instance likely to come into litigation, namely, the *existence of a particular foreign State* as independent among nations, the Court follows the action of the Executive of the forum; it recognizes that action, not as an international fact, but as a domestic political fact (*ante*, § 2566, par. 3). In another instance sometimes considered to fall under this head, namely, the *authenticity of a purporting seal* of a foreign State or judge, the process is in truth one of presuming genuine the specific seal-impression offered (*ante*, §§ 2163-2166); for although it might be possible to predicate judicial knowledge of a seal's design, it is preposterous to say that a judge can know whether a specific impress is genuine or who affixed it. Still another fact sometimes here classed, namely, the existence or effect of a *foreign judgment* is either a question of substantive law, not of evidence (*ante*, § 1347), or a question of proving the foreign record by ordinary means (*ante*, § 1681).

§ 2575. **Same:** (2) **Domestic Political Organization; Boundaries, Capitals, etc.** So far as the facts of political organization and operation of the State are determined in the law, they are judicially noticed as a part of the law (*ante*, § 2572). The chief difficulty comes in distinguishing between what is contained solely and abstractly in the law, and what depends more or less on specific official acts done under the law or upon the application of the descrip-

⁹ 1822, *Henthorn v. Doe*, 1 Blackf. 157, 161, 163 (printed statute book of Virginia judicially noticed as of a State originally sovereign in Indiana).

¹⁰ 1895, *U. S. v. Chaves*, 159 U. S. 452, 16 Sup. 57 (the laws and regulations of Mexico pertaining to land-grants made prior to the session of 1848).

¹¹ 1893, *Loree v. Abner*, 6 C. C. A. 302, 57 Fed. 159 (statutes of the colony of Pennsylvania and of the State under the articles of Confederation).

¹² 1888, *Liverpool & G. W. S. Co. v. Ins. Co.*, *supra*, note 6.

¹³ For a good exposition of the distinction

between noticing the domestic law, proving the foreign law, and presuming it, see Hooper v. Moore, 5 Jones L. 132.

¹ Except such facts as fairly fall within the principle of common notoriety (*post*, § 2580) or Executive action (*ante*, § 2566); e. g., a *state of war*: 1797, *Maclean's Trial*, 26 How. St. Tr. 797; 1805, *Dolder v. Lord Huntingfield*, 11 Ves. Jr. 283, 292 ("that France is now at war with Austria," not noticed; otherwise of being at war with England); 1814, *R. v. De Berenger*, 4 M. & S. 67, 69 (Ellenborough, L. C. J., said "there were so many statutes which spoke of a war with France that it was impossible for the judges not to take judicial notice of it").

tive terms of the law to concrete things. Courts are apt to be extremely liberal in drawing the line so as to favor judicial notice.

In regard to the *territorial descriptions* in political law — boundaries, capitals, surveys, roads, and the like —, it is difficult to make any generalization; in the liberal application of the principle, exact consistency is hardly possible.¹

¹ The following are illustrations: *Eng.*: 1721, *Fazakerley v. Wiltshire*, 1 Stra. 462, 469 (per Eyre, J.: "We must take notice of the extents of ports"); 1821, *Deybel's Case*, 4 B. & Ald. 242, 246 ("the general division of the kingdom into counties," noticed); 1842, *Brunt v. Thompson*, 2 Q. B. 789 (that a certain part of the Tower of London was within the boundary of the city of London, not noticed); 1856, *Cooke v. Wilson*, 1 C. B. n. s. 153, 163 (that the colony of Victoria is out of England, noticed); *Ala.*: 1857, *King v. Kent's Adm'r*, 29 Ala. 542, 552 (the location within the State of certain lands defined by statute, noticed); 1858, *Lewis v. Harris*, 31 id. 689 (that lands of F. Co. were held under U. S. government title, noticed); 1872, *Smitha v. Flournoy's Adm'r*, 47 id. 345 (that Eufaula is a city, in Barbour Co., etc., noticed); 1898, *Waters v. State*, 117 id. 189, 23 So. 28 (location of a public road in H. Co., not noticed); *Ark.*: 1895, *Re Independence Boulevard* — Ark. —, 30 S. W. 773 (limits of a municipality, noticed); 1900, *St. Louis Iron M. & S. R. Co. v. Cady*, 67 id. 512, 55 S. W. 929 (that "Glenwood" was in a certain county, not noticed); 1900, *St. Louis I. M. & S. R. Co. v. Magness*, 68 id. 289, 57 S. W. 933 (that a town is in a certain county, noticed); *Cal.*: 1893, *People v. Etting*, 99 Cal. 577, 579, 34 Pac. 237 (that a certain town is within a county and is its county-seat, noticed); 1894, *Rogers v. Cady*, 104 id. 288, 38 Pac. 1 (government survey, noticed); 1895, *DeBaker v. R. Co.*, 106 id. 257, 39 Pac. 610 (the course of a river frequently mentioned in statutes, and the boundary of a city, noticed); 1895, *Schwerdtle v. Placer Co.*, 108 id. 589, 41 Pac. 448 (that certain land is within the public domain, not noticed); 1895, *Diggins v. Hartshorne*, id. 154, 41 Pac. 283 (that a mapped space is correctly located, i. e. that boundaries actually run at a given spot, not noticed); 1896, *People v. Faust*, 113 id. 172, 45 Pac. 261 (that a town is a county seat, noticed); *Conn.*: 1856, *State v. Powers*, 25 Conn. 48 (that Stonington is in New London county, noticed); *Ga.*: 1901, *Perry v. State*, 113 Ga. 936, 39 S. E. 315 (on evidence that a town is in the State, the county of its location will be noticed); *Ill.*: 1832, *Ross v. Reddick*, 2 Ill. 73 (the boundaries of a county, noticed); 1873, *Gooding v. Morgan*, 70 id. 275 (similar); 1876, *Gardner v. Eberhart*, 82 id. 316 (the subdivision of town and city property into blocks and lots, etc., noticed); 1897, *Sever v. Lyon*, 170 id. 395, 48 N. E. 926 (a homestead covering more than one lot; notice taken of the block and lot subdivision); 1898, *Gilbert v. Nat'l C. R. Co.*, 176 id. 288, 52 N. E. 22 (that an incorporated town is in a given county, noticed); 1900, *McCoy v. World's Columbian Exposition*, 186 id. 356, 57 N. E. 1043 (location of the Exposition in Chicago, noticed); 1901, *Gunning v. People*, 189 id. 163,

59 N. E. 494 (that the "Reliance Building" is located in the town of South Chicago, not noticed); *Ind.*: 1877, *Steinmetz v. Versailles & O. Turnpike Co.*, 57 Ind. 457 (that a road between two towns would lie within a county, noticed); 1877, *Murphy v. Hendricks*, ib. 593 (Congressional survey of Northwest Territory, noticed); 1897, *Board v. State*, 147 id. 476, 46 N. E. 908 (the area and boundaries of a county, noticed); *Me.*: 1855, *Ham v. Ham*, 39 Me. 263 (county lines, and the towns therein, noticed); 1863, *Martin v. Martin*, 51 id. 366 (that a town is within a certain county, noticed); 1897, *State v. Simpson*, 91 id. 83, 39 Atl. 287 (the town of Waterville, noticed to be in the county of Kennebec); *Mass.*: 1869, *Com. v. Desmond*, 103 Mass. 445 (that Suffolk county is a county of Massachusetts, noticed); 1894, *Com. v. Wheeler*, 162 id. 429, 38 N. E. 1115 (the county within which a town lay, not noticed); *Mich.*: 1864, *Cummings v. Stone*, 13 Mich. 70 (that not all of the St. Clair river is in Michigan, noticed); *Minn.*: 1888, *Quinn v. Champagne*, 38 Minn. 323, 37 N. W. 451 (the general system of governmental surveys, noticed); 1896, *Baumann v. Trust Co.*, 66 id. 227, 68 N. W. 1074 (location of a city within a given county, noticed); 1898, *Kretzschmar v. Meehan*, 74 id. 211, 77 N. W. 41 (that a piece of land is in a certain county, not noticed); *Mo.*: 1894, *State v. Pennington*, 124 Mo. 388, 27 S. W. 1106 (county-seat, noticed); *N. H.*: 1860, *Winnepiseog Lake Co. v. Young*, 40 N. H. 420, 429 (counties and towns, noticed); *N. C.*: 1896, *State v. Snow*, 117 N. C. 774, 23 S. E. 322 (county-names, noticed as such); *R. I.*: 1855, *State v. Dunwell*, 3 R. I. 127 (the boundaries of the State as claimed by it, recognized, but not the boundary *de jure*); *Tex.*: 1866, *Wright v. Hawkins*, 28 Tex. 452, 472 (county-boundaries, noticed); 1880, *Solyer v. Romanet*, 52 id. 562, 568 (that the city of Galveston is in the county of Galveston in Texas, noticed); 1896, *Hambel v. Davis*, 89 id. 256, 34 S. W. 439 (that a town is the county-seat, noticed); *Whitner v. Belknap*, ib. 273, 34 S. W. 594 (same); *U. S.*: 1824, *The Apollon*, 9 Wheat. 362, 374 ("public facts and geographical positions" are to be noticed); 1833, *Peyroux v. Howard*, 7 Pet. 324, 342 (that the port of New Orleans was within the jurisdiction, as depending on the ebb and flow of tide at that point, noticed); *Utah*: 1898, *McMaster v. Morse*, 18 Utah 21, 55 Pac. 70 (that a certain city was surveyed into lots, blocks, and streets, noticed); *Va.*: 1902, *Anderson v. Com.*, 100 Va. 860, 42 S. E. 865 (unincorporated town, not noticed); *Wis.*: 1859, *Atwater v. Schenck*, 9 Wis. 160 (the legal subdivisions of public lands, noticed).

Distinguish the question whether the fact will be noticed that there is *only one town* of a given name in existence or in a particular country:

§ 2576. **Same : (3) Domestic Officials, their Identity and Authority ; Genuineness of Official Documents.** It is the law that creates certain offices, and attributes certain duties and authorities to the incumbents ; but whether the incumbent at a given time and place is a specific person depends on external political action, sometimes recorded or notorious, but sometimes neither. Courts have solved this application of the principle by considerations of practical good sense and convenience ; which are, however, difficult to reduce to a definite rule. All that can be said is that the incumbencies of the more important and notorious offices are judicially noticed, and that many of the lesser and local ones are not.¹

But the field for the present principle, applied without other complications, is after all limited. In the first place, the *authentication of official documents* involves usually the additional element of the presumption of genuineness of the seal or signature ; this has been elsewhere dealt with (*ante*, §§ 2161–2167) ; the pure question of judicial notice arises here only when the signature or seal is otherwise evidenced and the incumbency of the person remains alone to be proved. Again, the *presumption of office* from a notorious acting of a person in the office (*ante*, §§ 2168, 2535) does not rest on the present principle ; it is invoked only when the present principle fails to aid the purpose.

§ 2577. **Same : (4) Official Acts ; Elections, Census, Legislative Proceedings, etc.** It can seldom happen that the doing of an official act can properly

1819, *Kearney v. King*, 2 B. & Ald. 301 (bill of exchange, declared on as drawn and accepted at Dublin for £542 ; the question being whether it was drawn for Irish or English money, the Court declined "to take judicial notice that there is only one Dublin in the world" ; this was correct ; but the Court should have presumed that a bill purporting to be in Dublin was in the Dublin of Ireland, on the same principle as the presumption of dating (*ante*, § 2520) ; this result is plain, and it is curious that the Court could not find a principle on which to reach it) ; 1849, *Andrews v. Hoxie*, 5 Tex. 171, 182 (promissory note payable in New Orleans ; that this was in Louisiana, probably not noticed ; here the proper solution was the same as in the preceding case).

¹ To the following cases add most of those cited *ante*, §§ 2163–2168, where the same principle is involved ; some of the following cases belong there also, but are here placed as illustrations of the usage : 1705, *Elderton's Case*, 2 Ld. Raym. 978, 980, *semble* (the authority of certain officers as justices of the peace, noticed) ; 1809, *R. v. Jones*, 2 Camp. 131 (the signatures being proved, the incumbency of persons signing as lords Commissioners of the Treasury was presumed) ; 1855, *Ingram v. State*, 27 Ala. 17, 20 (sheriffs of the several counties, noticed) ; 1874, *Thielmann v. Burg*, 73 Ill. 293 (jurat of a notary public, without seal ; his incumbency noticed) ; 1900, *Crawford v. State*, 155 Ind. 692, 57 N. E. 931 (whether a person was a deputy of the attorney-general, not noticed) ; 1842, *Walden v. Canfield*, 2 Rob. La. 466, 469 (Edward Living-

ston's office as Senator, etc., noticed) ; 1857, *Lindsey v. Attorney-General*, 33 Miss. 508, 528 (changes in the governorship, noticed) ; 1900, *State v. Mason*, 155 Mo. 486, 55 S. W. 636 (number of members of the Legislature, noticed) ; 1866, *Wells v. Jackson I. M. Co.*, 47 N. H. 235, 260 (that D. L. M. was governor in 1826, noticed) ; 1827, *Bennett v. State*, Mart. & Y. 133, 135 (that T. B. C. was attorney-general, noticed) ; 1854, *Major v. State*, 2 Sneed 11 (the incumbency of one signing as clerk of court, noticed, as being a public officer) ; 1847, *State v. Evans*, 8 Humph. 110 ("John P. Campbell, attorney-general" ; notice taken of the district for which he was officer ; also that N. B. had resigned that office before the term ended, and that J. P. C. had been appointed) ; 1849, *State v. Cole*, 9 id. 626 (*venire* signed "B. H. G." ; notice taken that he was clerk of the issuing county) ; 1874, *Currey v. State*, 7 Baxt. 154, 156 (that J. M. T., signing an indictment, was attorney-general, noticed) ; 1870, *Deweese v. Colorado Co.*, 32 Tex. 570 (that H. was Governor of the State, noticed) ; 1854, *York & M. R. Co. v. Winans*, 17 How. 30 (the incumbency of the acting commissioner of patents, noticed) ; 1899, *Smyth v. New Orleans C. & B. Co.*, 35 C. C. A. 646, 93 Fed. 899 (signature of the government secretary of the Spanish colony of Louisiana, noticed) ; W. Va. Code 1891, c. 130, § 3 (the signature of any domestic judge or of the governor is to be noticed) ; 1865, *Ward v. Henry*, 19 Wis. 76, 81 (the incumbency of a deputy marshal, not noticed).

be judicially noticed; it must usually be evidenced in the ordinary ways.¹ Perhaps an Executive *proclamation* should be noticed.² All Courts take notice, in one or another aspect, of facts concerning *public elections*,³ though this often involves rather the use of official reports as evidence (*ante*, §§ 1351, 1672). The acts of the *census* officials, in returning the data of population, are commonly said to be judicially noticed;⁴ though this is almost always a misnomer for their admissibility in evidence (*ante*, § 1671). The *proceedings* of the Legislature, as shown in its *journals*, are by some Courts noticed;⁵ but this is an artificial theory; on principle, the proceedings as contained in the journal are evidenced by a printed copy or by a certified copy (*ante*, §§ 1662, 1680, 1684).⁶

§ 2578. **Judicial Proceedings:** (1) **Officers and Rules of Court.** Under the general principle for domestic officials (*ante*, § 2576), notice is taken of the incumbency of other *officers of Courts*; although here, as there, some uncertainty exists as to the extent to which this will include the inferior and more numerous officers, particularly justices of the peace and attorneys.¹

¹ In particular, by the official's statements (*ante*, §§ 1630-1684).

² But this usually involves rather the offer of the proclamation as evidence to a fact recited (*ante*, § 1662).

³ 1897, *State v. Downs*, 148 Ind. 324, 47 N. E. 670 (that at a recent election a "Republican Ticket" was submitted, noticed); 1901, *Re Denny*, 156 id. 104, 59 N. E. 359 (number of votes cast for a constitutional amendment, noticed); 1863, *State v. Minnick*, 15 Ia. 123, 125 (that a general election was held on a certain date, and that certain officers were to be voted for, noticed); 1873, *Ellis v. Reddin*, 12 Kan. 306 (similar); 1895, *Whitman v. State*, 80 Md. 410, 31 Atl. 325 (the result of a local-option election, not noticed); 1898, *State v. Stearns*, 72 Minn. 200, 75 N. W. 210 (reference had to election returns, etc., to determine whether a proper majority voted for a law); 1896, *Jackson Co. v. Arnold*, 135 Mo. 207, 36 S. W. 662 (the date of election to be held for President of the United States, noticed); 1898, *Kokes v. State*, 55 Nebr. 691, 76 N. W. 467 (result of State and county elections, noticed); 1893, *Thomas v. Com.*, 90 Va. 92, 95, 17 S. E. 788 (that a certain district voted against licensing the sale of liquor, noticed).

⁴ 1883, *People v. Williams*, 64 Cal. 87, 91 (Federal census results); 1880, *Worcester National Bank v. Cheney*, 94 Ill. 430 (county population by the census, noticed as not being within the first class); 1898, *Huntington v. Cast*, — Ind. —, 48 N. E. 1025 (the Federal census, as determining a city's population); 1893, *State v. Braskamp*, 87 Ia. 588, 54 N. W. 532 (the population of a county as shown by the last national census); 1898, *Bennett v. Marion*, 106 id. 628, 76 N. W. 844 (population of a city by the Federal census); 1895, *State v. Marion Co. Court*, 128 Mo. 427, 30 S. W. 103 (Federal census); 1893, *Brown v. Lutz*, 36 Nebr. 527, 530, 54 N. W. 860 (that a city is of the second class as to population); 1898, *Kokes v. State*, 55 id. 691, 76 N. W. 467 (the Federal census and the State

school census); 1900, *Stratton v. Oregon City*, 35 Or. 409, 60 Pac. 905 (population of a city by the Federal census).

⁵ 1895, *State v. Hocker*, 36 Fla. 358, 18 So. 767; Ga. Code, 1895, § 5210 (legislative journals, recognized without proof); 1899, *Dane Co. v. Reindahl*, 104 Wis. 302, 80 N. W. 438. *Contra*: 1867, *Illinois C. R. Co. v. Wren*, 43 Ill. 17; 1867, *Bedard v. Hall*, 44 id. 91; 1867, *Grob v. Cushman*, 45 id. 119, 125; 1856, *Coleman v. Dobbins*, 8 Ind. 156, 161 (the legislative journals will not be searched by the Court, but must be laid before the Court like any other record); 1884, *Burt v. R. Co.*, 31 Minn. 472, 477 (they must be put in evidence in order to overthrow the enrolled statute); 1856, *Green v. Weller*, 32 Miss. 650, 686, 711 (Smith, C. J., diss.); 1890, *Re Duncan*, 139 U. S. 449, 457, 11 Sup. 573.

⁶ The question usually arises in determining whether the journals overthrow the enrolled act (*ante*, § 1350).

¹ 1705, *Elderton's Case*, 2 Ld. Raym. 978 (cited *ante*, § 2576); 1737, *Skipp v. Hooke*, 2 Stra. 1080 (that Sir John Willes was Chief Justice of the Common Bench; apparently not decided); 1845, *Van Sandau v. Turner*, 6 Q. B. 773, 786 (that Sir G. R. was a judge of the Court of Review in Bankruptcy; not decided); 1858, *Ex parte Peterson*, 33 Ala. 74 (resignation of a circuit judge, noticed); 1899, *McCarver v. Herzberg*, 120 id. 523, 25 So. 3 (notice taken that T. G. W. was probate judge of P. Co.); 1898, *Clark v. Morrison*, — Ariz. —, 52 Pac. 985 (notice not taken of attorneys of a district Court not members of the Supreme Court bar); 1899, *Webb v. Kelsey*, 66 Ark. 180, 49 S. W. 819 (justice of the peace, noticed); 1892, *San Joaquin Co. v. Budd*, 96 Cal. 47, 51, 30 Pac. 967 (the acts of judges, noticed; but not the identity of a defendant having the same name as a judge); 1898, *People v. Ebanks*, 120 id. 626, 52 Pac. 1078 (notice taken that a person had ceased to be judge of a Superior Court); 1898, *State v. Travelers' Ins. Co.*, 70 Conn. 590, 40 Atl. 465

Under the general principle for domestic laws (*ante*, § 2572), notice is commonly taken of the various elements of *jurisdiction* as fixed by law,² of the *terms* of Court,³ and perhaps in general of the *rules* of superior Courts, though not those of inferior Courts.⁴

§ 2579. **Same: Records of Proceedings.** The proceedings in a Court are constituted by the record, and this record originally took its name from the judicial memory (*recordari*) which could be appealed to for recalling those prior proceedings.¹ Nevertheless, it seems to-day unreasonable, having regard to the general principle of judicial notice (*ante*, § 2565), to predicate an actual judicial knowledge of the proceedings in specific prior litigations (for they are commonly neither notorious, nor within the judge's duty of knowledge),

(whether a party is a citizen of the U. S., not noticed); 1867, *Graham v. Anderson*, 42 Ill. 514 (the justices of the peace in the county where the Court is sitting, noticed); 1895, *People v. McConnell*, 155 id. 192, 40 N. E. 608 (resignation of a circuit judge, noticed); 1895, *Ferris v. Bank*, 158 id. 237, 41 N. E. 1118 (that a person appearing as attorney is regularly licensed, noticed); 1898, *Gilbert v. Nat'l C. R. Co.*, 176 id. 288, 52 N. E. 22 (justice of the peace in the same county, noticed); 1880, *Kennedy v. Com.*, 78 Ky. 447 (that S. E. D. was a circuit judge, noticed); 1825, *Despau v. Swindler*, 3 Mart. n. s. 705 (magistrates of the parishes, noticed); 1842, *Follain v. Lefevre*, 3 Rob. La. 13 (N. J., noticed as not being the name of any associate judge of a city Court); 1824, *Ripley v. Warren*, 2 Pick. 592, 596 ("It is at least questionable whether we have any judicial knowledge of the fact" that J. M. W. was not the first justice of the Common Pleas Court); 1890, *Davis v. McEnaney*, 150 Mass. 451, 23 N. E. 221 (*semble* that E. B. G. was clerk of the Police Court of H. at the time of complaint filed, not noticed); 1858, *Kilpatrick v. Com.*, 31 Pa. 198 (that neither J. R. L. nor J. A. was president of the Court of Common Pleas, noticed; leading opinion, by Strong, J.); 1900, *Barnwell v. Merion*, 58 S. C. 459, 36 S. E. 818 (that a judge was in a certain judicial circuit, that he was assigned to a certain session, that a certain day was the first day of the session, and that a county was in the circuit, noticed); 1898, *Sutton v. R. Co.*, 98 Wis. 157, 73 N. W. 993 (notice not taken that an attorney had removed from the State).

Compare the cross-references noted *ante*, § 2576.

² 1697, *Tregany v. Fletcher*, 1 Ld. Raym. 154 (that "the Exchequer in Wales is a Court," noticed); 1835, *Chitty v. Dendy*, 3 A. & E. 319, 324 ("that the County Court had no authority to give leave to plead double," noticed); 1851, *March v. Com.*, 12 B. Monr. 25 (city ordinances, as affecting the jurisdiction of a City Court, exceptionally noticed, because the case came up for review on a writ of error); 1830, *Newell v. Newton*, 10 Pick. 470 (jurisdiction of a foreign Court, not noticed on a plea of abatement for *lis pendens*; otherwise, of a Court of the same government); 1896, *Chicago, B. & Q. R. Co. v. Hyatt*, 48 Nebr. 161, 67 N. W. 8 (boundaries of a judicial district, noticed).

³ The following facts were noticed, except as otherwise noted: 1874, *Rodgers v. State*, 50 Ala. 103 (that the fall term of the Circuit Court of L. Co. begins on the fourth Monday of October and may last three weeks, etc.); 1852, *Ross v. Anstill*, 2 Cal. 183, 191 ("the times and places of holding the Courts," noticed, in particular aspects); 1877, *Dorman v. State*, 56 Ind. 454 (that a grand jury drawn for the January term was also for the preceding September term); 1877, *Spencer v. Curtis*, 57 id. 221, 227 (that the March term of a trial Court began on Mar. 1 and ended on Mar. 20); 1893, *Rogers v. Venis*, 137 id. 221, 223, 36 N. E. 841 (that the first day of the September term of a circuit Court in 1891 was Sept. 7); 1895, *Anderson v. Anderson*, 141 id. 567, 40 N. E. 131 (the time of a circuit Court term); 1858, *Kidder v. Blaisdell*, 45 Me. 461, 470 (that a session of Court before which a deposition was returnable was a Court of the proper county and State); 1859, *Fabyan v. Russell*, 38 N. H. 84 (attendance fees; the number of days of a Court's session at each term, etc.); 1894, *State v. Toland*, 36 S. C. 515, 523, 15 S. E. 599 (that the November term was the only remaining term for the year); 1870-71, *Davidson v. Peticolas*, 34 Tex. 27, 35 (that a term of the District Court was held in Victoria Co. on the third Monday of February, etc.); 1893, *Thomas v. Com.*, 90 Va. 92, 94, 17 S. E. 788 (that a June term is not a quarterly term); 1894, *Donovan v. Terr.*, 3 Wyo. 91, 2 Pac. 532 (that the first day of a term of a county Court was Sept. 17, 1883, and that a jury-drawing on that date could have taken place in that Court only).

⁴ 1845, *Van Sandau v. Turner*, 6 Q. B. 773, 784 (even assuming that the practice and rules of the long established Courts are to be noticed, held that the rules of a Court of Review in Bankruptcy, recently created by statute, would not be noticed); 1897, *Kindel v. LeBert*, 23 Colo. 385, 48 Pac. 641 (rules of a district Court, not noticed); 1897, *Cornelieson v. Foushee*, 101 Ky. 257, 40 S. W. 680 (rules of a circuit Court, not noticed); 1860, *Scott v. Scott*, 17 Md. 78, 90 (that a cause was not regularly set for hearing under the rules of a circuit Court; the rules not noticed).

⁵ *Ante*, § 2426, p. 3422, § 2450; Pollock & Maitland, *History of the English Law*, II, 666.

or to expect the Court to make its own researches into the mass of the records for the purpose of informing itself. Accordingly, it may be said generally that a Court is not by any rule bound to take notice of the tenor of any legal proceedings (other than those transacting at the moment in its presence). Indeed, this much is assumed in the conceded rules of law which require the original of a judicial record to be produced in proof, and define the exceptions by which a copy is allowed to be used instead (*ante*, §§ 1215, 1216).

However, for reasons of convenience, where controversy is unlikely and the expense of a copy would be disproportionate, Courts are often found taking notice of the tenor or effect of some part of a judicial proceeding, without requiring formal evidence. Since this dispensation is not obligatory on the part of the Court, and since it must depend more or less on the practical notoriety and certainty of the fact under the circumstances of each case, little uniformity can be seen in the instances. It is often done for a part of the record in the *same proceeding*, or in a *prior stage of the same controversy*; less often for the record of a *distinct litigation*, especially when in another Court.²

§ 2580. **Notorious Miscellaneous Facts:** (1) **Commerce, Industry, History, Natural Science, etc.** Applying the general principle (*ante*, § 2565), especially in regard to the element of notoriousness, Courts are found noticing, from time to time, a varied array of unquestionable facts, ranging throughout the data of commerce, industry, history, and natural science.¹ It is unprofit-

² 1866, *Lake Merced W. Co. v. Cowles*, 31 Cal. 215 (petition for land-condemnation; notice not to be taken of the pendency of another petition in the same Court by another party for the same land); 1894, *Lester v. People*, 150 Ill. 408, 37 N. E. 1004, *semble* (in contempt proceedings arising out of a civil case, the record of the original cause, if properly incorporated, may be considered on appeal); 1899, *Bailey v. Kerr*, 180 id. 412, 54 N. E. 165 (application to compel execution of a deed by an assignor for benefit of creditors; notice taken of an order approving the sale); 1899, *Crawford v. Duckworth*, — Ind. T. —, 53 S. W. 465 (that the defendant had in another proceeding in a Federal Court been declared not a Cherokee citizen, noticed); 1862, *Baker v. Mygatt*, 14 Ia. 131, 133 (that an affidavit offered was duly executed, as known to the judge by its filing in another suit not between these parties; not noticed); 1899, *Lawless v. Stamp*, 108 id. 601, 79 N. W. 365 (recitals in a deed of a receiver appointed in another suit, not noticed); 1877, *National Bank of Monticello v. Bryant*, 13 Bush 419 (litigation over a judgment; the records of other connected suits, not noticed); 1876, *State v. Bowen*, 16 Kan. 475 (new trial, with plea of former jeopardy; the prior proceedings, noticed); 1860, *Pagett v. Curtis*, 15 La. An. 451 (title to slaves; an order of Court pertaining to them, noticed); 1897, *Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074 (petition for a receiver against a buyer under judicial sale; the record in the suit for sale, not noticed); 1899, *Olson Co. v. Brady*, 76 Minn. 8, 78 N. W. 864 (garnishment proceedings;

the judgment against the principal defendant, noticed); 1875, *Banks v. Burnam*, 61 Mo. 76 (specific performance of a contract; a former suit for its rescission, not noticed); 1897, *State v. Electric Co.*, 61 N. J. L. 114, 38 Atl. 818 (contempt for disregarding a stay implied in a certiorari writ; notice not taken of the writ or other proceedings in certiorari, the present proceeding being "quasi-criminal"); 1900, *State v. Bates*, 22 Utah 65, 61 Pac. 905 (proceedings in the same cause, noticed).

¹ Some of these instances, in which notice was taken, are to be accounted for by their close approximation to facts of *law* (*ante*, § 2572); compare also the instances of a *jury's* judicial notice of matters of common knowledge (*ante*, § 2570): *Eng.*: 1761, *Edie v. East India Co.*, 2 Burr. 1216, 1228 (the custom of merchants is to be noticed, so far as it is "part of the law," per Wilmot, J.; but here the question was whether a special usage amounted to law); 1846, *Brandao v. Barnett*, 3 C. B. 519, 530 ("The general lien of bankers is part of the law merchant, and is to be judicially noticed, — like the negotiability of bills of exchange, or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established, it becomes part of the law merchant, which Courts of justice are bound to know and recognize. Such has been the invariable understanding and practice in Westminster Hall for a great many years"); 1902, *Edelstein v. Schuler*, 2 K. B. 144, 155 (negotiable character of certain bonds, in trade usage, noticed); *Ala.*: 1867, *Modawell v. Holmes*, 40 Ala. 391, 405 (depreciation of the

able, as well as impracticable, to seek to connect them by generalities and distinctions; for the notoriousness of a truth varies much with differences

currency during the war, not noticed); 1870, *Buford v. Tucker*, 44 id. 89, 91 (that contracts were made generally, at a certain period, with reference to Confederate currency, noticed); 1898, *Mobile & O. R. Co. v. Postal T. C. Co.*, 120 id. 21, 24 So. 408 (that a telegraph line of a certain sort is a public improvement, noticed); *Cal.*: 1859, *Dutch Flat W. Co. v. Mooney*, 12 Cal. 535, *semble* (mining customs, not noticed); 1873, *Goldsmith v. Sawyer*, 46 id. 209 (rules of the San Francisco board of stock-brokers, not noticed); 1893, *Benson v. R. Co.*, 98 id. 45, 48, 32 Pac. 809 (the usual speed of trains, away from towns, noticed); 1895, *Fox v. Mining Co.*, 108 id. 369, 41 Pac. 308 (the nature of the relation between broker and customer in a certain class of transactions as shown by frequent decisions, noticed); 1898, *Scanlan v. R. Co.*, — id. —, 55 Pac. 694 (the art of mensuration as applied to railroad embankments, noticed); *Colo.*: 1874, *Sullivan v. Hense*, 2 Colo. 424, 429 (mining rules and customs, sanctioned in mass by a statute, not noticed); 1893, *Atchison T. & S. F. R. Co. v. Headland*, 18 id. 477, 483, 33 Pac. 185 (custom of separation of passenger and freight trains, noticed); *Conn.*: 1897, *State v. Main*, 69 Conn. 123, 37 Atl. 80 (that "peach yellows" was a tree-disease, of a baneful and contagious nature, noticed); 1899, *Knowlton v. R. Co.*, 72 id. 188, 44 Atl. 8 (that the railroad between New Haven and New York was opened by Jan. 1, 1849, noticed as an "historic fact"); *D. C.*: 1894, *Metropolitan R. Co. v. Snashall*, 3 D. C. App. 420, 433 (that passengers are commonly allowed to ride on the platform of a street-car, noticed); *Ga.*: 1897, *Southern R. Co. v. Hagan*, 103 Ga. 564, 29 S. E. 760 (notice not taken of the duties of a railway superintendent in a particular town); *Ill.*: 1898, *Cleveland C. C. & St. L. R. Co. v. Jenkins*, 174 Ill. 398, 51 N. E. 811 (notice taken of a railroad custom in regard to clearance-card); *Ind.*: 1867, *Neaderhouser v. State*, 28 Ind. 257, 267 (the navigability of the Ohio River, etc., noticed); 1892, *Matchett v. R. Co.*, 132 id. 334, 31 N. E. 792 (a brakeman's duties in general); *Ky.*: 1827, *Feemster v. Ringo*, 5 T. B. Monr. 336 (the value of paper of the State bank at a particular time, not noticed); *Md.*: 1894, *State v. Fox*, 79 Md. 514, 528, 29 Atl. 601 (that glanders is for human beings contagious, not noticed); *Mass.*: 1889, *Com. v. King*, 150 Mass. 221, 224, 22 N. E. 905 (that the Connecticut river at a certain place was not a navigable water under Federal jurisdiction, noticed); *St.* 1895, c. 419, § 2 (notice allowed of the methods of various specified lotteries and gambling businesses); *Mich.*: 1897, *Haines v. Gibson*, 115 Mich. 131, 73 N. W. 126 (notice not taken that certain lake navigation would be closed on April 1); *Minn.*: 1899, *Rosted v. R. Co.*, 76 Minn. 123, 78 N. W. 971 (that exposure to cold is likely to cause inflammatory rheumatism, noticed); *Miss.*: 1854, *Turner v. Fish*, 28 Miss. 306, 311 (the Choctaw custom as to family headship, not noticed); *Mo.*: 1893, *Atkeson v. Lay*, 115 Mo. 538, 557,

22 S. W. 481 (that a newspaper is published in a certain county, not noticed); *Nebr.*: 1899, *Shiverick v. Gunning Co.*, 58 Nebr. 29, 78 N. W. 460 (destruction of a sign-painting of a bull; notice not taken that it was so indecent as to be a nuisance); 1901, *Erickson v. Schmill*, 62 id. 368, 87 N. W. 166 (that gestation may exceed 280 days, not noticed); 1902, *Meyers v. Menter*, 63 id. 427, 88 N. W. 662 (that potatoes, sugar-beets, and turnips are not the spontaneous product of the soil, noticed); *N. J.*: 1894, *Meyer v. Krauter*, 56 N. J. L. 696, 29 Atl. 426 (that trolley-lines had not in 1884 or 1885 superseded horse-cars, noticed); *N. Y.*: 1889, *Hunter v. New York O. & W. R. Co.*, 116 N. Y. 615, 621, 23 N. E. 9 (injury at a tunnel; that the sitting height of a man could not be four feet seven inches, noticed); 1893, *Rowland v. Miller*, 139 id. 93, 34 N. E. 765 (that the business of an undertaker in a certain locality was offensive, noticed); 1898, *Baxter v. McDonnell*, 155 id. 83, 49 N. E. 667 (the legal nature and powers of the Holy Roman Catholic Church, not noticed); *N. D.*: 1897, *Mathews v. R. Co.*, 7 N. D. 81, 72 N. W. 1085 (notice taken of a general custom to pasture on unsurveyed public lands); *Okl.*: 1898, *Goodson v. U. S.*, 7 Okl. 117, 54 Pac. 423 (that in certain Indian reservations there are no resident freeholders qualified as jurors, noticed); *Or.*: 1880, *Lewis v. McClure*, 8 Or. 273 (local customs as to irrigation, given the force of law in mass by Federal statute, not noticed); *R. I.*: 1893, *State v. South Kingston*, 18 R. I. 258, 273, 27 Atl. 606 (that many Seventh Day Baptists lived in a town S. H., and that they would not vote at an election held on Saturday, noticed); *Tenn.*: 1898, *Austin v. State*, 101 Tenn. 563, 48 S. W. 305 (that tobacco in cigarette form is deleterious for smoking, noticed; they "are inherently bad, and bad only"); 1898, *Kerns v. Perry*, — id. —, 48 S. W. 724 (that certain lowlands were overflowed by freshets, noticed); *U. S.*: 1875, *Brown v. Piper*, 91 U. S. 37 (patent for a freezing mixture to preserve fish; the method used in an ice-cream freezer, noticed, as "a thing in the common knowledge and use of the people throughout the country"); 1893, *Lyon v. U. S.*, 5 C. C. A. 359, 55 Fed. 964 (the usual existence of hair along with sheep-fleece, noticed); 1897, *Railroad & Tel. Cos. v. Board*, 85 Fed. 302, 308 (notice taken of an assessors' custom to rate property at a percentage of actual value); 1898, *Von Mumm v. Wittemann*, 85 Fed. 966 (notice taken that labels of champagne, as ordinarily served from a cooler, disappear before the bottle is shown to the customer); 1899, *Smyth v. New Orleans C. & B. Co.*, 35 C. C. A. 646, 93 Fed. 899 (existence noticed, as a matter of history, of a certain ancient Spanish land-register); 1899, *Cushman P. B. M. Co. v. Goddard*, 37 C. C. A. 221, 95 Fed. 664 (notice taken of the state of an art of manufacturing, on a matter of general interest, as shown by the Court's prior records); 1899, *United States v. Rio Grande D. & I. Co.*, 174 U. S. 690, 19 Sup. 770 (that the Rio Grande

of period and of place. It is even erroneous, in many if not in most instances, to regard them as precedents. It is the spirit and example of the rulings, rather than their precise tenor, that is to be useful in guidance.

§ 2581. **Same: (2) Times and Distances.** Among the common instances, under this miscellaneous class, are the facts of time or season¹ and of distance;² though here also the quality of notoriousness will naturally vary with the place and the epoch, as well as with the greater or less accuracy involved in the facts desired to be noticed.

§ 2582. **Same: (3) Meaning of Words; Intoxicating Liquors.** Another common class of instances, subject to the foregoing general considerations (*ante*, § 2580), is that of the meanings of words and phrases and written symbols. So far as these are notorious and unquestioned, they are constantly found noticed. Here, too, the local circumstances and the usage of the time must more than ever control the ruling. The popular familiarity with the fable of the Frozen Snake, and therefore the general understanding of the meaning of that epithet, may well be noticed in one period and community,¹ yet not in another. So much of special usage in commerce, religion, and

river at a particular place ceased to be navigable, not noticed); 1900, *Austin v. Tennessee*, 179 id. 343, 21 Sup. 132 (*contra* to *Austin v. State*, Tenn., *supra*); *Wash.*: 1896, *Mullen v. Sackett*, 14 Wash. 100, 44 Pac. 136 (that there are always taxes remaining unpaid, noticed); 1898, *Bartholomew v. Bank*, 18 id. 683, 62 Pac. 239 (notice not taken of the presence or absence of a bank in a town); 1899, *Prescott Irrig. Co. v. Flathers*, 20 id. 454, 55 Pac. 635 (that ordinary sagebrush soil needs irrigation to produce crops, noticed); 1899, *Hill Estate Co. v. Whittlesey*, 21 id. 142, 57 Pac. 345 (vestry powers in the Protestant Episcopal Church, not noticed); *W. Va.*: 1876, *Simmons v. Trumbo*, 9 W. Va. 358, 364 (that Confederate notes were currency in the South during the war, that they were but little depreciated at a certain time, and were never made legal tender by the Confederacy, noticed); *Wis.*: 1899, *Katzer v. Milwaukee*, — Wis. —, 79 N. W. 745 (rules of the Catholic Church, not noticed).

¹ In some of these instances, the evidential admissibility of the record of the official meteorological bureau (*ante*, § 1639), or of histories and almanacs (*ante*, §§ 1698, 1699), was the real effect of the ruling: 1705, *Harvy v. Broad*, 2 Salk. 626 (that the calendar day for a writ being returnable fell on Sunday, noticed); 1705, *Davies v. Salter*, ib. 626 (similar); 1859, *Sprowl v. Lawrence*, 33 Ala. 674, 684 (that the first Monday of August, 1853, was August 1, noticed); 1876, *Tomlinson v. Greenfield*, 31 Ark. 557 (that a crop of cotton named in a mortgage of January could not have been planted or in being at that time, noticed); 1896, *People v. Mayes*, 113 Cal. 618, 45 Pac. 860 (time of moon-rising, noticed); 1879, *State v. Morris*, 47 Conn. 179 (coincidence of days of the month and week, noticed, by refreshment of memory from the almanac); 1851, *Dawkins v. Smithwick*, 4 Fla. 158, 162 (that a day of the month fell on Sunday, noticed); 1903, *Dorough v. Equitable M. Co.*, — Ga. —, 45

S. E. 22 (coincidence of the days of week and month, noticed); 1866, *Dixon v. Nicolls*, 39 Ill. 372, 385 (the time of maturity of grain crops in a certain region, not noticed); 1877, *Ross v. Boswell*, 60 Ind. 235 (that the use of a farm in cropping season is more valuable than in winter, noticed); 1881, *McIntosh v. Lee*, 57 Ia. 358, 10 N. W. 895 (that March 10, 1878, was Sunday, noticed); 1853, *Sasscer v. Farmers' Bank*, 4 Md. 409, 420 (that Dec. 26 fell on Sunday, and that by commercial usage the day of payment of a note is in such cases anticipated, noticed); 1881, *Philadelphia, W. & B. R. Co. v. Lehman*, 56 id. 209, 226 (that July 28, 1878, was Sunday, noticed); 1894, *Morgan v. Burrow*, — Miss. —, 16 So. 432 (day of the month, noticed); 1879, *Reed v. Wilson*, 41 N. J. L. 29, 32 (that the day of a note's maturity fell on Sunday, noticed, and also the law merchant as to days of grace); 1901, *Payne v. McCormick Harvesting M. Co.*, 11 Okl. 318, 66 Pac. 287 (time of planting and harvesting annual crops, noticed).

² 1893, *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118 (that East Portland, Oregon, is distant 2398 miles from Crawfordsville, a place of trial in Indiana, noticed); 1893, *Mutual Ben. L. Ins. Co. v. Robison*, 7 C. C. A. 444, 58 Fed. 723 (that the distance between Dubuque, Ia., and Asheville, N. C., exceeds 100 miles, noticed); 1895, *Blumenthal v. Meat Co.*, 12 Wash. 331, 41 Pac. 47 (the distance between two towns, noticed); 1876, *Siegbert v. Stiles*, 39 Wis. 533, 536 (that two towns in the State were separated only by a river and were mutually accessible across the ice, noticed).

¹ 1848, *Hoare v. Silverlock*, 12 Q. B. 624 (defamation for applying to the plaintiff the "fable of the Frozen Snake"; held, that no innuendo was necessary, and that, in arrest of judgment, the jury might justly attribute a libellous sense; per Erle, J., that their well-known application in a libellous sense could be noticed).

industry, and of social life in general, is involved in the meanings of words, that no generalizations are practicable. The rulings must depend upon good sense rather than upon precedent.²

A difficult case is presented when the word in question is used in more than one notorious meaning, particularly when it has by custom come to be applied artificially or evasively to objects not strictly entitled to it. Common instances of this sort are the names of intoxicating liquors. The true solution here is rather to be found in the theory of presumptions (*ante*, § 2490); first, because judicial notice becomes inappropriate as soon as a fact is in any manner practically dubitable, and, next, because the fact really sought in many such instances is the meaning or use in a concrete instance which could not be notorious. Of various possible meanings, one may be presumed to apply. There is naturally some variance of ruling. Apart from particular local circumstances, it would seem to be proper to hold that "whiskey" or "gin" may be assumed to signify an intoxicating liquor,³ and that a liquor termed "brandy" is intoxicating,⁴ and even that "wine,"⁵ or malt or hop liquors,⁶ are intoxicating. But "beer" is a term applied to so many non-intoxicating drinks that evidence of its qualities in a given instance may well be required.⁷

² The following are examples: 1809, *Clementi v. Golding*, 2 Camp. 25 (it was held that "book" in a copyright act might apply to a single printed sheet); 1861, *Moseley's Adm'r v. Mastin*, 37 Ala. 216, 221 (that "adm'r" signified "administrator," noticed); 1893, *Edwards v. Publishing Soc.*, 99 Cal. 431, 435, 34 Pac. 128 (that "sack," in discussing electoral corruption, means a corruption-fund, noticed); 1895, *Sinnot v. Colombet*, 107 id. 187, 40 Pac. 329 (meaning of "kindergarten" in a resolution of a school-board); 1898, *Hines v. Miller*, 122 id. 517, 55 Pac. 401 (meaning of "shafts" "tunnels," etc., noticed); 1867, *Hill v. Bacon*, 43 Ill. 477 (that the S. E. forty of a quarter-section signified one of four forties, noticed); 1877, *Hart v. State*, 55 Ind. 599, 601 (that "bills" testified to were bank-bills, not presumed; on the theory that the Court would notice the existence of other kinds of "bills"); 1827, *Jones v. Overstreet*, 4 T. B. Monr. 547 ("money," noticed); 1838, *Com. v. Kneeland*, 20 Pick. 206, 239 (the meaning of "blasphemy," examined); 1879, *State v. Johnson*, 26 Minn. 316, 3 N. W. 982 (the orthography or pronunciation of Polish names, not noticed); 1902, *Martin v. Eagle Creek D. Co.*, 41 Or. 448, 69 Pac. 216 (technical meanings are not noticed); 1849, *U. S. v. Burns*, 5 McLean C. C. 23 ("fifty-cent pieces," etc., noticed).

The rules about *expert opinion* of the meaning of words (*ante*, § 1955) and about the use of dictionaries in evidence (*ante*, § 1699) serve to dispose of many of these questions.

³ 1877, *Schlicht v. State*, 56 Ind. 173, 176 (whiskey); 1854, *Com. v. Peckham*, 2 Gray 514 (gin); 1901, *Peterson v. State*, 63 Nebr. 251, 88 N. W. 549 (whiskey).

⁴ 1893, *State v. Tisdale*, 54 Minn. 105, 55 N. W. 903 (that California brandy is intoxicat-

ing, noticed); 1893, *Thomas v. Com.*, 90 Va. 92, 94, 17 S. E. 788 (that apple-brandy is intoxicating, noticed).

⁵ 1901, *Caldwell v. State*, 43 Fla. 545, 30 So. 814 (that wine is intoxicating, noticed); 1897, *Starace v. Rossi*, 69 Vt. 303, 37 Atl. 1109 (Italian "sour wine," noticed as intoxicating). Otherwise, where the description implies different ingredients: 1898, *Loid v. State*, 104 Ga. 726, 30 S. E. 949 (that home-made blackberry wine is intoxicating, not noticed).

⁶ *Contra*: 1877, *Shaw v. State*, 56 Ind. 188 (malt liquors); 1894, *People v. Rice*, 103 Mich. 350, 61 N. W. 540 ("hop pop").

⁷ Differing views have been judicially expressed, but usually declining notice: 1876, *Adler v. State*, 55 Ala. 16, 23 (that lager beer is a malt liquor, noticed); 1892, *Bell v. State*, 91 Ga. 227, 231, 18 S. E. 288 (that rice-beer is intoxicating, not noticed); 1902, *Du Vall v. Augusta*, 115 id. 813, 42 S. E. 265 (that beer is intoxicating, not noticed); 1886, *Hansberg v. People*, 120 Ill. 21, 23, 8 N. E. 857 (similar); 1883, *Kerkow v. Bauer*, 15 Nebr. 150, 155, 18 N. W. 27 (that beer is intoxicating, not noticed; except so far as defined by statute); 1901, *Peterson v. State*, 63 id. 251, 88 N. W. 549 (that whiskey and beer are intoxicating, noticed); 1889, *Blatz v. Rohrbach*, 116 N. Y. 450, 22 N. E. 1049 (that beer is intoxicating, not noticed; Bradley, J., diss.); 1877, *State v. Goyette*, 11 R. I. 592 (that lager bier is a malt liquor, noticed); 1881, *State v. Beswick*, 13 id. 211, 220 (that beer is intoxicating, not noticed); 1894, *State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 45, 58 N. W. 1 (that beer is a malt or intoxicating liquor, not noticed; because there are many sorts); 1894, *State v. Church*, 6 id. 89, 60 N. W. 143 (that lager beer is intoxicating, noticed).

TITLE II: JUDICIAL ADMISSIONS.

CHAPTER XC.

§ 2588. Theory of Judicial Admissions.
 § 2589. Distinction between Judicial Admissions, Pleadings, Demurrers to Evidence, and Estoppels.
 § 2590. Effect of Judicial Admissions: (1) Conclusive upon the Party making.
 § 2591. Same: (2) Exclusive of Evidence by the Party benefiting.
 § 2592. Same: (3) Validity as a Waiver of Unconstitutionality or other Illegality.

§ 2593. Same: (4) Effect on Subsequent Trials.
 § 2594. Form of the Admission; Who is authorized.
 § 2595. Avoiding a Continuance by Judicial Admission; Testimony of an Absent Witness of the Opponent.
 § 2596. Admissions of the Genuineness of a Document.

§ 2588. **Theory of Judicial Admissions.** An express waiver, made in court or preparatory to trial, by the party or his attorney, conceding for the purposes of the trial the truth of some alleged fact, has the effect of a confessory pleading, in that the fact is thereafter to be taken for granted; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn — *i. e.* ceremonial or formal — or judicial admission, and is, in truth, a substitute for evidence, in that it does away with the need for evidence.¹

This judicial admission is sharply marked off from the ordinary or quasi-admission, — which indeed does not deserve to bear the same name. The latter is merely an item of evidence, available against the party on the same theory on which a self-contradiction is available against a witness. The distinctions between the two have already been examined (*ante*, §§ 1048, 1057). It is enough to note that, as to the effect, the latter is not conclusive; while as to its form, it may be either implied or express, and need not be either written or made in open court.

§ 2589. **Distinction between Judicial Admissions, Pleadings, Demurrers to Evidence, and Estoppels.** The effect which a judicial admission produces is of course an effect shared in common with certain other legal acts. In the first place, a *pleading* may by confessing a fact place it beyond the range

¹ *Ante* 1726, Gilbert, Evidence, 103 ("The consent of the parties concerned must be sufficient and concluding evidence of the truth of such fact, for they [the jury] are only to try the truth of such facts wherein the parties differ"); 1896, Prestwood v. Watson, 111 Ala. 604, 20 So. 600 (Brickell, C. J.: "Agreements of this character, intelligently and deliberately made, — whether made by the parties in person, or by their attorneys or solicitors of record, — are encouraged and favored. Their purpose, generally, is to save costs, and to expedite trials, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or, as in the present case, the admission

of uncontroverted facts, of the existence of which the parties are fully cognizant"); 1855, Com. v. Desmond, 5 Gray 80, 82 (Thomas, J., referring to the prosecuting attorney's admission on trial that a witness was an accomplice: "Admissions made in the course of judicial proceedings are substitutes for, and dispense with, the actual proof of facts"). In Louisiana the Continental law has left its mark: La. Rev. Civ. C. 1888, § 2291 ("Judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding. It amounts to full proof against him who has made it. It cannot be divided against him. It cannot be revoked," unless made through error of fact, but not for error in law).

either of needing evidence or of permitting dispute; and an omission to plead in denial may have the same consequence. The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun, and may thus counteract or diminish the effect of a pleading; that it is not a part of the required statements defining the parties' issues; and that it is therefore not subject to the rules of time, form, amendment, and the like, which govern the allegations of pleading.

Furthermore, a *demurrer to evidence*, the object of which is to raise a question of law, will like other demurrers have the effect of admitting the facts conclusively (*ante*, § 2495). It has the further common feature, frequent in a judicial admission, that it is made after issues formed and trial begun; but nevertheless it is in this respect, like a motion to arrest judgment, merely a postponed pleading.

Finally, an *estoppel* has the similar effect of concluding all dispute of the fact. But here the distinction is that the estoppel is an obligation made by a rule of substantive law, of the same general class as contracts and representations;¹ that it requires some additional act of detriment on the part of the obligee; and that it is absolute as regards the permanent legal relations of the parties, and not merely hypothetical or relative to the procedure of a particular litigation between them.

§ 2590. **Effect of Judicial Admissions; (1) Conclusive upon the Party making.** The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it, *i. e.* the prohibition of any further dispute of the fact by him, and of any use of evidence to disprove or contradict it.¹ In view, however, of the commendable purpose which leads (or ought to lead) to the voluntary making of admissions, it is always

¹ Harriman on Contracts, 2d ed., § 618.

¹ Cases cited *ante*, § 2588, and the following: 1896, *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600 (Brickell, C. J.: "Such agreements are sometimes made to avoid continuances, or for some specific purpose, and, by their terms, are limited to the particular occasion or purpose, and, of course, lose all force when the occasion has passed, or the purpose has been accomplished. But if by their terms they are not limited, and are unqualified admissions of facts, the limitation is not implied, and they are receivable on any subsequent trial between the parties. And when made in open court, and reduced to writing, intended to be used, and used, as an instrument of evidence, and is without limitation as to time or occasion, it cannot be withdrawn or retracted at the mere will of either party. The presence of witnesses to prove the facts stated is waived. If the witnesses had been produced and testified, and they died, or became insane, or removed without the jurisdiction of the court, on a subsequent trial evidence of their testimony would be admissible. The admission of the facts dispensing with evidence, if it could be disregarded by either party on any subsequent trial, in the event of inability

to produce witnesses to establish them, would often convert such admissions into instruments of fraud and injury. When they are made deliberately and intelligently, in the presence of the Court, and reduced to writing, they are of the best species of evidence; and parties cannot be permitted to retract them, as they are not permitted at pleasure to retract admissions of fact made in any form. If they are made improvidently and by mistake, and the improvidence and mistake be clearly shown, the Court has a discretion to relieve from their consequences,—a discretion which should be exercised sparingly and cautiously"); 1868, *Paige v. Willet*, 38 N. Y. 28, 31 ("A party who formally and explicitly admits by his pleading that which establishes the plaintiff's right will not be suffered to deny its existence or to prove any state of facts inconsistent with that admission"); 1880, *Oscanyon v. Arms Co.*, 103 U. S. 261, 263 ("Any fact, bearing upon the issue involved, admitted by counsel, may be the ground of the Court's procedure equally as if established by the clearest proof"; here the counsel's opening statement of the issues was taken as sufficient for directing a verdict for the defendant).

and properly said that the trial Court may in discretion relieve from this consequence.²

§ 2591. **Same: (2) Exclusive of Evidence by the Party benefiting.** A fact that is judicially admitted needs no evidence from the party benefiting by the admission. But his evidence, if he chooses to offer it, will even be excluded;¹ first, because it is now as immaterial to the issues as though the pleadings had marked it out of the controversy (*ante*, § 2); next, because it is superfluous and merely cumbers the trial (*ante*, §§ 1863, 1904); and furthermore, because the added dramatic force which might sometimes be gained from the examination of a witness to the fact (a force, indeed, which the admission is often designed especially to obviate) is not a thing which the party can be said to be entitled to.

§ 2592. **Same: (3) Validity as a Waiver of Unconstitutionality or other Illegality.** The effect of an admission being to remove the fact from controversy, precisely as if no plea or demurrer had raised the issue, it follows that any fact whatever may be the subject of an admission, provided only that the fact does not require the Court to violate those rules of public policy which even a contract could not override or displace.¹ Consequently, the admission may relate to a fact proved by *evidence otherwise inadmissible* (by virtually waiving objection to it);² or to a fact which the Court might have

² *Prestwood v. Watson*, Ala., *supra*, note 1; *Seely v. Cole*, Oh., *post*, § 2594, note 2.

Under the Louisiana Code, quoted *ante*, § 2588, the rule may be different: 1842, *Kohn v. Marsh*, 3 Rob. La. 48, 49 (consent to an order appointing experts; opinion not clear).

¹ 1890, *Dean v. State*, 89 Ala. 46, 8 So. 38 (absent witness' testimony). *Contra: Me.*: 1897, *Dunning v. M. C. R. Co.*, 91 Me. 87, 39 Atl. 352 (*Savage, J.*: "It does not lie in the power of one party to prevent the introduction of relevant evidence by admitting in general terms the fact which such evidence tends to prove, if the presiding justice, in his discretion, deems it proper to receive it. Parties, as a general rule, are entitled to prove the essential facts,—to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight"); *Mass.*: 1849, *Com. v. Miller*, 3 Cush. 243, 250 (other forged notes, to show guilty knowledge, the knowledge being admitted); 1876, *Com. v. Costello*, 120 Mass. 358, 364, 369 (an admission in Court of the fictitious nature of a name on an appeal bond); 1896, *Stetson's Will*, — *id.* —, 44 N. E. 1085 (admission of a will's execution does not prevent the calling of the subscribing witnesses as such); 1898, *Whiteside v. Lowney*, 171 id. 431, 50 N. E. 930 (in the trial Court's discretion the evidence may be excluded).

If admitted, however, it may of course not be sufficient ground for a new trial: 1898, *Davis v. Emmons*, 32 Or. 389, 51 Pac. 652.

² 1885, *New York, L. & W. R. Co.'s Petition*, 98 N. Y. 447, 453 (stipulation as to commissioners of valuation; *Earl, J.*: "Parties by

their stipulations . . . may stipulate away statutory, and even constitutional rights; . . . all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced; and generally, all stipulations made by parties for the government of their conduct or the control of their rights, in the trial of a cause or the conduct of a litigation, are enforced by the Courts. . . . So it is not true that parties cannot enter into stipulations which in some sense will bind and control the action of the Courts").

² 1896, *Brady v. Nally*, 151 N. Y. 258, 45 N. E. 547, 549 (the argument that "in view of the conclusive nature of the presumption that the written agreement embraced the entire contract, the parol evidence, although received by consent, cannot overcome that presumption," rejected); 1903, *Thompson v. F. W. & R. G. R. Co.*, 31 Tex. Civ. App. 583, 73 S. W. 29 (hearsay admitted by stipulation); and the statutes for depositions (*ante*, §§ 1380, 1411) frequently assume this.

In *Shaw v. Roberts* (1818), 2 Stark. 445, *Abbott, C. J.*, acknowledged that an "admission of particular facts" was to be enforced; his further remark, that "it was the business of the Court to guard against the reception of improper evidence, independently of any admissions whatever, and it was the duty of the Court to reject illegal evidence, although the parties on both sides should agree to it," was ill-worded or ill-reported; what he meant was that one counsel's introduction of improper evidence was not such an acknowledgment of its propriety as disentitled him to object to further inquiries on that subject; *i. e.*, the principle of curative admissibility (*ante*, § 15).

noticed as non-existent;³ or to a rule of evidence *constitutionally sanctioned* for the benefit of the waiving party;⁴ or to some other rule constitutionally protected, in particular, to the failure to observe the requirements for *legislative proceedings in a statute's enactment*.⁵ Any other result would seem to be inconsistent with the general spirit and practice of our litigation, which judicially leaves to the parties the framing of their pleadings and issues and determines no objection not expressly raised by one of them. Moreover, unless the admission is expressly rejected at the outset by the opponent, the judicial refusal to recognize it would often permit unseemly breaches of faith by counsel who have agreed to the admission.

§ 2593. **Same: (4) Effect on Subsequent Trials.** Whether a judicial admission continues to have effect for a subsequent part of the same proceedings, including a new trial, has been the subject of some opposition of rulings, although the orthodox English practice plainly answered in the affirmative.¹

³ *Contra*: 1887, *Attorney-General v. Rice*, 64 Mich. 385, 391, 31 N. W. 203 (admission that a mere title, with no bill, was introduced cannot avail if the Court sees the fact to be contrary).

⁴ Cases cited *post*, § 2595, note 5.

⁵ 1892, *Norman v. Kentucky Board*, 93 Ky. 537, 547, 563, 20 S. W. 901 (by demurrer; *Pryor, J., diss.*). *Contra*: 1873, *Happel v. Brethauer*, 70 Ill. 166 (stipulation for trial, that a statute was not constitutionally passed); 1899, *State v. Aloe*, 152 Mo. 466, 54 S. W. 494 (similar); 1884, *Passaic Co. v. Stevenson*, 46 N. J. L. 173, 186, 193 (admission of lack of notice of a bill, as making an act unconstitutional, not received); 1895, *Carr v. Coke*, 116 N. C. 223, 239, 22 S. E. 16 (admission of fraud in enrolment, not received); 1901, *Commissioners v. De Rosset*, 129 id. 275, 40 S. E. 43 (legislative journals); 1833, *Allen v. McKean*, 1 Sumner 276, 314 (Story, J.: "The people have a deep and vested interest in maintaining all the constitutional limitations upon the exercise of legislative powers; and no private arrangements between such parties can supersede them"; treating as null the acquiescence of a board of trustees in an unconstitutional act). It would seem that in such a case the Court does not have to commit itself to a ruling of unconstitutionality; it can merely ignore the statute for the case in hand. Compare the cases on the conclusiveness of enrolled statutes (*ante*, § 1350).

Judicial admissions are of course equally effective in *criminal cases* as in *civil cases* (apart from such questions as the waiver of jury trial): 1901, *Com. v. McMurray*, 198 Pa. 51, 47 Atl. 952; the contrary has been declared: 1878, *Clayton v. State*, 4 Tex. App. 515, 519; but this is carrying tenderness for criminals too far.

¹ *England*: 1832, *Elton v. Larkins*, 1 Mo. & Rob. 196 (Tindal, C. J., reserved the point, but thought that such an admission "applies to every trial which may take place by direction of the Court"); 1835, *Doe v. Bird*, 7 C. & P. 6 (receivable on a new trial, unless there was a limitation to the particular trial); 1836, *Langley v. Oxford*, 1 M. & W. 508 (debt on a bond, with a new special plea; the prior admission as

to handwriting, received, the issue as to handwriting being not altered; "the admission is to be used on the trial of the cause, whenever the trial takes place; no matter whether it be the first or the second trial"); *Canada*: 1884, *McDonald v. Murray*, 5 Ont. 559, 575 (copy agreed to be used instead of the original, admitted on a second trial, per Wilson, C. J.); *United States*: 1896, *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600 (usable on a new trial; quoted *ante*, § 2590); 1873, *Perry v. Simpson W. M. Co.*, 40 Conn. 313 (admitted on a second trial; yet allowed to be disputed by denying their correctness); 1897, *Luther v. Clay*, 100 Ga. 236, 28 S. E. 46 (an agreed statement of facts used at a former trial; admissible, unless otherwise expressly provided; but conclusive only for the trial in hand); 1898, *King v. Shepard*, 105 id. 473, 30 S. E. 634 (usable on the second trial, but not binding); 1878, *Holley v. Young*, 68 Me. 215 (the admission binds for a new trial, unless the judge sees fit to relieve; "it would be wiser to adopt some rule by which more admissions could be obtained, than to allow parties at their own will and pleasure to withdraw the few now made"); 1860, *Central B. Co. v. Lowell*, 15 Gray 106, 128 (an agreement for the use of certain computations by an expert accountant, held to apply by intention to a second trial); 1901, *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582 (stipulation as to the manner of payments for property, effective on a second trial); 1885, *New York, L. & W. R. Co.'s Petition*, 98 N. Y. 447, 453 (stipulation as to commissioners of valuation, enforced for a new appraisal after an appeal reversing the original award); 1902, *Cutler v. Cutler*, 130 N. C. 1, 40 S. E. 689, *semble* (excluded on a second trial; but here the admission had been conditioned on another fact, which no longer existed); 1899, *Consolidated S. & W. Co. v. Burnham*, 8 Okl. 514, 58 Pac. 654 (agreed statement of facts, effective for a second trial); 1900, *Acme Mfg. Co. v. Reed*, 197 Pa. 359, 47 Atl. 205 (stipulation as to a deposition, not binding in a second action after a non-suit in the first); 1898, *Scaife v. Land Co.*, 33 C. C. A. 47, 90 Fed. 238 (admission in a bill of excep-

It is true that the pleadings of the parties continue to be binding (subject only to the usual rules for amendment); but the very distinction between pleadings and judicial admissions is that the latter are not subject to the fixed requirements of the former (*ante*, § 2589). On the other hand, a regard for fairness of practice indicates the opposite result; for after the case of the party benefiting by the admission has been exposed at the first trial, the party making the admission may discover that the proof of the fact would have been difficult or onerous, and by withdrawing the admission he may thus obtain a factitious advantage which the law hardly contemplates as the consequence of a new trial. Moreover, the ignorance which may have led to an ill-advised admission is no more a cause for revoking it at the second trial than at the first; and in any event the judge's discretion may grant relief (*ante*, § 2590) in the one instance as well as the other. It would seem, having regard to the voluntary and contractual nature of the act, that the duration of its effect, no less than its scope, depends, after all, on the intent of the parties; that this implied intent may vary with the circumstances; and that where no special circumstances indicate the contrary, the intention should be implied to extend the effect of the admission to all subsequent parts of substantially the same litigation between the same parties, including a new trial.² Such seems to be the general trend of the rulings.

§ 2594. **Form of the Admission; Who is Authorized.** (1) It is sometimes declared, in statute, court-rule, or decision, that all agreements between attorneys or counsel, including presumably judicial admissions, must be in writing, in order to obtain enforcement from the Courts;¹ and no doubt, for admissions made out of court, or at least prior to trial and out of court, the rigid policy of the law should look only at written admissions, even though professional honor could not suffer such a distinction. But that policy need not apply to admissions made in court, where the memory of the judge and the presence of other members of the bar could be trusted for verification in

tions in a former trial, received); 1800, *Pearl v. Allen*, 1 Tyl. 4 (admission of execution on a former trial, "when not attached to the record," insufficient).

Whether, though not binding, they are at least receivable as *ordinary admissions* (as laid down in some of the rulings above) depends on the general principles applicable to the use of pleadings as ordinary admissions (*ante*, §§ 1063-1067).

² Of course the admission would not bind between *other parties*: 1847, *Holman's Heirs v. Bank of Norfolk*, 12 Ala. 369, 408 (admission by stipulation of the present complainant's counsel in a prior suit over the same mortgage on a bill by other parties against the present complainant, held not binding here; "it would be a most alarming doctrine that an admission made by counsel in the progress of a cause was proof of the fact so admitted through all future time"); 1863, *Wilkins v. Stidger*, 22 Cal. 231, 238 (action for medical services to an injured person; defendant's attorney's admission of the

correctness of the plaintiff's bill, in an action by the defendant against the tortfeasor before arbitrators for the injury, excluded).

The following ruling seems unsound: 1857, *Thompson v. Thompson*, 9 Ind. 323, 333 (conclusiveness not given to those made "pending the suit," but only to those "made in court for the purposes of the trial").

¹ Cal. C. C. P. 1872, § 283 ("An attorney or counselor shall have authority to bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk or entered upon the minutes of the court, and not otherwise"); 1878, *Holley v. Young*, 68 Me. 215 ("reduced to writing or incorporated into a record of the case"); Mass. Rev. L. 1902, c. 173, § 70 ("All agreements of attorneys relative to an action or proceeding shall be in writing").

The authentication of the attorney's signature may be aided by principles already considered (*ante*, §§ 2167, 2578).

case of misunderstanding and the oral habit of the proceedings is inconsistent with such an exception.²

(2) It is of the nature of an admission, plainly, that it be by intention an act of waiver, relating to the opponent's proof of the fact, and not merely a statement of assertion or concession, made for some independent purpose;³ in particular, a statement made for the purpose of *giving testimony* is not a judicial admission.⁴

(3) Judicial admissions are usually made by the party's *attorney or counsel*. It is settled that the general authority to conduct the trial implies the authority to make such admissions.⁵

§ 2595. **Avoiding a Continuance by Judicial Admission; Testimony of an Absent Witness of the Opponent.** When a continuance, or postponement, of the trial is applied for on the ground of the present impossibility of securing the attendance of a material witness, the granting of the application, by orthodox practice, lies in the Court's discretion, *i. e.* subject to no mandatory rules, provided certain fundamental conditions exist as to materiality, diligence, and the like. Assuming, however, that they exist, and that the Court would by them be justified in ordering the continuance, the opponent may attempt to remove these grounds for granting it, by making a judicial admission either that the witness *would if present testify* as affirmed by the applicant, or that the *tenor of the desired testimony is true*. The earlier practice

² 1896, *Prestwood v. Watson*, 111 Ala. 604, 20 So. 600 (Brickell, C. J.: "That the agreement was not signed by the parties or by the counsel was not of importance. Their signatures were not necessary to impart to it validity. Private agreements between parties or their attorneys, relating to the proceedings in a pending cause,—agreements not made in the presence of the Court,—the rules of practice require, shall be in writing, and signed by the party to be bound thereby. The rule has never been supposed to have any application to agreements or admissions made in the presence of the Court. Upon such agreements or admissions, made verbally, every court is necessitated to act daily. The refusal to recognize and act upon them would delay the transaction of business, and entail upon counsel and parties much unnecessary labor. The purpose of the rule is to relieve such admissions or agreements from the infirmative considerations attaching to mere oral admissions of facts imputed to the one party or the other, and to avoid the unseemly wrangles, disputes, and contradictions which would ensue if they rested only in memory. Where the agreement or admission is made in the presence of the Court, it is without the purpose or reason, if not without the letter, of the rule"); 1834, *Seely v. Cole*, *Wright Oh.* 681 (an oral admission, made in court on the opponent's offer of a witness, not allowed to be retracted, unless by leave of Court). An admission made in the counsel's statement of the case is always treated as binding: 1895, *Lake Erie & W. R. Co. v. Rooker*, 13 Ind. App. 600, 41 N. E. 470 (the incidental statement of counsel, in opening, that he intended to prove the fact in question); 1880,

Oscanyon v. Arms Co., 103 U. S. 261, 263 (cited *ante*, § 2590). Sometimes a larger scope may be conceded: 1892, *Smith v. Whittier*, 95 Cal. 279, 287, 30 Pac. 529 (an oral stipulation, not filed or entered under C. C. P. § 283, *supra*, is nevertheless binding if it has been so acted upon that it would be inequitable to disregard it).

³ 1901, *Cramer v. Truitt*, 113 Ga. 967, 39 S. E. 459 (admission of attorney in private conversation with the judge out of Court, not sufficient).

⁴ 1900, *Owen v. Palmour*, 111 Ga. 885, 36 S. E. 969 (a party testifying at a former trial, the brief of evidence therein having been agreed to by counsel and approved by Court, is not estopped from testifying contrary thereto); 1898, *Smith v. Olsen*, 92 Tex. 181, 46 S. W. 631 (answer by way of discovery). *Contra*, but unsound, 1901, *Feary v. R. Co.*, 162 Mo. 75, 62 S. W. 452 (a statement made on the stand while testifying, held conclusive; Valliant, J., diss.).

That the "*proofs of loss*," in insurance, are judicial admissions has sometimes been argued, but not with good reason (*ante*, § 1073).

The payment of money into court was formerly a common type of judicial admission, more allied to a pleading; it is briefly noticed *ante*, § 1061, and more fully in *Greenleaf, Evidence*, § 205; statutes and rules of court often regulate it.

⁵ Cases cited *ante*, § 1063; 1859, *Rosenbaum v. State*, 33 Ala. 361; 1847, *Greenlee v. McDowell*, 4 Ired. Eq. 481, 484.

A change of attorneys does not abrogate an admission originally binding: 1892, *Smith v. Whittier*, 95 Cal. 279, 289, 30 Pac. 529.

seems for a time to have left in the Court's discretion the propriety of recognizing this as sufficient to avoid the continuance. But statutes have now come, in most jurisdictions, to prescribe a rule, declaring that one or the other kind of these admissions will *per se* avoid the continuance, and (sometimes) that, conversely, an application based on specified grounds shall be granted unless one or the other of these admissions is made.¹

For the *opponent* of such an application, *i. e.* the party making the admission, the difference between the two kinds (so far as concerns the rules of evidence) is that the first kind still leaves it open to him to impeach the credit of the absent witness, just as he could that of a deponent,² except that the rule for self-contradictions raises here a special problem;³ but the second kind obviously precludes him from any impeachment of credit, since

¹ The following list is not exhaustive; typical statutes are set out in full: *Ariz.* Rev. St. 1887, §§ 752, 753; *Ark.* Stats. 1894, § 5797; *Cal.* C. C. P. 1872, § 595, as amended by St. 1880 ("The Court may require a moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered, or overruled as improper, the trial must not be postponed"); *Colo.* C. C. P. 1891, § 177; *D. C.* Comp. St. 1894, c. 55, § 120; *Ill.* Rev. St. 1845, Rev. St. 1874, c. 110, § 43 (in asking a continuance "on account of the absence of testimony," the party's or his agent's affidavit stating the facts expected to be proved thereby, etc., must be offered); § 44 ("if the other party will admit the affidavit in evidence, the cause shall not be continued"); § 45, Laws 1867, p. 157 ("When the affidavit is concerning the evidence of a witness, the party admitting such affidavit shall be held to admit only that if the absent witness were present he would testify as alleged in the affidavit, and such admission shall have no greater force or effect than if such absent witness were present and testified as alleged in the affidavit, leaving it to the party admitting such affidavit to controvert the statements contained therein, or to impeach said witness, the same as if such witness were present and examined in open court"); c. 38, § 428 *a*, St. 1885, June 26, p. 73 (on such affidavits in a criminal case, neither party shall be "required to admit the absolute truth of the matter set up in the affidavit for continuance, but only that such absent witness, if present, would testify as alleged in the affidavit; and if it is so admitted, no continuance shall be granted, but the case shall go to trial, and the party admitting the evidence shall be permitted to controvert the statements contained in such affidavit by other evidence, or to impeach such absent witness the same as if he had testified in person; provided that the Court may in its discretion require the opposite party to admit the truth absolutely of any such affidavit when, from the nature of the case, he may be of opinion that the ends of justice require it"; the act not to apply to applications at the same term of Court

when the indictment, etc., is found); *Ind.* St. 1881, Rev. St. 1894, § 413 (civil cases; if "the adverse party will consent that on the trial the facts shall be taken as true, if the absent evidence is written or documentary, and, in case of a witness, that he will testify to said facts as true, the trial shall not be postponed for said cause; and in such case the party against whom such evidence is used shall have the right to impeach such absent witness, as in case where the witness is present or his deposition is used"); § 1850 (criminal cases; if "the prosecuting attorney will admit the truth of the facts which the defendant in his affidavit for a continuance alleges that he can prove by the absent witness, or by the written or documentary evidence therein specified and described, the trial shall not be postponed for that cause"); § 1851 ("If the defendant will admit that the facts which the prosecutor states he expects to prove are true, the trial shall not be postponed for that cause"); *Iowa* Code 1897, § 3665 (if an application for continuance is sufficient, "the cause shall be continued, unless the adverse party will admit that the witness, if present, would testify to the facts therein stated, in which event the cause shall not be continued, but the party may read as evidence of such witness the facts held by the Court to be properly stated"); *La.* St. 1894, No. 84, Wolff's Rev. L. p. 277, Code Pr. 1894, § 466; *Mo.* Rev. St. 1899, §§ 687, 3980; *Nev.* Gen. St. 1885, § 3182; *N. M.* Comp. L. 1897, §§ 2986, 2987; *Utah* Rev. St. 1898, §§ 3133, 3712; *Wyo.* Rev. St. 1887, § 3397.

Distinguish those statutes by which a continuance is granted on condition that the applicant assent to the taking and using of *depositions of witnesses now present* for the opponent; *e. g.* *Cal.* C. C. P. 1872, § 596; *Utah* Rev. St. 1898, § 3134; these merely avoid the necessity of notice and other conditions precedent ordinarily to the use of the deposition (*ante*, §§ 1378, 1415).

² 1881, *Powers v. State*, 80 Ind. 77 (the truth of an absent witness' testimony admitted by the prosecution to avoid postponement; impeachment forbidden; but not in civil cases, where merely the fact of testifying is admitted); 1878, *State v. Miller*, 67 Mo. 604, 608 (by statute); 1878, *State v. Thomas*, 68 id. 605, 615. 'The statutes frequently declare this expressly.

³ The authorities are collected *ante*, § 1034.

the facts to be testified to are judicially admitted.⁴ But he cannot be *forced* to make either kind of admission (by an order directing the trial to proceed and receiving in evidence the applicant's statement of the testimony or the facts); for this would be to deprive the opponent of his right to cross-examination.⁵ The opponent, however, even though a defendant in a criminal case, may of course waive this right, by a *voluntary* admission of the testimony or the facts.⁶

For the *applicant*, who is refused a continuance when the opponent makes one of these admissions, the difference between the two kinds is obviously a radical one. Whether the Court should require the more stringent of the admissions, *i. e.* of the facts as established, not merely of the testimony as uttered, and should, in default of it, as a rule of law grant a continuance otherwise sufficiently grounded, has been one of the controverted questions in judicial opinion.⁷ Regarded as a matter of common-law practice or of legislative policy, it seems to rest ultimately on local experience. If either rule is found, in a particular community, to work detriment to the safety of innocent accused persons in general or of the State's justice in general, it should be abandoned. Thus far the common experience has been that the requirement of an admission of facts, not merely of testimony, has served to add a powerful weapon of chicanery to the armory of unscrupulous counsel defending hardened villains.⁸ The constitutional objection, it is true, has been raised against the use of the less stringent form of admission, *i. e.* the objection that to refuse a continuance, if the prosecution admits merely that the proposed testimony would have been given, would deprive the accused of his right (*ante*, § 2191) to compulsory process for his witnesses. In spite of the sanction given by some Courts to this objection, it seems to be totally devoid of grounds.⁹ The constitutional provision for compulsory process, as the history of that right shows, was designed merely to give equally to the accused (beyond the power of legislative change) the aid of the State's subpoena. The contrast marked by that right is that, without it, the accused must depend (as at common law) solely on his own persuasion and the witness' choice, for securing his witnesses' attendance, but that, with it, the accused, like the prosecution and like civil parties, may invoke the State's compulsive power, whatever that may avail. But the constitutional provi-

⁴ *Supra*, note 2.

⁵ *Ante*, § 1384; 1882, *Wills v. State*, 73 Ala. 362 (leading case). This would be equally true in civil cases; unless a statute prescribed a contrary rule; for no constitutional clause would prevent such a statute.

⁶ 1884, *State v. Fooks*, 65 Ia. 452, 21 N. W. 773; 1875, *U. S. v. Sacramento*, 3 Mont. 239; 1903, *State v. Mortensen*, 26 Utah 312, 73 Pac. 562, and cases cited *ante*, § 1398, note 9.

⁷ 1856, *People v. Diaz*, 6 Cal. 248; 1871, *Van Meter v. People*, 60 Ill. 168; 1866, *Wassels v. State*, 26 Ind. 30; 1855, *Trulock v. State*, 1 Ia. 515, 519; 1896, *Adkins v. Com.*, 98 Ky. 539, 33 S. W. 948 (leading case); 1902, *State v. Fairfax*, 107 La. 624, 31 So. 101; 1887, *State v. Berkley*,

92 Mo. 41, 4 S. W. 24 (leading case); 1901, *Russell v. State*, 62 Nebr. 512, 87 N. W. 344; 1827; *People v. Vermilyea*, 7 Cow. 369, 388, 394, 399 (leading case); 1867, *DeWarren v. State*, 29 Tex. 464, 481.

Of course an admission of the truth of the facts would suffice: 1889, *Pace v. Com.*, 89 Ky. 204, 207, 12 S. W. 271 (leading case); 1857, *Browning v. State*, 33 Miss. 47, 71. *Contra*, but anomalous: 1838, *Goodman v. State*, Meigs 195.

⁸ The opinion of Grace, J., in *Adkins v. Com.*, *supra*, forcefully shows this for Kentucky. In Illinois and Indiana the same stages of experience have developed.

⁹ The opinion of Grace, J., in *Adkins v. Com.*, Ky., *supra*, best expounds this.

sion does not have anything to say about the time of holding trial; which is the only question here involved. Much less does it pledge absolutely to the accused the presence of all desired persons, or any other superhuman feat. The Constitution cannot raise witnesses from the dead, nor spirit them from beds of illness or kennels of concealment. To interpret the Constitution into any such pledge is to invent (as experience has shown) a guarantee that no determined offender shall be tried for his crime until he himself pleases. Whether the one or the other kind of admission should be required may depend on the circumstances of each community and each case; but it is impossible to regard the constitutional clause as being in any way involved.

§ 2596. *Admissions of the Genuineness of a Document.* In probably most instances where a document is material under the pleadings, or is evidentially used, its genuineness is not doubtful. Yet the proof of that genuineness may be onerous and expensive. The opponent's admissions, judicial or extrajudicial, are receivable for the purpose (*ante*, §§ 2131, 2132), and may suffice; but it is only casually and seldom that they would be available to the party desiring to make the proof; and for lack of them at common law, the usual evidence must be resorted to, however needless. It would therefore be the part of common sense to recognize the needs of the situation by some expedient for facilitating the proof. The appropriate remedy seems naturally to lie in securing some sort of judicial admission, by rule of pleading or otherwise, where the circumstances justify it. It was Bentham (as usual, one might say) who seems first to have proposed this measure.¹ Almost immediately his proposal bore fruit in one of the Hilary Rules of 1834. By this Rule the opponent was made to take the risks of paying the costs of proof, if after having a prior opportunity to satisfy himself he declined to admit judicially in writing the document's genuineness.² This rule was preserved in later English legislation,³ and furnished one of the two chief types for statutes in the United States.

The other common expedient, now in vogue in perhaps the majority of jurisdictions of the United States, takes the form of a rule of pleading,⁴ by

¹ 1827, Bentham, *Rationale of Judicial Evidence*, b. VII, c. V. (Bowring's ed., vol. VII, pp. 185-188).

² Rules of Practice, Hilary Term, 4 Wm. IV (set out in 10 Bing. 456), No. 20 ("Either party, after plea pleaded, and a reasonable time before trial, may give notice of his intention to adduce in evidence certain written or printed documents; and unless the adverse party shall consent, by indorsement on such notice, within forty-eight hours, to make the admission specified," the offering party may move that the opponent show cause, and "the judge shall, if he think the application reasonable, make an order that the costs of proving any document specified in the notice, which shall be proved at the trial to the satisfaction of the judge or presiding officer, shall be paid by the party so required, whatever may be the result of the cause"; provided that the judge "may give time for inquiry or examination of the documents intended to be

offered in evidence, and give such directions for inspection and examination, and impose such terms upon the party requiring the admission, as he shall think fit"; and no costs of proving a document shall be allowed "to any party who shall have adduced the same in evidence on any trial, unless he shall have given such notice as aforesaid, and the adverse party shall have neglected or refused to make such admission" or the judge have indorsed the application as not reasonable to be granted); 1841, *Rutler v. Chapman*, 8 M. & W. 388 (Rule 20 held to apply to any document, and not merely one in the possession or power of the party seeking to offer it).

³ 1853, Report of the Commission on Common Law Procedure, I, 44; 1852, St. 15 & 16 Vict. c. 76, §§ 117-119; 1854, St. 17 & 18 Vict. c. 125, § 25; 1883, Rules of Court, Order 32, rule 2.

⁴ It is sometimes miscalled a rule of evi-

requiring a special denial on oath (either in the formal plea or in a separate affidavit) of the genuineness of the document; in default of this denial, the genuineness cannot be put in issue. This form is adapted especially to documents named in the pleadings as a foundation of the claim or defence; the other is applicable to any document whatever. In a few jurisdictions, both measures have been separately recognized; in others, the statute combines features of both.⁵

There are also occasional other expedients for applying the principles of pleading or of judicial admissions to facilitate the proof of documents, but they are of only local vogue or narrow scope.⁶ There is still room for

denial; *e. g.*, 1867, *Joynes, J.*, in *James R. & K. Co. v. Littlejohn*, 18 Gratt. 53, 76.

⁵ The following list is not exhaustive; typical statutes are set out in full: *Ala.* Code 1897, § 1801; *Ariz.* Rev. St. 1887, § 1877; *Ark.* Stats. 1894, § 2929; *Cal.* C. C. P. 1872, § 447, as amended by St. 1874 ("When an action is brought upon a written instrument, and the complaint contains a copy of such instrument, or a copy is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the answer denying the same be verified"); § 448 ("When the defense to an action is founded on a written instrument, and a copy thereof is contained in the answer, or is annexed thereto, the genuineness and due execution of such instrument are deemed admitted, unless the plaintiff file with the clerk, within ten days after receiving a copy of the answer, an affidavit denying the same, and serve a copy thereof on the defendant"); § 449, as amended by St. 1880 ("But the execution of the instrument mentioned in the two preceding sections is not deemed admitted by a failure to deny the same under oath, if the party desiring to controvert the same is upon demand refused an inspection of the original. Such demand must be in writing, served by copy upon the adverse party or his attorney, and filed with the papers in the case"); *Colo.* C. C. P. 1891, § 62; *Fla.* Rev. St. 1892, § 1073; *Ill.* Rev. St. 1874, c. 110, § 34, Rev. St. 1845, p. 415, § 14 ("No person shall be permitted to deny, on trial, the execution or assignment of any instrument in writing, whether sealed or not, upon which any action may have been brought, or which shall be pleaded or set up by way of defense or set-off, or is admissible under the pleadings when a copy is filed, unless the person so denying the same shall, if defendant, verify his plea by affidavit, and if plaintiff shall file his affidavit denying the execution or assignment of such instrument; provided, if the party making such denial be not the party alleged to have executed or assigned such instrument, the denial may be made on the information and belief of such party"); *Ind.* Rev. St. 1897, § 491; *Kan.* Gen. St. 1897, c. 95, § 379; *La.* C. P. 1894, § 324; *Mass.* Pub. St. 1882, c. 167, § 21, Rev. L. 1902, c. 173, § 86 ("Signatures to written instruments declared on or set forth as a cause of action, or as a ground of defence or set-off, shall be taken as admitted, unless the party sought to be charged thereby files in Court, within the time allowed for an answer, a special

denial of the genuineness thereof, and a demand that they shall be proved at the trial"); *Miss.* Annot. Code 1892, §§ 1797-1800; *Mo.* Rev. St. 1899, § 742 (for any material paper); §§ 746, 6762 (for an instrument on which pleading is founded); *Nebr.* Comp. St. 1899, § 5967; *Nev.* Gen. St. 1885, § 3557; *N. M.* Comp. L. 1897, § 2685, sub-sec. 123, §§ 2977, 2984; *N. Y.* C. C. P. 1877, § 735 ("The attorney for a party may, at any time before the trial, exhibit to the attorney for the adverse party a paper material to the action, and request a written admission of its genuineness. If the admission is not given, within four days after the request, and the paper is proved or admitted on the trial, the expenses, incurred by the party exhibiting it, in order to prove its genuineness, must be ascertained at the trial and paid by the party refusing the admission; unless it appears, to the satisfaction of the Court, that there was a good reason for the refusal"); *N. D.* Rev. C. 1895, § 5643; *Okl.* Stats. 1893, § 4257; *S. D.* Stats. 1899, § 6481; *Tex.* Rev. Civ. Stats. 1895, § 2318; *Utah* Rev. St. 1898, § 3473; *Wash. C. & Stats.* 1897, § 6048; *Wis.* Stats. 1898, §§ 4184, 4192; *Wyo.* Rev. St. 1887, § 2636.

⁶ In *Minnesota*, a statute which in literal reading declares a genuine presumption of authentication (*ante*, §§ 2130, 2132) has been judicially construed apparently into one of the above sort: *Minn.* Gen. St. 1894, § 5751 ("Every written instrument purporting to have been signed or executed by any person shall be proof that it was so signed or executed, until the person by whom it purports to have been signed or executed shall deny the signature or execution of the same by his oath or affidavit"; except where the purporting person "shall have died previous to the requirement of such proof"); 1860, *Pennsylvania Ins. Co. v. Murphy*, 5 Minn. 36, 40 (statute applied to articles of partnership); 1862, *Turrell v. Morgan*, 7 id. 368, 372 (held not to apply to unsigned indorsements on a note); 1878, *Brayley v. Kelly*, 25 id. 160 (printed notice in plaintiff's name; genuineness not presumed); 1883, *Mast v. Matthews*, 30 id. 441, 16 N. W. 155 (the statute applies only in actions against the maker of the instrument or to defences or counterclaims against him); 1897, *Moore v. Holmes*, 68 id. 108, 70 N. W. 872 (distinguishing this rule from that which requires a specific traverse of execution in order to put execution in issue; *Canty, J.*, diss., on the ground that the signature purported to be by an

improvement and expansion. Here, as everywhere, the time has hardly come when the law can afford to consider as closed that great period of rational advance which owed its first marked impulse to the caustic preaching of Bentham.

agent, and that the authority of an agent could not be presumed); 1898, *Fitzgerald v. English*, 73 id. 266, 76 N. W. 22 (does not apply where the alleged signer is dead or is not a party).

In *Georgia* and in *Texas* a statute forbids the use of *deed-copies from the registry* if an affidavit denying the original's genuineness is made; but this is construed as still permitting a forgery to

be shown, even though the sworn denial is omitted (*ante*, § 1651).

In several jurisdictions there are statutes exempting from proof of deeds prior to a *common source of title*, unless the opponent makes a sworn denial; e. g., 1884, *Thatcher v. Olmstead*, 110 Ill. 26; compare *ante*, § 2132, note 6.

THE END.

TABLE OF STATUTES CITED

TABLE OF STATUTES CITED

[The full descriptive title of the editions of codes and compilations consulted will be found in the List of Statutory Compilations prefixed to each Volume. In the following list, the citations made in the foregoing pages from earlier codes or compilations are not represented, where they are duplicated by corresponding sections in the later editions here cited; except in a few instances, where they have historical or practical importance. All single enactments not embraced in the regular numbering of a code or compilation are here placed under the common heading of Session Laws; a session law amending a specific code-section, and printed in the later code-edition here referred to, is usually not represented in the list of Session Laws. A list of latest session laws consulted will be found prefixed to each Volume.]

ENGLAND.			Section	Section	
Statutes at Large.					
Const. of Clarendon, c. 6	Section 2250	3 Car. I, c. 4	1518	54 Geo. III, c. 144	2454
13 Edw. I, Westm. Second, c. 31	20	13 " c. 2	2032	c. 170	488
9 Edw. II, c. 10	2394	c. 12	2250	1 & 2 Geo. IV, c. 24	2036
2 H. IV, c. 15	2250	c. 4	1518	2 " c. 78	2451
4 " c. 3	2250	c. 10	2250	4 " c. 52	1650
5 " c. 8	575	c. 11	2250	6 " c. 76	1644
2 H. V, c. 7	2250	12 Car. II, c. 32	575	7 " c. 50	1163
5 Rich. II, 2d sess., c. 5	2250	13 " c. 1	2036	9 " c. 64	848, 1326,
3 H. VII, c. 1	2250	c. 12	2250, 2268	c. 14	1374, 1375
25 H. VIII, c. 14	2250	13 & 14 " c. 23	1364	c. 54	1466
c. 19	2067, 2250	29 " c. 3, § 1	2454	1 Wm. IV, c. 22	848
27 " c. 4	2032	§ 3	2454	c. 1	1374, 1380,
c. 16	1650, 2426,	§ 4	2454	2 " c. 42	1411
	2454	§ 5	2049, 2454	3 & 4 " c. 49	1650
28 " c. 15	2032	§ 7	2454	c. 82	488, 576
32 " c. 1, § 1	2426, 2454,	§ 19	2050, 2454	c. 86	1828
	2462	§ 20	2050, 2454	c. 111	1828
35 " c. 16	2067	§ 19	2032	4 & 5 " c. 76	2061
1 Ed. VI, c. 12, § 22	818, 1364,	2d sess., c. 2	2250	6 & 7 " c. 76	2150, 2529
5 & 6 " c. 11	2036, 2250	3 & 4 " c. 11	2032	c. 86	1644
	818, 1364,	6 & 7 " c. 61	1644	c. 111	196
	2036	7 W. III, c. 3	575, 818,	c. 114	575, 579,
1 & 2 P. & M. c. 6	2250		1364, 2036,	Rules of Practice, Hil-	865, 1262,
c. 8	2250		2038, 2190	ary Term, 4 Wm. IV,	1364, 1850
c. 10	818, 1364,	c. 7	2036	No. 20	2596
	2036	8 & 9 " c. 26	2036	1 & 2 Vict. c. 77	1828
c. 11	2036	1 Anne, c. 9	575, 1825,	c. 94	1680, 1681
c. 13	848, 1326,	2 & 3 " c. 4	2190	c. 105	1828
2 & 3 " c. 10	1374, 2250	3 & 4 " c. 9	1650	c. 26	488
	848, 1326,	4 " c. 16	2451	c. 92	1644
1 Eliz. c. 1	1374, 2250	5 & 6 " c. 18	1163	5 & 6 " c. 39	2281
	1364, 2032,	6 " c. 35	1650	c. 51	2036
	2036, 2067,	7 " c. 20	1650	6 & 7 " c. 22	6, 1828
c. 20	2250	c. 21	1847, 1851	c. 85	488, 986
5 " c. 9	2032	10 " c. 18	1224, 1650	7 & 8 " c. 101	2061
	1364, 2190,	3 Geo. II, c. 25	1163	8 & 9 " c. 16	1074
13 " c. 14	2201	8 " c. 6	1650	c. 113, § 1	2162
c. 1	1650	26 " c. 33	1644	§ 2	2162
c. 7	2036	21 Geo. III, c. 53	1644	§ 3	1684
31 " c. 4	2250	26 " c. 57	1312	9 & 10 " c. 95	488, 577,
35 " c. 2	575	32 " c. 60	2557		602
42 " c. 6	2250	38 " c. 78	2150	11 & 12 " c. 12	2036
4 Jac. I, c. 1	2250	40 " c. 93	2036	c. 42	1374, 1375,
7 " c. 12	575	43 " c. 58	2066	c. 42, § 17	1406
21 " c. 19	1518	44 " c. 77	1644		1326, 1413,
c. 27	2227	46 " c. 37	2223, 2252,	§ 18	848, 1326,
3 Car. I, c. 1	2066	48 " c. 127	2254		1667
	2250		1644	§ 19	1667
				§ 27	1835
					1850

TABLE OF STATUTES.

ENGLAND (<i>continued</i>).		Section	32 & 33 Vict. c. 68	Section	c. 32, § 156	Section
12 & 13 Vict. c. 69,	18	848		488, 577,	c. 50, § 111	1674, 1680
14 & 15 " c. 93,	14	848	§ 2	2252	c. 51, § 38 ff.	1684
c. 99,	1	488, 577		488,	c. 69, § 32	1225
	2	488, 602,	§ 3	2061	c. 73, § 21	1674
		2218		488,	c. 74, § 112	1680
	§ 3	488, 602,		602, 2252	c. 93	1641
		2252		1828	c. 106, § 92	2286
	4	488	c. 73, § 23	2287	c. 107, § 11	2281
	6	1859, 2219	33 & 34 " c. 97	2184	c. 113, § 28-33	488
	7	1680, 1681,	34 & 35 " c. 112, § 19	326	c. 118, § 14	196
		2162	35 & 36 " c. 33, § 12	2215	c. 119, § 47	1674
	11	6, 2162	c. 65, § 4	2061	c. 123, § 1	1680
	13	1270	36 & 37 " c. 66, Rules of		c. 134, § 3	1683
	14	1680,	Procedure, No. 36	1380	c. 135, § 94	1074
		1681	38 & 39 Vict. c. 77, § 17	1380	c. 136, § 96	1074
		2281	40 & 41 " c. 14	488	c. 137, § 99	1683
15 & 16 " c. 57,	8	1177,	41 & 42 " c. 13, § 1	2451	c. 138, § 102	2286
c. 76,	55	1859	42 & 43 " c. 11, § 3	1223, 1519	c. 139, § 103	2162
		1859		1519	c. 140, § 104	1411
	§ 56	1163	45 & 46 " c. 9, § 2	1223	c. 141, § 105	1380
	§ 117-119	2596	46 & 47 " c. 52, § 17	1684	c. 142, § 106	1411
	c. 83, § 42	1862	48 & 49 " c. 69	2281	c. 143, § 107	1411
	c. 86	1377		1406, 1828	c. 144, § 108	2281
16 & 17 " c. 83,	§ 1-3	488	§ 2, 3	2044,	c. 145, § 109	2066
	4	602	§ 4	2061	c. 146, § 110	2066
17 & 18 " c. 104,	§ 107	1647		488, 1828,		
	§ 280, 285	1641		2061, 2066		
	§ 526	1290	51 & 52 " c. 46, § 1, 3, 5	1828		
	c. 125	1856	52 & 53 " c. 44, § 8	488, 1828,		
	§ 22	900, 905		2061		
	23	1028	53 & 54 " c. 71, § 27	2281		
	24	1256,	54 & 55 " c. 39, § 14	2184		
		1263	56 & 57 " c. 23, § 3	1672		
	§ 25	1270,	57 & 58 " c. 16, § 3	16		
		2596	57 & 58 " c. 60, § 239	1641		
	§ 26	1290	60 & 61 " c. 37, first	683		
	27	1998,	schedule, § 3	2220		
		2016	c. 65	1650		
	§ 47, 48, 50	1859	61 & 62 " c. 36	488, 602,		
	§ 58	1161,		865, 986,		
		1163,		2252, 2276		
		1862				
	§ 103	986				
	104	2016				
19 & 20 " c. 113		6	Ord. XXII, R. 22	1061		
21 " c. 25		1644	Ord. XXX, R. 7	1519		
22 " c. 20		6	Ord. XXXI	1856		
22 & 23 " c. 61		488	R. 12, 14, 15	1859		
c. 63		6, 564,	R. 24	2124		
		1674	Ord. XXXII, R. 2	2596		
24 & 25 " c. 11		6, 564,	Ord. XXXIII, R. 7	1519		
		1674	Ord. XXXVI, R. 37	1411		
		1828	R. 38	986		
		2281	Ord. XXXVII	1380		
25 & 26 " c. 96		1074	R. 4	1411		
26 & 27 " c. 89		2281	R. 5	1383		
28 & 29 " c. 18,	1	1270, 2016	R. 9	2203		
	3	905	R. 18	1411		
	5	1263	R. 20	1380		
	6	986	Ord. XXXVIII	1380		
	8	2061	Ord. XXXIX, R. 6	21		
	2, 3	6	Ord. L, R. 3	445, 1163,		
	6	6, 1680,		1862, 2220		
		1684	R. 4, 5	1163, 2220		
		2257	Ord. LVI	2484		
30 & 31 " c. 104, § 34		1411	Ord. LXV, R. 27	2203		
	c. 35, § 61	1375,	Rules of Nov. 1893, R. 9	1061		
		1880	R. 12	1856		
British North America Act 1867,	§ 18	6				
	§ 56, 91, 92, 94	6				
	§ 143	1680				
31 & 32 Vict. c. 37	§ 2	1680, 1684				
	c. 110, § 20	2287	c. 9, § 39	2281		
	c. 119, § 26	2220	c. 10, § 9	2281		
			c. 11, §§ 5-8	2375		

CANADA.

DOMINION.

Revised Statutes 1886.

Criminal Code 1892.

Evidence Act (St. 1893, c. 31).

ENGLAND — CANADA.

	Section		Section		Section
§ 13	1680	c. 71, § 44	1290	c. 57, § 6	488
14	1680		2016	7	2573
15	2167	c. 73, § 31	1681	8	1680, 1684
16	1684	c. 111, § 48	1225, 1651	9	1680, 1684
17	1639, 1680		1676	10	1680, 1684
18	1225, 1651	c. 123, § 14	1466	11	1680
19	1639, 1680, 1859	c. 129, § 21	1644, 1680	12	1681
		c. 161, § 26	1681	13	1680, 1684
21	6			14	1223, 1680, 1683
23	1828			15	1680
24	1828			16	1639, 1680
25	488, 1828, 2066			17	1225, 1651
		<i>Session Laws.</i>		18	1680
		1899, c. 39, § 73	1680	19	1680
			2167	20	1684
		c. 62, § 22	2371	21	1639, 1651, 1680, 1681, 1683, 1859
			2162		1681
			2162		1681
			2211		1681, 1828
		1900, c. 9, § 2	1225, 1651		1223, 1859
			2281		1223, 1859
			488, 2061		1675
			488, 2065		1271, 1684, 1703
			2065		1828
			2065		1823
			2167		488, 2066
		c. 18, § 82	1828, 2066		2162
		1901, c. 9, § 35	1225, 1651		1710
		1902, c. 22, § 2	1828		488
			1519, 1710		2162
			986, 1890		1710
					488
					1680
					1680
					2206
					1684
					2281
					1680
					1680
					2167
					196
					1680
					1674
					1684
					1680
					1674
					1680
					1684
					488
					1680
					1680
					1681
					1674, 1680, 1684
					1674, 1683
					1680
					1680
					1674
					1680
					1680
					1684
					1680
					1683
					1683
					1684
					1680
					1683
					1683
					1680
					1684
					2371
					2211
					2211
					2162
					2162
					1225, 1651

TABLE OF STATUTES.

CANADA (continued).		Section	Section	Section
c. 150 (Registry)	50	1878, c. 27, 2	488	986, 1270
	51	c. 41, 1	488	1290
	75	1225, 1651	1651	2016
	76	1881, c. 14, 1	1651	1225, 1651
c. 168, 10	1680, 1684, 2167	1859, 2154	95, 1236	2065
	1674	2463	c. 72, 10	2065
c. 172, 27	1644, 1680	1680, 1684	c. 80, 23	1681
c. 173, 31	1644, 1680	1680, 1684	c. 85, 5	1466
	35	1680	c. 96, 20	1680
c. 246	1882, c. 27	1651, 1859	c. 108, 11	1680
	1887, c. 5, § 18	1644, 1680	c. 110, 24	1680
	1888, c. 8	1225, 1651	c. 133, 9	1644, 1680
	1889, c. 9	1681		
Session Laws.	c. 11, 6	1680	Session Laws.	
1903, c. 6, § 6	150	1681	1897, c. 15, § 49	1160
c. 41, § 12	1684	1684	c. 21	1223, 1519, 1683
		1680, 1859	1901, c. 10, § 2	1828
NEW BRUNSWICK.	1894, c. 8, § 47	21		
	c. 11	1680		
Consolidated Statutes 1877.	c. 20, 31	1681	NORTHWEST TERRITORIES.	
		1681	Consolidated Ordinances 1898.	
c. 36, § 4	2162	1225, 1651, 1859	c. 9, § 23	1680
	2162	1676	c. 14, § 20	1644, 1680
c. 37, 131	1062	1651, 1676	c. 21, R. 191-200	1859, 2219
	1859, 2219	1225, 1651, 1859	201-225	2218
	1859, 2219	1859	207	1859, 2219
	1380, 1387	1225, 1859	208	1859, 2219
	186	1681	221-225	1856
	188	1225	224	2124
	194	1519	260	986
c. 45, 22	1411	1680	263	1380, 1411,
c. 46, 1	1163	1644, 1680		1710
	2223	1225, 1651	267	1411
	488, 2218, 2252	488	271	1380
	488	2281	272	1380
	488	488	280	1411
	1273, 1680	1310, 1320	286	1710
	2109	1644, 1680	293	1710
	1225, 1651	488, 2252	490	1674
	1680, 1681		c. 23, 25	1680
	2162		c. 43, 30	1225, 1651
	1647, 1680		c. 44, 9	1225, 1651
	1680, 2110, 2167		c. 70, 100	1680
	1828		c. 76, 6	150
	900, 905, 907		c. 89, 105	1680
	1028, 2167			196
	1283		Session Laws.	
	986, 1270		1900, c. 22, § 5	150
	1290, 1301		1901, c. 10, 1	488
	2016		1902, c. 5, 1	2124
	1387		1903, c. 8, 1	1669
	1413, 1666			1669
	1684			
c. 49, 40	1859, 2219			
	1710			
	1710			
	1380			
	1411			
	1674			
	1519			
c. 53, 30	1380, 1411			
c. 71, 11	1644			
c. 97, 24	1680			
c. 99, 86	1680			
	1674			
	1680			
c. 115, 14	1680			
c. 120, 3	1684			
Session Laws.				
1859, c. 22, § 4	1675			
1878, c. 27, § 1	488			

CANADA.

	Section		Section		Section
c. 100, § 164	488	Ord. 50, R. 3	1163	c. 73, § 54	1290
c. 128, 47	1074		1163	c. 73, § 55	2016
	1683		1163	c. 90, 10	1375, 1411
c. 158, 18	1310	Ord. 59, R. 2	2162	c. 134, § 2	1225, 1573, 1651, 1662, 2105, 2143
c. 159, 41	1880, 1411	Crown Rules 5	1710		
c. 163, 3	1684				
	1680, 1684			c. 138, § 100	1651
	1680, 1684	<i>Session Laws.</i>		c. 146, 4	1466
	1680, 1684	St. 1866, c. 13, § 11	488	c. 148, 24	1225, 1651
	2167	St. 1902, c. 81	2281	c. 191, 66	1223, 1683
	2167				1074
	1680			c. 207, 40	1223, 1683
	1684	ONTARIO.		c. 223, 200	2211
1223, 1680,		<i>Revised Statutes 1897.</i>			2281
1683					1680
	1674	c. 9, 158	2215		1680
	1639, 1680		2281		1680
	1680	c. 11, 26	1411	c. 245, 101	196
	1647, 1681,		2281		1680
	2110	c. 12, 63	1684		1680
	1681	c. 28, 47	1680		2167
	1680	c. 59, 29	1411	c. 324, 12	1680
	2162	c. 60, 141	1411		1387
	1680		1411		
	1225, 1651		1380, 1411	<i>Rules of Court 1897.</i>	
	1225, 1651,		1411		94
	1681		1519, 1710		1674
	1681	c. 61, 131	1163		2313
	1651		1163		1856, 2218
	1225, 1651		1163		1859, 2219
	1651		1163		2124
	1676	c. 73, 2	488		2124
	1225, 1651		488		2124
	1675		488, 2218		2220
	1675		2252		1859, 2219
	1236, 2154		488, 2061		1856, 2218
	1680		488, 986,		1380, 1411,
	1290		2276		1710, 1856
	2016		488		1380, 1411
	488		488		73
488, 2065,			2065		916
2218			2065		1681
	488		1828		1380
	488, 2252		1828		1828
	488		1828		811
	1411		2218		1837, 1869
	900, 907		1263		1881
	905		1028		1163
	1263		986, 1270		1163, 1862
	986, 1270		900, 905,		445, 1163,
	1828		907		1862
	2162		1684	<i>Session Laws.</i>	
c. 167, 8	1466		1680, 1684		2220
			1680, 1684	1892, c. 11	2220
			2167	1900, c. 17, § 13	2065
			1684		2281
			1223, 1680,	c. 26, 7	1680
			1683	c. 27, 14	1074, 1674, 1684, 2162
			2375		
			1639, 1680	c. 49, 30	2281
			1680	1902, c. 12, 29	1828
			2167	c. 15	1908
			1681	c. 27, 14	2167
			1225, 1651	c. 33, 186	2281
					1680
					196
				1903, c. 18, 71	1680
				c. 19	1680
					2215
			1681, 1859		2281
			1681		488
			1859		
			1225, 1651		
			1225, 1651,		
			1859		
			1223, 1683,		
			1859		
			63		488
			4		488

Ord. 22, R. 17	1061	
Ord. 30, R. 1	1856, 2218	
1 ff.	1856	
12-22	1859, 2219	
23	2124	
Ord. 32, R. 3	1519	
Ord. 34, R. 30	73	
31	986	
36	1163	
Ord. 35, R. 1	1411, 1710	
3	1681	
3 B	1380	
4	1411	
10	1380	
17	1411	
24	1387	
35	1387	
Ord. 36, R. 1	1710	
28	1710	
Ord. 37, R. 6	21, 445,	
	1862	

TABLE OF STATUTES.

PRINCE EDWARD ISLAND (cont'd).

	Section
5	488
6	488, 2252
7	488, 2061
8	488
9	488
10	488
11	2065
12	2065
13	1828
15	900, 905,
	907
	1028
	1263
18	986, 1270
19	1290
20	2016
21	1680, 1681
22	1644, 1680
23	1681
25	2162
26	1647, 1680
27	1680
28	1680
29	2375
30	1680, 1684
31	1680
32	2167
33	1684
34	1684
35-37	1675
38	2162
42	1225, 1651
43	1225, 1859
44	1225, 1651
45	1225, 1651
46	1225, 1651
47	1676
48	1223, 1859
49	1225, 1651
50	1676
52	1519
53	2167
54	2150
55	1681
56	1411, 1681
57	1213
58	1207

Other Session Laws.

1853, c. 12,	1	1859, 2219
	9	1859, 2219
1873, c. 21,	24	1304, 1310, 1320
c. 22,	107	1163
	244	1856, 1859, 2219
	245	1856, 1859, 2218
	246	1856, 1859
	247	1856, 1859
	248	1856, 1859
	252	1163, 1862
1887, c. 4,	2	1380
	3	1380
	4	1380
1890, c. 3,	35	2281
1898, c. 3,	1	1680
1899, c. 15,	5	1669
	8	1669
1900, c. 3, §	15	196

UNITED STATES.

ALABAMA.

Constitution 1875.

Art. I, § 7	1397, 2191, 2252
§ 19	2039

Code 1897.

	Section
	31
	79
	273
	209
	380
	395
	992
	995
	1018
	1206
	1243
	1341
	1449
	1491
	1544
	1758
	1794
	1795
	1796
	1797
	1798
	1801
	1804
	1808
	1809
	1810
	1811
	1812
	1813
	1814
	1815
	1816
	1817
	1818
	1819
	1821
	1822
	1823
	1825
	1833
	1834
	1835
	1836
	1846
	1847
	1850
	1850-1858
	1857
	1859
	1860
	1863
	1864
	1866
	1867
	1870
	1871
	1872
	1873
	1874
	1879
	1974
	2341
	2483
	§ 2647 ff.
	2679
	2681
	2846
	2847
	2889
	3029
	3030
	3051
	3217

	Section	Section
	1710	3234
	1680, 1681	3265
	1680	3780
	1710	3797
	1680, 1684	3807
	1672, 1680	3860
	1225, 1651,	3895
	1676	4088
	1225, 1676	4265
	1225, 1676	4276
	1680	4277
	1680	4281
	2201	4282
	1674, 1680	4300
	2067	4805
	1225, 1651	5235
	1674	5289
	488, 9218	5290
	488, 987	5291
	1299, 1301	5292
	665	5293
	2594	5297
	1710	5298
	1519	5299
	1519	5300
	1704	5301
	1644, 1680,	5302
	1683, 2167	5503
	1239	1680
	1680	1680

Session Laws.

St. 1899, Feb. 1, No. 241	1225, 1676
---------------------------	------------

ALASKA.

Code of Criminal Procedure 1900.

1680, 1684	27	2360
1680, 1684	30	1851
	137	1873
	141	145
	1382	146
	1382	149
	1382	488, 1890,
	1411	2272, 2276
	1411	488
	150	2056
	151	2061
	155	2567
	156	1326
	2110	1326
	1859, 2219	852
	1859	1837
	1383	1326
	1383	1326
	1710	1326
	1387, 1389,	1326
	1412	1326
	1383	1890
	1389, 1412	
	1412	
	1383	
	1412	
	94	1676
	99	1225, 1651
	106	1225, 1651
	108	1225, 1651
	110	1239
	116	1651
	1681	1681
	167	2051

Civil Code 1900.

1676, 1680	187	1873
1674	188	1163
1676, 1680	233	2567
1675	480	1062

Code of Civil Procedure 1900.

CANADA—UNITED STATES.

Section		Revised Statutes 1887.		ARKANSAS.	
1859, 2219		Section		Constitution 1874.	
490	2207	752	2595		Section
630	1710	753	2695	I, 8	2191
638	1710	762	1878	II, 8	2252
639	1710	929	1672	10	1397
640	1411	931	1660	14	2039
644	1382	978	1304	26	1828
646	1382	983	1304, 1310, 1320	III, 9	2281
650	1382	984	1411	XIX, 1	1828
652	1382	997	2052		
653	803	999	1411		
656	1389	1359	1389		
657	1382, 1411	1643	488		
658	1387, 1893	1649	488		
659	1837	1828	2201		
660	781, 1908	1831	916		
662	770	1834	1382		
664	736	1835	1382		
665	773	1836	1382		
666	905, 907	1837	1382		
667	1877, 1896,	1839	1383, 1387,		
668	1898	1849	1412		
669	923, 987, 1270	1850	1389		
670	1028, 1263	1855	2055		
671	64, 1104	1856	1411		
672	1861	1858	916		
673	285, 1008,	1863	916		
674	2034, 2056	1864	488, 516		
675	2201, 2210	1865	488		
	987, 2210,	1866	1828		
	2223, 2252,	1867	1828		
	2270	1868	1684		
676	781, 2210	1869	1680		
677	1062	1870	1680, 1681		
678	2067	1871	1678, 1681		
679	1383	1872	1675, 1680		
680	1387, 1412	1873	1680		
681	1828	1874	1225, 1651,		
682	1828	1875	1676		
683	1828	1876	1681		
684	488, 966, 987	1877	1680, 1681		
685	488	1878	2596		
686	488	1879	1275		
687	2292	2037	1678		
688	2395	2038	488, 935, 966,		
689	2380	2039	987, 1828		
690	1680	2040	488		
691	1680	2113	488, 2292		
	2556	2040	488, 2272, 2276		
	2561	2113	488, 2067		
	3144	2556	1275		
14	2281	2561	1660		
361	2281	3144	1225		
545	2281	3145	1665		
1111, par. 3	2395	3184	2895		
1111, par. 4	2380	3238	2896-2900		
1270	2380	3248	2901		
1345	1326	3251	2903		
1346	1326		2906		
1347	1837		2907		
1356	1837		2908		
1418	1326		2909		
1643	2360		2910		
1652	1873		2911		
1656	2039, 2042		2912		
1657	2085		2913		
1659	1339, 1625		2914		
1660	2044		2915		
1669	2056		2916		
1670	1163		2916 (5)		
2054	1800		2917		
2069	2207		2918		
2075	1382		2919		
2091	1389, 1411		2920		
2097	1382		2921		
	1389, 1411		2922		
			2923		
			1326, 1375,		
			1387, 1413		
	</				

TABLE OF STATUTES.

ARKANSAS (continued).

	Section		Section		Section
2924	702		1326	1798	1674
2929	1828		704	1826	1829
2940	867		1837	1830	1175
2941	868		1837	1839	1175
2954	869		1326, 1349	1844	2106
2955	882		1382	1845	2034
2958	781, 1908		2360	1847	657
2959	943		1851	1849	923
2960	770, 773, 914		1873, 2277	1850	1082
2961	905, 907, 917		196	1852	1750
2962	923, 987, 1270	par. 1	488, 2279	1853	1480
2963	1028, 1263		488	1854	1455
2964	1104		2279	1855	2113
2965	1876, 1896		488, 1008		1213, 1225, 1230,
2966	1837		2039		1269, 1275
2967	2199		1870, 1863		2025
2968	1909, 1910		2085	par. 3	1072
2969	1861, 1883		1339, 1625	par. 4	1430, 1455,
2970	1710		2061		1480
2971	1710		2044	par. 8	1387, 1413
2972	1411		2056	par. 9	2016
2973	1411, 2207		2056	par. 10	689, 1938
2974	2162		1856	par. 11	1480, 1597,
2975	2162		1163		1605
2976	2162		1800	par. 12	1597
2977	1382		1411	par. 13	1480
2978	1383		488		2162
2979	1387, 1412		488, 2252,		488, 1828
2980	1681		2272, 2276		488, 2063
2981	2162		2207		488, 2241,
2982	1856		1382		2292
2983	1873		1382	par. 3	2395
2984	1873		1382	par. 4	2380
2985	1163		1389, 1411	par. 5	2375
2986	2051		1411		
2987	2051		1382		488, 2292,
2988	2050		1389, 1411		2380
2989	1382, 1411				1909, 1910
2990	1310, 1320				811
2991	1304, 1310,				1225, 1680
2992	1320				1684
2993	1411				1680
2994	1427				1271, 1703
2995	1681				1352, 1662
2996	2106				1681
2997					1681
2998					1273, 2110,
2999					2158
3000					1680, 1684
3001					1651, 1680
3002					1639
3003					1681
3004					1681
3005					1677, 1680,
3006					1681
3007					1239
3008					1639
3009					1292
3010					1597
3011					1188, 1230,
3012					1234, 1267
3013					1206, 1207,
3014					1208
3015					2125
3016					1940
3017					1941
3018					1297, 1298,
3019					1302
3020					2132, 2137,
3021					1300, 1301
3022					701
3023					1693, 2016
3024					2017, 2137
3025					1455, 1519,
3026					1639
3027					1519, 1521
3028					1676
3029					2373
3030					1186, 1225,
3031					1651, 1676

ARKANSAS — COLORADO.

	Section	Session Laws.		Section		Section
§ 1954	1163			3176		1862
§ 1963	285 1684, 1703			3287		1675
	par. 4	2510	1850, Apr. 22, § 207	1664	3289	1828
	par. 6	287	1891, p. 185	2281	3290	1828
	par. 9	2518	1893, p. 26, § 32	2281	3297	1680
	par. 10	2518	1897, c. 74	1651	3382	488
	par. 11	2515			3706	283, 1672
	par. 12	1587, 2515			3738	1672
	par. 13	2518	COLORADO.		3741	2162
	par. 14	2535	Constitution 1876.		3752	1275
	par. 15	2534			3753	1660
	par. 23	2520	Art. II, § 4	1828	3755	1705
	par. 24	95	9	2039	3756	1705
	par. 24	1213	16	1397, 1398,	3761	1705
	par. 25	2529		2191	3762	1705
	par. 26	2531	§ 17	1382, 1397,	3771	1640, 1674
	par. 30	2505		1398, 1411	3786	1674
	par. 31	2527	§ 18	2252	3827	1674
	par. 32	2530	Art. VII, § 9	2281	3830	1674
	par. 34	2137			3876	1674
	par. 40	2532	Annotated Statutes 1891.		3910	1674
	par. 40	1073			3920	1640, 1680
1968	2039, 2042	15		1672	3972	1680
1982	2525	175		1710	4240	150
1987	2201	185		488	4251	150, 1680
1989	2207	216		150	4316	1680
1990	2199	226		1326	4397	1680
1997	1411	384		1671, 1680	4442	1680, 1684
2009	1710	444		1225, 1651	4669	1304
2010	1710	447		1225, 1651,	4670	1304
2015	2162			1676	4671	2050
2020	1411	457		1275	4672	2052
2021	1411, 1856	467		1681	4674	1411
2024	1382	502		1680	4676	1310, 1320
2028	1389	504		1680	4679	1411, 1681
2031	1382	838		1225, 1651,	4785	488
2032	1411, 1856			1680	4807	1680
2033	1382	874		1326	4816	488
2034	912, 1387,	914		1665	4817	1519
	1389	922		1680	4818	488
2042	1867	1168		488	4819	488
2043	1837	1170		488	4820	488
2044	781, 1908	1171		488, 2272	4821	1828
2046	770	1172		488	4822	488, 935,
2047	736, 745,	1173		488		966, 987,
	748, 753,	1267		1625		1270, 1828
	759, 761	1268		1339	4823	488
§ 2048	773, 914,	1312		2281	4824	488, 2292,
	1890	1317		2085		2375, 2380,
§ 2049	900, 905,	1325		2061		2395
	907	1460		1851	4825	488, 2292,
§ 2050	1877, 1896,	1678		2281		2380, 2395
	1898	1746		1684	4827	1710
§ 2051	923, 987,	1747		1681	4833	1382
	1270, 1985	1748		1239, 1678	4834	1411
§ 2052	1028, 1263	1749		1680		
§ 2053	64, 1104	1752		1680		
2054	1263, 1861,	1753		1710		
	1883	1756		1239, 2167	61	2281
§ 2061	1013	1759		1195	62	2596
	par. 2	2034		1270	152	1848
	par. 3	1008		1674, 1680	177	2595
	par. 4	2056		1680	187	1873
	par. 6, 7	2272		1710	188	1163
§ 2065	987, 2210,	2414		1859, 2219	217	2354
	2223, 2252	2426		1387	281	1062
2066	781, 2210	2546		1680	336	1828
2078	1062	2650		1411	341	1411
2079	2067	2651		1411	342	1382
2084	1383	2780		488	343	1389, 1411
2088	1387, 1389,	2796		1680	344	1387
	1412	2981		1681	349	1382
2094	1828	2985		1680	354	1382
2095	1828	3003		1644, 1680	355	1859, 2219
2096	1828	3147		1680	356	1230, 1680
2097	1828	3161		1680, 1710	357	2525
2102	2567	3164		1862	358	1681

TABLE OF STATUTES.

COLORADO (continued).

	Section	c. 70, §	30
359	1681		31
360	1681, 2158		33
361	1684	c. 71, §	1
364	1862		2
366	1383		3
370	1387, 1389,		4
	1412, 1681		5
422	1680		6
427	1835		7
922	1681		8
1102	1681		19
2300	1382		25
2650	1382		27
2651	1382		28
			29

Session Laws.

1891, p. 166, § 42	2281
p. 171, § 8	2281
p. 274, § 2	1239
p. 267, § 1	1684
p. 397, § 2	1680
1893, p. 78, § 1	1163
p. 90, § 1	1074
p. 116, § 1	1851
p. 127, § 3	488
p. 239, § 16	2054
p. 261, § 1	1698
p. 264, § 1	2016
p. 303, § 1	1062
p. 420, § 15	1674
p. 423, § 18	1674
p. 431, § 2	1710
1894, p. 53, § 6	1225, 1651,
	1674
p. 74, § 8	1674, 1680
1899, Mar. 1, c. 95	916
Apr. 6, c. 142, § 19	150
1902, Mar. 14, c. 1, § 16	1639

COLUMBIA (DISTRICT).

Compiled Statutes 1894.

c. 11, § 14	1675
c. 14, § 2	1326
c. 15, § 77	1680
c. 16, § 20	2281
c. 20, § 38	488
	1382
	1411
	1383
	1383
	1412
	1383
	1383
	1383, 1387, 1412
	2207
§ 18 ff.	1680
23	1660
23 ff.	1681
24	1660
29	852, 2281
30	1859, 2219
31	1859, 2219
32	1680, 1681
33	1225, 1681
34	1676
c. 30, § 18	1644, 1680
33	2067
c. 55, § 120	2595
155	1908
c. 58, § 26	1225
c. 70, § 17	1225
18	1681
28	1304
28	2051

Section	1080	Section	1383
2050	1083		1387
2050	1084		1675
1382, 1411	1086		1680
488, 2218	1087	1684, 2572	1703
488, 2252	1088		1680
1828	1089		1680
1828	1090		1680
488, 516	1091		1680
2281	1092		1680
488, 516	1093		1273
488, 2272	1094	488, 1387,	1466, 1576
1411	1095		1576
1411	1096		2509
1382	1097		488
1382	1098		488, 966,

Code 1901.

§ 1099	1304, 1310,	§ 1207	1141
	1320	1500	2281
	1304, 1310,	1622	2044
	1320, 1382	1623	488, 2272
	1326	1624	2281
	1828	2011	1326
1382, 1411	2201, 2207	2016	1837
2201, 2207	1382, 1411	2106	1674
1382, 1411	488, 2218	2270	1672, 1680
488, 2218	488	2553	2281
1387, 1413	488	2561	2281
488	488	2618	1674
488, 987,	1270	2620	1674
1270	488	2659	1674
488	488	2788	1644
488	1680, 1681	2983	2281
1680, 1681	1225, 1651,	3073	1680
1225, 1651,	1681	3105	1681
1681	1859	3107	1326, 2281
2380	2380	3117	238
905	3120		1674, 1680
	3436		1680
	3445		1680
	3895		1225, 1651
	3960		1680

CONNECTICUT.

Constitution 1875.

Art. I, § 9	1397, 2191,
	2252
Art. IX, § 4	2039

General Statutes 1887.

1326	1326
1680	1680
1681	1681
1215, 1681	1215, 1681
1710	1710
2569	2569
1681	1681
1669	1669
1669	1669
781	781
2281	2281
1856, 1859,	1856, 1859,
2218, 2219	2218, 2219
1856, 1859,	1856, 1859,
2219	2219
1856, 1859,	1856, 1859,
2201	2201
1382, 1411,	1382, 1411,
1676	1676
1411	1411
803	803
1382	1382

Session Laws.

1893, June 14, c. 198	987
1895, May 7, c. 116	1405, 1413,
	1669
1897, Mar. 3, c. 16	64
June 9, c. 224	1680

DELAWARE.

Constitution 1831.

Art. I, § 7	1397, 2191,
	2252
VI, § 16	1397

Revised Statutes 1893.

c. 33, § 4	1326, 1374,
	1413
c. 35, § 10	1225, 1651,
	1680
c. 39, § 7	1644, 1683
c. 56, § 2	1383, 1387,
	1412
c. 75, § 6	2067
c. 77, § 15	1141
c. 77, § 16	1375, 1411
c. 82, § 6	2531
c. 83, § 14	1225, 1651

COLORADO — GEORGIA.

	Section		Section		Section
c. 83, § 15	1676	1121	2016	3033	2509
c. 84, § 6	1681	1122	1848	3281	1304
7	1681	1123	1411	3282	1310, 1320
8	1681	1124	1382	3289	2052, 2106
c. 89, § 50	1680	1129	803	3290	1681
c. 97, § 18	1826, 1375, 1413	1132	1411	3291	1681
	1413	1134	1382	3301	1681
c. 107, § 4	488, 516	1138	1383	3302	1681
5	1684	1141	1381	3303	1681
6	1684	1142	1411	3610	2137, 2141
7	1684	1146	1387	3611	1660
8	1271	1618	1411	3628	1651
9	1680	1634	1828	3630	1225
11	1519	1798	2051	3772	1503
12	2535	1799	2050	3835	2525
13	1859, 2219	1805	1304, 1411	3893	1415
14	1680, 1681	1908	488, 1290	3947	2252, 2292, 2375
c. 108, § 5	1828	1867	1680		1856
6	1828	1904	1672	§§ 3953-3957	2218
7	1828	1962	2054	3954	987, 2252
8	1828	1979	2159	3957	1383, 1387, 1412
c. 109, § 20	1163	2026	150	3961	1387
		2058	1644		1412
<i>Session Laws.</i>		2059	1710	3963	1387
1859, Feb. 18	2218	2126	1680	3966	1412
c. 598, § 1	488, 916	2321	488	4545	2282
2	488	2322	488	5144	2498
3	488, 987	2470	1074	5145	2497, 2498
1873, c. 550, § 10	488	2813	2360	5146	966
1881, c. 536	2016	2814	2360	5148	2162
c. 537, § 1	488	2863	488, 2245	5150	2137
1893, c. 777, § 1	488, 2272	2905	488	5155	1073
1895, c. 121, § 1	1859	2908	488	5156	2039, 2042, 2056
c. 209, § 2	1674	2909	2039		64
1897, c. 578, § 3	1651	2910	1339	5159	2486
1903, c. 394, § 6	1680	2911	1710	5160	285
76	1680	2912	1411	5163	1174
128	1680	§ 2913 ff.	1382	5166	1681
132	1680	2917	1411	5167	2535
		2918	1163	5168	1698
		3018	1326	5169	1214
				5170	1192
FLORIDA.				5172	1233
<i>Constitution 1887.</i>				5173	1269
Declaration of Rights, § 5	1828	1891, c. 4029	488, 2245	5173	1189
§ 11	1397, 2191	c. 4036, § 1	1828	5174	1480
§ 12	2252	§ 2	1028	5177	2529
§ 23	2039	1895, c. 4400	246, 488, 2252, 2272, 2276, 2277	5178	1750, 1756
				5179	1455, 1467
<i>Revised Statutes 1892.</i>				5180	1519
1039	1859, 2219	1897, c. 4552	1680	5181	1597
1073	2596	c. 4554	1354	5182	1597
1082	1862	1899, c. 4719, § 1	2220	5183	1330, 1387, 1413, 2098
1087	1163	c. 4727, § 2	2220	5184	499, 815, 1062
1095	488	c. 4950	1382	5185	1072
1096	488, 987, 1270	c. 4951	1275	5186	2113
1097	488, 923, 1270	§§ 2-7	1859, 1705	5194	488
1101	900, 905	c. 4966	488, 987, 1270	5195	2292
1102	1028, 1037	1903, c. 5122, § 5	1669	5196	2360
1105	1684			5198	2360
1106	1684				1684, 2577
1107	1703	GEORGIA.			1225, 1651, 1681, 1860, 1878
1108	1271	<i>Constitution 1877.</i>			1225, 1680
1109	1681	Art. I, § 1, par. 2	2039	5199	1681
1110	1681	par. 5	1397, 1851, 2191	5211	1225, 1651, 1681
1111	1225, 1651, 1680		2252		1878
1112	1674	par. 6		5212	1225, 1680
1113	1674			5213	1681
1114	2162	<i>Code 1895.</i>		5214	1681
1115	1859, 2219			5216	1680
1116	1856, 2218	§ 484	1665	5219	1225, 1651
1117	2218	1005	2071	5220	1269
1119	1674	1033	1639	5223	1660
1120	1519	2430	2067	5231	1684

TABLE OF STATUTES.

<i>GEORGIA (continued).</i>		Section		Section	
	Section	991	2039, 2056	1421	900, 905, 907
5233	1680, 1681	993	64	1422	1028
5235	1675	998	1750	1423	1263
5236	1223, 1683	1000	1430	1424	2167
5237	1680, 1681	1001	1330, 1387,	1425	1290
5238	1680		1413, 2098	1426	2016
5239	1194	1003	1072	1427	831
5241	2113	1004	2113	1848	1676
5243	1297	1006	831	1849	1225, 1651
5244	1291, 1294,	1007	831, 840, 841	1864	1675
	1299, 1301,	1008	858	1866	1675
	1310, 1311	1010	488, 2276	1929	2067
5245	1310, 1320	1011	488, 2252	1934	2067
5246	693		488	1955	488
5247	2016	par. 4			
\$ 5248-5254	1859, 2219	par. 5	2292		
5254	1205	1017	1837	<i>Penal Laws 1897.</i>	
5255	2200	1019	770, 773		
5256	2200	1024	905	31	2039
5257	1212, 2200	1026	1021, 1028,	655	196
5258	2205		1108	678	1387
5261	2201	\$ 1265	1326	979	1326
5268	488, 935, 1828				
5269	488, 2218	<i>Session Laws.</i>		<i>Session Laws.</i>	
5270		1799, Judiciary Act, § 6	1859	1896, No. 50, § 19	1644, 1680
5271	1911, 2292,	1850, p. 46	1911		
	2314, 2315, 2317	1859, p. 18	1911	<i>IDAHO.</i>	
5272		488	1911	<i>Constitution 1889.</i>	
5273		488, 1866, p. 138	1911	Art. I, § 4	1828
5274		488	1911	§ 5	2039
5275		488	1911	§ 13	2191, 2252
5276		488	1897, p. 53		
5279		488	p. 87		
5280		1828	p. 107		
5281		1837	1899, p. 42		
5282		2210	1900, p. 57		
5283		1890	488	<i>Revised Statutes 1887.</i>	
	770, 773,			149	987, 2281
	1564	<i>HAWAII.</i>		290	1675
5284	736	<i>Civil Laws 1897.</i>		1535	1710
5285	1951, 1978			1558	1640
5286		§ 1094	2215	2471	2067
5287		1368	2201	2585	1680
5288	987, 2252,	1374	1411	4209	1848
	2292, 2375	1375	2199	4383	1873
5289	949	1379	1382	4386	1163
5290	905, 916	1380	1382	4439, subdiv. 2	2354
5292	1021, 1028,	1381	1382	4760	1681
	1035, 1108,	1382	1382	4870	1062
	1263	1388	1387	4871	2219
\$ 5293	923, 987,	1390	1383	4875	1859
	988, 1111,	1392	1389, 1412	5306	1304
	1985	1393	1387	5311	1304, 1310,
5295	1008, 1013	1395	1862		1320
5296	1835	1396	1859, 2218	5312	1413
5297	1411, 2206	1397	2218	5326	2052
\$ 5299-5301	1382	1398	1680, 1681,	5403	1678
5303	803		2162	5950	2162
5306	2206	1399	1239	5956	488, 923,
5313	1382, 1411	1400	1647, 1680		946, 1

GEORGIA—ILLINOIS.

Section		Section		Section	
5984	1639	1899, Feb. 6,	§ 7	2281	c. 51, § 15
5990	1597, 1693	Feb. 10,	§ 6	1411, 2206,	§ 17
5991	1206, 1207, 1208			2371	§ 18
5992	2125			803	§ 20
5993	1290			1387	§ 21
5994	1302			1383	§ 22
5995	1300			1387, 1412	§ 23
5996	1455, 1519, 1639	Feb. 14,	9	1644, 1680	§ 24
5997	1676	Feb. 16,	7	1680	§ 25
5998	1225, 1651, 1676	1903, p. 223,	87	1665	§ 26
5999	1208, 1225, 1230,				§ 27
	1269, 1680, 1681				§ 28
	2039, 2042				§ 30
6005	2201				§ 33
6037	2207				§ 34
6039	1710				§ 39-44
6052	1710				§ 46
6053	1382				§ 48
6061	1389				§ 51
6066	1382				§ 63, § 6
6067	1382				c. 79, § 15
6069	1389				c. 82, § 16
6070	1837				c. 88, § 3
6075	770				c. 89, § 12
6077	736				c. 95, § 5
6079	773, 1890				c. 99, § 14
6080	900, 905, 907				c. 100, § 1
6081	1877, 1896				c. 101, § 3
6082	923, 987, 1270				c. 103, § 1
6083	1028, 1263				c. 109, § 2
6084	64, 1104				c. 110, § 20
6085	1861, 1883				c. 111, § 11
6090	2201, 2210				c. 109, § 2
6091	987, 2210,				c. 110, § 20
	2223, 2252				c. 111, § 11
§ 6117-6119	1383				c. 110, § 20
§ 6121	1387, 1389				c. 111, § 11
§ 6128-6131	1828				c. 110, § 20
6308	2231				c. 111, § 11
6670	1387				c. 110, § 20
6716	2231				c. 111, § 11
6852	2231				c. 110, § 20
7356	2252				c. 111, § 11
7383	1326				c. 110, § 20
7516	1326				c. 111, § 11
7574	1327				c. 110, § 20
7575	1327				c. 111, § 11
7576	1326				c. 110, § 20
7588	1382				c. 111, § 11
7855	1873				c. 110, § 20
7861	488				c. 111, § 11
7862	488				c. 110, § 20
7867	2085				c. 111, § 11
7868	1339, 1625				c. 110, § 20
7869	2061				c. 111, § 11
7870	2044				c. 110, § 20
7871	2056				c. 111, § 11
7878	1163				c. 110, § 20
7879	1800				c. 111, § 11
8141	488				c. 110, § 20
8142	488				c. 111, § 11
8143	488, 2272				c. 110, § 20
8152	2207				c. 111, § 11
8163	1382				c. 110, § 20
8169	1389				c. 111, § 11
8182	1382				c. 110, § 20
8189	1389				c. 111, § 11
8382	1326				c. 110, § 20
Session Laws.					
1889, Jan. 10	1890				
1890, Feb. 10, § 2	1382				
	31				
1891, Feb. 3, § 3	1681				
1897, Mar. 12, § 4	1705				
	1705, 1859				
ILLINOIS.					
Constitution 1870.					
Art. II, § 3	1828				
§ 9	1397, 2191				
§ 10	2252				
Revised Statutes 1874.					
c. 3, § 56	1672, 1681				
§ 60	2065				
c. 15, § 6	1639, 1680				
c. 17, § 6	488				
c. 19, § 10	1239				
	1239, 1680				
c. 24, § 11	1680, 1684				
c. 30, § 12	1664				
	1651, 1676				
	1651				
	1275				
	1651				
	1681				
	1225, 1651, 1676				
	1225, 1651				
	1239				
	1680				
	1326				
	1680				
	987				
	2085				
	488, 2272, 2281				
	2281				
	2039				
	1326				
	1326				
	2360				
	1851				
	488, 968, 987,				
	1270, 2272				
	2595				
	196				
	1681				
	2535				
	488, 2085				
	2061				
	2067				
	2067				
	2085				
	1163				
	488, 966,				
	987, 1270				
	488				
	1519				
	488				
	488				
	488, 916, 1856,				
	2218, 2219				
	488				
	488				
	1859				
	1684				
	1680				
	1684				
	1681				
	1680				
	1861, p. 79				
	1867, § 3, p. 184				
Session Laws.					
1861, p. 79	2165				
1867, § 3, p. 184	1519				

TABLE OF STATUTES.

ILLINOIS (continued).

	Section	
1887, July 15	1273, 1705	513
1889, p. 112	196	514
1891, June 11, p. 206	2231	515
1893, June 17	2085	516
June 20, § 7	2281	517
1897, May 1, § 37	1676	518
§ 39	1225, 1651	519
§ 58	1225, 1651	520
July 1, p. 298, § 7	2281	521
1899, April 24	488	522
1901, May 11, § 3	488, 2085	523
1903, May 28, p. 118	1651	525

INDIANA.

Constitution 1851.

Art. I, § 7	1828	
8	1828	
13	1397, 2191	1255-1294
14	2252	
29	2039	

Revised Statutes 1897.

378	2498	1763
428	1382	1766
429	1382	1876
430	1382	1888
432	1411, 2206,	1889
	2371	1890
434	1411	1891
438	803	1892
441	1411	1893
449	1387	1894
450	1383	1895
451	1383	1896
454	1681	1898
455	1387, 1412	1901
463	1680, 1681	1904
464	1680	1907
465	1680, 1684	1908
467	1681	1914
468	1681	1916
469	1675, 2165	1918
471	1225, 1651,	2446
	1680	2504
473	2107	2667
474	2107	2805
475	1239, 1680	2806
477	1239, 1680	2810
479	1223, 1710	2830
480	1680	2831
481	1239, 1680	2975
482	1239	3371
483	1680	3434
484	1681	3435
485	1684	3439
486	1710	3500
489	1271, 1703	3570
490	1271	3590
491	2596	3602
492	1859, 2219	3696
493	1859, 2219	4131
494	1710	4133
502	2201	4235
503	2201	4619
505	2201	4622
507	1828, 2292,	4871
	2380, 2395	4916
507 (6)	488	4971
508	811	4995
509	488	5073
510	488	5169
511	488	5285
512	488	5616

Section		Section
488	5686	1223, 1683
488	5706	1223, 1683
488	5737	1680
488	5750	1225, 1651
2203	5756	1225, 1651
935, 1828	5768	1225, 1651
966, 987	6599	1674
900, 905, 907	7616	1680, 1710
1087	7649	1644, 1680
2218	7660	1225, 1651
1856	7811	1680
916	7930	1680
1062	8000	1680
1062	8016	1674
1163	8027	2167
1326, 1413	8037	1680
1387, 1413	8196	1680
1681	8324	1326
2067, 2281	8396	1225, 1651
1411	8428	1675
1275	9129	1680
1383, 1412	9216	1680
1383, 1412	9228	1680

Revised Statutes 1894.

413	2595
1731	2363
1850	2595
1851	2595

Session Laws.

1339, 2026, 2044	1861, p. 52	7
831, 2071	1899, c. 74	1382
923	c. 239, § 2	2085, 2088
488	1903, c. 39	458
1411	c. 127	1674

IOWA.

Constitution 1857.

Art. I, § 4	488, 1828, 2218
§ 10	1397, 2191
§ 16	2039

Code 1897.

1304, 1310, 1320	75	1680
	245 a (Suppl. 1902)	1669, 2098
	520	1326
	538	1665, 1680
1387, 1413	1298	2201
	1451	1680
	1680	2080
	1651	2131
1225, 2143	2197	2281
1225, 1651	2399	2281
	1074	2422
	1680	3007
	1674	3146
	1684	3285
	1674	3286
	1684	3536
	1680	3587
	1680	3593
	1223	3639
	1680	3665
	1674	3700
	1674	3710
	1680	3719
	1674	3817-3819
	1680	4075
	1674	4567
	1680	4601
	1680	4602

488, 966, 987

ILLINOIS — KENTUCKY.

	Section		Section		Section
4603	488	5372	1873	c. 101, § 48	2281
4604	488	5373	1855	225	2281
4606	488	5380	1163	c. 102, § 50	1837
4607	488	5381	1800	51	1326
4608	2286, 2292,	5457	2061	110	2360
	2380, 2395	5484	488, 2272	111	2360
4609	2375	5485	488, 2276	112	2360
4610	1909	5486	2061	169	1411
4611	2223	5489	2056	171	1382, 1411
4612	987, 2281	5491	2071	211	1800
4613	987, 1270			217	488, 966, 968
4614	923			218	488, 2272
4615	2113	<i>Session Laws.</i>		223	1625
4618	1597, 1693	1898, c. 9, § 1	1669, 2098	224	2281
4619	1302	c. 108, § 1	488	226	1339, 2044
4620	2016	1900, c. 125, § 1	3292	235	1163
4621	1676			264	488
4622	1455, 1519	<i>KANSAS.</i>		269	1800
4623	1519	<i>Constitution 1859.</i>		c. 110, § 12	1304
4624	1675, 1680, 2165			13	1310
4629	1676			17	1681
4630	1225, 1651	Bill of Rights, § 7	1828	22	1413
4633	1239	§ 10	1397, 2191	24	1681
4634	1710	§ 13	2039	27	1681
4635	1680	§ 17	2252	c. 120, § 217	966
4636	1651				
4639	1275, 1680	<i>General Statutes 1897.</i>			
4640	1678			<i>General Statutes 1899.</i>	
4641	1651, 1678	c. 27, § 141	1326	§ 5315	1851
4642	2167	c. 95, § 330	488, 966, 987	5348	1851
4644	1681	331	488		
4645	1681	332	2218		
4646	1681	333	488	<i>General Statutes 1901.</i>	
4647	1681	334	488	§ 4771, par. 5	2395
4649	1684	340	2207	par. 6	2380
4650	1680, 1684	341	2201		
4651	1684	342	2201		
4652	1271, 1680, 1703	351	1828	<i>Session Laws.</i>	
4653	1680, 1684	355	1710	1901, c. 124	1651
4654	1859, 2219	357	1411	c. 125	1710
4655	1859, 2219	361	803	c. 233	2360
4656	1859	363	1382	1903, c. 387	488, 2067
4660	2207	364	1382	c. 388	488, 2067
4661	2203	375	1411		
4662	2201	376	1387	<i>KENTUCKY.</i>	
4677	1710	378	1519	<i>Constitution 1891.</i>	
4678	1710	379	2596		
4679	2162	380	1859, 2219	§ 5	1828
4680	1710	381	1859	11	1397, 2191,
4681	1710	384	1383		2252
4684	1411	385	1383	§ 229	2039
4687	1382	387	1387, 1389, 1412		
4688	1379, 1382	c. 96, § 59	488, 2067		
4689	1382	60	2067, 2085		
4693	1382	c. 97, § 1	1684	<i>Statutes 1899.</i>	
4694	1382	2	1225, 1651,	213	2281
4695	1382		1680, 2373	235	2371
4696	1382	§ 3	1225, 1651,	479	1675
4697	1382		1680, 1681	519	1225, 1651
4698	1382	4	1681	530	1326
4699	1382	6	1684	1130	196
4709	1411	7	1684	1180	488
4718-4720	1383	9	1239	1241 A	2281
4723	1387, 1389, 1412	10	1680	1593	2281
4726	2039	11	2167	1594	2044, 2281
4870	1339, 1625	13	1239	1625	2167
4944	1620	14	1671, 1680	1626	1684
5003	1620	17	1684	1627	1680, 1681
5222	1382	18	1271, 1703	1629	1680, 1683
5224	1411	19	1680	1630	1681
5225	1837	20	1681	1631	1674
5226	1837	21	1710	§ 1632-1634	1275
5227	1326	22	1680, 1684	1635	1681
5239	1326	23	1644	1636	1680
5267	1360	24	1633, 1710	1637	1680
5268	1360	c. 100, § 36	2061	1638	1225, 1651,
5269	2360	269	2281		1680, 1681

TABLE OF STATUTES.

KENTUCKY (continued).

	Section	611	Section	3943	Section
1639	2531	613	1383, 1387	3944	2201
1640	1271, 1703	640	1412	3949	1909
1642	1680, 1684		1062	3959	2207
1644	1684			3960	2207
1645	488, 2272				
1646	488, 1869				
1648	488				
1649	2016				
1734	2201				
1973	488, 2281				
2119	2046, 2066, 2067				
2255	1800				
2419	1684				
2579	2281				
2581	1644				
2582	1644				
2588	1644, 1680				
3723	1680				
3725	1675				
3726	1675				
4643	1387, 1398, 1413, 1669				
4838	488				
4855	1382, 1411				
4863	1411				

Session Laws.

1880, Mar. 4	21
1894, Mar. 23	580
1897, May 20, c. 20, § 10	2281
1898, c. 1	488
1902, c. 25, § 7	2281

LOUISIANA.

Constitution 1879.

6	2252
8	1397, 2191
151	2039

Constitution 1898.

9	1397
11	2252
162	2039
184	2281
216	2281

Revised Code of Practice 1894.

134	2201
138	1411
139	1154, 1163
140	1859, 2219
141	2200
142	1651, 2200
143	2200
324	2596
325	701, 2016
347	1856
349	2206, 2218
351	2207
352	1411, 2207
353	2124
356	2113, 2124
425-439	1411
425	1382
426	1382
427	1382
428	1382
429	1382
430	1382
438	1382
440	1383, 1412
462	2203
473	1859, 2219
474	2200
478	1828
479	1828
482	488
484	1878
530	2360
531	2360
586	1413
599	1413
698	1651
752	1681
753	1681
933	1304
943	1413
1042	1413

Code of Criminal Procedure 1895.

62	1837
63	1837
64	852
113	2360
151	2201, 2207
153	1382, 1411
224	1873
234	580
236	1163
240	2071
241	2056
318	1803
340	21

Revised Civil Code 1888.

6	1639, 1674
2234	1651
2235	1651
2236	1651
2245	2016
2248	1519, 1557
2251	1651
2253	1651
2255	1651
2257	1651
2258	1225
2259	1225
2260	1651
2261	1651
2267	1651
2268	1225, 1651
2269	1651
2270	1651
2277	2054
2279	1225
2281	1195
2282	488
2283	600, 966
2291	1911, 2292
	2588

Code of Civil Procedure 1895.

149	2207
317	1873
318	1163
534	2207
536	2201
554	1411
556	1411
566	1382
567	1382
568	1382
569	1382
592	1873
593	781
595	770, 773, 1890
596	905, 907, 917
597	923, 987, 1270
598	1028, 1263
599	1104
600	1877, 1896
601	1837
602	2199
603	1909, 1910
604	1263
605	488
606	488, 617
par. 4	1869
par. 5	2292, 2395
par. 7	1519
par. 10	2218
607	488
608	488
609	488

Revised Laws 1897.

615	1382, 1411
617	1389, 1411
621	1382
662	1326
694	1223, 1683
1191	488, 600
1436	2162
1437	1665
1438	488
1439	1375, 1413,
	1672, 1681
1440	1684
1445	1239
1455	1651
2141	2360
2232	488
3080	1651
3192	1909
3941	1411, 2207
3942	1411, 2206

Session Laws.

1870, No. 143	1681
1877, No. 103	2206, 2207
1884, No. 19	2203
1886, No. 29, § 1	488
§ 2	488, 1890,
	2252, 2272,
	2276
1888, No. 59	488
No. 140	1681
1894, No. 67	1908
No. 84	2595
1896, No. 124	1382, 1411
1898, No. 190	488
1902, No. 185	488

MAINE.

Constitution 1819.

I, § 6	1397, 2191, 2252
§ 12	2039

Public Statutes 1833.

c. 18, § 80	1163
c. 27, § 49	1605

KENTUCKY — MASSACHUSETTS.

c. 46, 10	Section 1223	Art. 18, 46	Section 1680	1898, c. 478	Section 1680
c. 46, 11	1674	19, 22	1674	1902, c. 495	488
c. 49, 46	1680	20, 20	1678		
c. 60, 2	488	23, 4	1683		
c. 64, 4	1411	27, 131	2281		
c. 64, 5	1304	32, 5	1674		
c. 70, 5	1267, 1304	33, 24	1680		
c. 71, 27	1681	35, 1	488, 2218		
c. 74, 18	1710	2	488, 1126		
c. 74, 19	2050	3	488, 2046,		
c. 81, 100	2050	4	2061, 2272		
c. 82, 69	1466	5	916		
c. 82, 82	1672		966, 987,		
c. 82, 92	1163		1270		
c. 82, 93	935, 1828	6	1290, 2016		
c. 82, 94	488, 966, 2218	15	1382, 1411		
c. 82, 97	488, 2252	16	1382, 1411		
c. 82, 98	916	19	1382, 1411		
c. 82, 99	488	22	1382		
c. 82, 103	1828	25	1411		
c. 82, 104	1828	28	1378, 1382		
c. 82, 105	488, 987	31	1383		
c. 82, 106	2201	36	1681		
c. 82, 107	1681	38	1225, 1651,		
c. 82, 108	1684		1680		
c. 82, 109	1271, 1703	39	1676		
c. 82, 110	1225, 1651	40	1676		
c. 82, 112	1680	43	1710		
c. 82, 113	1678	44	1710		
c. 82, 114	1387, 1413, 1514	47	1684		
c. 87, 10	488	48	1684		
c. 95, 2	1163	49	1680		
c. 95, 6	1141	50	1680		
c. 104, 41	1163	51	1225, 1275,		
c. 107, 4	1411		2107		
c. 107, 5	1382	52	1239		
c. 107, 6	1382	53	1239		
c. 107, 7	1382	54	1680		
c. 107, 8	1382	55	1680		
c. 107, 9	1382	56	1680		
c. 107, 14	1379	57	1680		
c. 107, 17	1411	58	1681		
c. 107, 19	1387	59	1681		
c. 107, 22	1383	60	1681		
c. 107, 27	1383	54, 4	1681		
c. 117, 1	2039	73, 8	1710		
c. 117, 2	2039	75, 80	1856		
c. 120, 18	316	81	1856		
c. 132, 8	2201	84, 8	1710		
c. 133, 12	1326	9	1382, 1411		
c. 134, 8	2360	93, 8	1678, 1710		
c. 134, 15	2201	39	1680		
c. 134, 19	488, 1411,	54	1681		
c. 139, 23	2252, 2272	55	1681		
c. 139, 7	1163	112	1681		
	1326	312	2051		
		331	1304		
		334	1304, 1310		
		335	1681, 1710		
		336	1681		
		337	1310, 1320,		
		338	1710		
		339	1681		
			1681		
	</				

TABLE OF STATUTES.

MASSACHUSETTS (continued).		Section	Section	Section	Section
c. 5, § 4		1680	c. 175, § 70	1290	822
c. 11, § 252		2281		1681	959
c. 13, § 313		2281		1680	1046
		1710		1680	1142
		1710		1684	1256
		1710		1271, 1703	1270
c. 23, § 9		1680	c. 191, § 51	1837	1271
c. 29, § 20		1680	c. 198, § 6	1710	1305
c. 32, § 3		1837		1710	1377
c. 56, § 42		1674	c. 202, § 12	1466	1405
		1674		1466	1708
c. 69, § 13		1710	c. 206, § 4	2039	2129
c. 70, § 3		1680	c. 208, § 29	2281	2333
c. 73, § 13		1675	c. 209, § 11	1339	2365
c. 75, § 24		1021		1710	2371
c. 76, § 26		1674	c. 212, § 7	2044	2511
c. 78, § 4		1225, 1651	c. 217, § 39	1326	2619
c. 82, § 16		1141, 2281		1413	2635
c. 100, § 67		1674	c. 218, § 9	1851	2638
c. 110, § 21		1680		2360	2692
c. 111, § 46		1680		1851	2758
c. 113, § 54		1710		1851	2759
c. 115, § 4		1680			2915
c. 116, § 38		1710			2928
c. 119, § 13		1680			2932
c. 126, § 4		1680			2937
c. 128, § 104		1225, 1651			2963
		1225, 1651			3087
c. 135, § 15		2281			3083
c. 186, § 2		1710			3240
c. 139, § 2		1710			3242
c. 146, § 15		1710			3244
		33			238
		1710			3369
c. 151, § 37		1644			3372
		38			3386
		39			3387
c. 155, § 27		2085			3394
c. 163, § 10		1681			3407
c. 165, § 24		1681			3413
		85			2580
		1669			3427
c. 173, § 6		1859, 2219			238
		1859, 2219			3476
		1859			3541
		1856, 1859, 2219			3722
		1856			3871
		1859, 2218, 2219			3879
		2594			3922
		1064			4032
		2596			4239
		1062			4264
		2218			4277
c. 175, § 70		1064			4279
		86			4541
		87			4548
		88			4612
		89			4617
		15			4772
		16			5103
		17			5140
		18			5230
		19			5273
		20			5304
		21			5331
		24			5425
		905, 907, 1028			5428
		1411			5997
		1382			5998
		803			6006
		1371, 1411			6007
		1382			6025
		1382			6092

MASSACHUSETTS — MINNESOTA.

	Section		Section		Section
6224	1680	8523		11147	1710
6225	1680	8601	1644, 1680	11668	1339
6227	1680	8611		11669	1710
6234	1680	8612		11685	1680
6254	1680	8615		11796	1397
6397	1680	8652	488, 2046, 2067	11801	1326
6437	1680	8964	1225, 1651	11823	1326
6468	1680	8965	1225, 1651	11852	1835, 1837
6481	1680	8984		11853	1326
6510	1680	8990	1225, 1651, 1676	11873	1835
6516	1680	8995	1225, 1651	11883	1851
6524	1680	8996	1225, 1651	11887	2360
6631	1680	8997	1275	11893	1851
6654	1680	8999	1275	11902	2201
6669	1680	9000	1275	11934	1851
6687	1680	9004	1275	11952	1163
6699	1680	9006	1225, 1651		
6768	1680	9031	1275		
6913	1680	9040	1225, 1651	<i>Session Laws.</i>	
6925	1680	9041	1674	1887, No. 82	488
6949	1680	9042	1681	1893, No. 408	1835
6961	1680	9043	1225, 1651	1897, No. 212	488
6982	1680	9046	1225, 1651, 1681	1901, No. 239	488
6997	1680	9047	1225, 1651, 1681		
7000	1680, 1710	9050	1225, 1651	<i>Circuit Court Rules 1884.</i>	
7031	1680	9052	1225, 1651	<i>Rule 40</i>	1859
7034	1680	9100	1710	40-46	2219
7035	1680	9178	1680	43	1859
7045	1680	9266	1310	46	1859
7053	1680	9279	1304, 1681	48	1856, 2218
7069	1680	9280	1210, 1320		
7071	1680	9459	1680		
7098	1680	9471	1681	<i>Circuit Court Rules 1901.</i>	
7130	1680	9476	1680		
7135	1680	9528	1651	No. 50	1859
7145	1680	9635	1651		
7159	1680	9660	2281		
7165	1680	10013	1672	<i>MINNESOTA.</i>	
7169	1223, 1710	10019	1680	<i>Constitution 1857.</i>	
7186	1680	10074	1859, 2219		
7188	1680	10136	803, 1382, 1411	I, § 6	1397, 2191
7195	1680	10140	1383, 1412	7	2252
7233	1680	10142	1387, 1411	9	2039
7264	1680	10145	1681	17	1828
7282	1680	10146	2158		
7364	1680	10147	1681	<i>General Statutes 1894.</i>	
7379	1680	10148	2201		
7418	1680	10162	1710	381	1672
7436	1680	10163	1710	386	1672
7446	1680	10164	1680, 1710	387 f	2162
7501	1680	10165	1710	389 c	2281
7536	1680	10166	1680	391 c	2281
7621	1680	10168	1676	392	1672
7637	1680	10169	1680	393	1672
7656	1680	10170	1678	399	1672
7673	1680	10171	1681	642	488
7698	1680	10172	1684	671	1680
7736	1680	10173	1684	697	1665
7745	1680	10174	1703	699	1665
7753	1680	10179	2223, 2252	849	1326
8141	1680	10180	2395	881	1680
8152	1680	10181	2380	1065	1680
8163	1680	10189	716, 2066	1079	1710
8185	1680	10192	1519	1090	1710
8186	1680	10193	1680, 1684	1107	1680
8173	1680	10197	1239	1115	1680
8259	1680	10198	1680	1157	1710
8398	1680	10199	1290	1191	488
8429	1680	10201	1639, 1680	1207	1680
8435	1680	10202	1706	1215	1680
8439	1223	10211	1856, 2218	1308	1710
8439	1710	10256	1163	1338	1680
8458	1680	10415	406	1350	1680
8466	1680	10715	1710	1703	1680
8471	1680	10776	1651	1751	1680
8480	1680	10819	1681	1752	1680
8498	1680	10846	1681	1820	1680

TABLE OF STATUTES.

MINNESOTA (continued).

	Section	5688	Section	5688	Section
1844	1639	5690	1382	§§ 7523-7584	1651
1876	1665	5694	1411	7675	1354
2007	488, 516	5697	1383	7749	1710
2188	2281	5701	1387, 1412, 1681	7823	1680
2216	488	5704	1383	7839	1680
2245	1674	5706	1387, 1412	7844	1680
2274	1675, 1680	5707	1681		
2275	1675	5708	1684		
§ 2319-2329	1665, 1680	5709	1684	<i>Session Laws.</i>	
2321	1710	5711	1684	1895, c. 27	488
2324	1710	5713	1684	c. 31	2292
2339	1710	5715	1684	c. 39	1683
2397	1672, 1680	5716	1684	c. 145, § 2	1680
2400	1672, 1680	5717	1271, 1703	1899, c. 284	1665
2403	1680	5718	1680	1901, c. 116	2143
2405	150, 1674	5719	1271	1903, c. 227	488
2413	150	5720	1684		
2416	1647, 1680	5721	1710		
2418	1647, 1680	5722	1680, 1710	<i>MISSISSIPPI.</i>	
2492	1680	5723	1710	<i>Constitution 1890.</i>	
2561	488	5724	1710	Art. III, § 10	2039
3038	1680, 1710	5725	1680	§ 26	1397, 2191, 2252
3056	1710	5726	1680		
3057	1680, 1710	5727	1676	<i>Annotated Code 1892.</i>	
3096	1681	5732	1678		
3152	1672, 1680	5733	1680		
3268	1680	5734	1680	9	1684
3298	1680	5738	1519	222	1208
3394	1680	5739	1519	253	1413
3525	2044	5740	1519	257	1141
3803	1639, 1680	5741	1185, 1519	539	2162
3963	1239, 2162	5742	1185	677	1859
4135	1225, 1651	5743	1681	823	1326
4151	1225, 1651	5744	1681	927	1859, 2219
4193	1651	5745	1681	1398	2061
4436	1304	5746	1681	1430	2281
4437	1310, 1320	5747	1681	1432	2281
4442	1267	5748	1681	1433	2281
4443	2052	5749	1681	1571	488
4445	2050	5750	1859, 2219	1737	2531
4452	1681	5751	2596	1738	488, 966, 2218
4616	1681	5752	1466	1739	488
4701	1681	5753	1239	1740	488
4715	1681	5754	1239	1741	488, 2272
4739	1681	5755	1678	1742	1828
4754	1674	5756	1239	1743	488
4976	1062	5758	1239, 1665, 1678	1744	1828
4984	1859	5759	1225, 1651, 1676	1746	966, 987, 1270, 2210, 2252
5005	1411	5760	1644, 1680		
5246	1848	5762	2085	1747	1411
5372	1163	5763	1339	1748	1411
5405	1062	5764	§ 1750-1764		1382
5406	1062	5766	831, 2071	1751	1411
5547	2203	5767	2056	1754	803
5548	2201	5769	2067	1756	911, 1411
5595	2201	6047	1710	1759	1411
5641	1828	6048	1680	1761	1856
5642	1828	6356	2281	1762	1856, 2218
5643	1828	6495	2281	1763	1411
5658	488, 935, 966,	6662	2281	1764	1411
	987, 1828, 2272	6839	2281	§ 1767-1771	1383
5659	488, 916, 2218	6841	488, 987, 1270	1775	1387, 1412, 1681
5660	488	6916	2281	1777	1225, 1651, 1676, 1680, 1681
5661	488	6957	2281		1225, 1651, 1676
5662	488, 2292, 2375,	7145	1837	1778	1225, 1651, 1676
	2380, 2395	7146	1326	1779	1225, 1651, 1676
5663	1828	7216	2360	1780	1681
5664	1828	7220	1851	1781	1681
5665	1828	7223	1851	1782	1239
5666	1828	7234	1851	1783	1680, 1681
5668	1411	7278	1851	1784	1239
§ 5669-5675	1382	7324	488	1785	1680
5676	803	7325	488	1786	1665
5679	1411	7329	1800	1787	1681
5681	1387	7330	1163	1788	1674
5685	1382	7476	1681	1789	1644, 1680

MINNESOTA — MISSOURI.

	Section		Section		Section
1790	1681	935	1651	3123	1225
1791	1680	941	1225, 1651	3129	1710
1792	1681	1000	1074	3130	1710
1793	1680	1037	1680	3133	1710, 1856
1794	1215, 1681	1059	1680	3134	1675, 1856
1795	1678	1208	1680	3135	1681, 1703
1796	2162	1247	1680	3137	1681
1797	2596	1290	1680	3138	1681
1798	2596	1412	1680	3139	1681
1799	2596	1437	1680	3140	1644, 1680
1800	2596	1505	150	3141	1651, 1676
1802	1675, 1680	1861	2085	3142	1225
1803	1710	2174	167, 1154	3143	1647, 1680
1804	1710	2206	2281, 2282	3144	2531
1807	1275	2345	2281	3145	1710
1809	1684	2350	1706	3146	2143
1816	1304, 1310, 1320	2454	1326	3147	1225, 2143
1817	1710	2477	1851	3148	1684
1819	1185, 1411	2506	2360	3149	1668
2023 a	2201	2507	2360	3356	1710
2070	1674	2517	1851	3429	2281
2245	1411	2566	2201	3495	1681
2381	2360	2567	1411	3660	1680
2382	1851	2568	1411	4196	1684
2391	1163	2569	1411	4218	966, 2276
2571	1672	2615	1800, 1910	4320	1644
2657	987, 2281	2627	59, 1873	4528-4531	1383
2791	1705	2630	2039	4540	1387, 1389,
2792	1705	2631	2061		1412, 1681
2793-2804	1660	2634	1625, 1684	4551	1383
3912	1674	2635	488	4557	1387, 1412,
3918	1674	2636	488		1680, 1681
3924	1674	2637	488, 1890	4560-4565	1660
3938	1674	2638	488, 2272	4563	1710
4315	1672	2638	1681	4564	1680
4492	2050	2877	1411	4569	1681
		2883-2891	1382	4617	1411
			1382	4619	1304, 1320
			1411	4620	1304, 1310, 1320
			1684	4621	1326
			1684	4625	1411
			1680	4626	2050
			1684	4632	1681
			1680	4635	1681
			1684	4652	488, 1519
			1684	4653	1859, 2219
			1684	4654	488, 2218
			1680	4655	488, 2252
			1680	4656	488
			1680	4657	2281
			1680	4659	488
			1684	4660	2223
			1680	4663	2201
			1680	4679	2016
			1680, 1684	4680	488, 987, 1270
			1223, 1644, 1683	4691	1710
			1683, 1710	4939	1674
			1239	5074	1225, 1651
			1239	5399	1674
			1676	5458	1680
			1225, 1239, 1651	5521	1680, 1684
			1651	5540	1680
			1225, 1651	5645	1640
			1225	5664	1674
			1680	5670	1710
			2143	5686	1674
			2143	5694	1680, 1684
			1225, 2143	5848	1674
			1225, 1651	5870	1680
			1651, 2143	5887	1680
			1239	5891	1674
			1239	5893	1674
			2143	5970	1674
			1680	5986	1674
			1680	6016	1674
			1680	6020	1674
			1680	6074	1674
					1680

Session Laws.

1894, c. 62	1163
1896, c. 99	488
c. 102	1651
1900, c. 97	1859

MISSOURI.

Constitution 1875.

Art. II, § 5	1828
13	2039
22	1397
23	2252
Art. III, § 22	2191

Revised Statutes 1899.

35	1681
85	1672
89	1710
195	1710
200	1710
265	2531
290	1680
463	1675
687	2595
737	1859, 2219
738	1859, 2219
739	1859, 2219
740	1859, 2219
741	1859, 2219
742	2596
746	2596
751	1062
752	1062
929	1275
932	1651, 1676
933	1225

TABLE OF STATUTES.

MISSOURI (continued).

	Section	1357	Section	3164	Section	1909, 1910
6083	1674	1431	2252	3188		1684
6242	1710	1678	1837	3189		1680
6267	1674	1679	1837	3190		1271, 1703
6284	1674	1680	1326	3193		1681
6289	1670	1692	1382, 1411	3194		1681
6306	1714	1734	1851	3195		2158
6314	1674	1789	2360	3206		1680, 1684
6323	1710	1813	1851	3207		1651
6364	1680, 1684	1910	1851	3208		1639
6682	1680	2070	1873	3209		1681
6762	2596	2075	488	3210		1681
6789	1680	2076	488	3213		1239
6949	1665	2079	2039	3214		1639
7600	1680	2082	2079	3227		1597, 1693
8200	1680	2083	2085	3229		1206, 1207, 1208
8248	1239	2084	1339, 1625	3230		2105
8531	1680	2085	2061	3232		1302
8556	1680	2086	1625, 1684	3233		1300
8840	1828	2089	2056	3234		701
8841	1828	2097	1163, 1803	3235		2016
8842	1828	2098	1800	3236		2017
8918	966	2440	488	3237		1455, 1519, 1639
8920	916, 2218	2441	488	3239		1676
8925	2292, 2380, 2395	2442	488, 968, 2272	3241		1225, 1651
8957	1225, 1651	2443	488	3250		1163
8972	2281	2464	2207	3266		285
9066	1644	2483	1382	3266, par. 34		2137
9078	1239	2490	1389, 1411	3271		2039, 2042
9086	1275	2491	1411	3302		2201
9109	1275	2504	1382	3304		2207
9325	1640	2506	1382	3330		1710
10026	1680	2513	1389, 1411	3331		1710
10186	1665	2795	1326	3332		1680
10197	1275			3342		1411, 1856
10255	1680			3354		1382
10271	1680			3360		1389
10348	1680			1680		1411, 1856
10372	2281			1651		1389
				1680, 1710		1382, 1387
						1837
						781, 1908
						770
						736
						1890
						900, 905, 907
						1877, 1896
						923, 987, 1270
						1028, 1263
						64, 1104
						1861
						1008
						2201
						987, 2210, 2252
						781, 2210
						1062
						2067
						1383
						1387, 1389, 1412
						1828
						1828
						1828

Session Laws.

	1845, § 16	1651	Code of Civil Procedure 1895.	2354	3374	781, 1908
	18	1651	296, par. 2	3375	3374	770
	58	1651	377	1669	3376	736
1877, p. 356	2277	1080	1873	3377	3377	1890
1895, p. 284	488, 987	1081	1163	3378	3378	900, 905, 907
1901, Mar. 28	1705	1314	1862	3379	3379	1877, 1896
p. 140	59	1810	1859, 2219	3380	3380	923, 987, 1270
1903, p. 106	1705, 1710	2330	1304	3381	3381	1028, 1263
p. 107	1705, 1710	2343	1304, 1310, 1320	3382	3382	64, 1104
		2344	1413	3390	3390	1861
		2371	2052	3400	3400	1008
		3120	2034	3401	3401	2201
		3121	657	3402	3402	987, 2210, 2252
		3123	923	3414	3414	781, 2210
		3126	1750	3415	3415	1062
		3128	1480	3421	3421	2067
		3129	1455	3425	3425	1383
		3130	2113	3431	3431	1387, 1389, 1412
		3131	1225, 1230	3432	3432	1828
		3140	2025	3433	3433	1828
		3146	1597, 2016	3434	3434	1828
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
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			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			1387, 1413			
			689, 1938			
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			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
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			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			
			2162			
			1597, 2016			
			1430, 1455, 1480			
			1387, 1413			
			689, 1938			
			1480			
			1480			

MISSOURI — NEVADA.

Compiled Statutes 1899.

	Section		Section		Section
446		5978	1710	2704	1326
758		5981	1710	2705	2052
970		5982	1680	2733	1710
1373	1680, 1684	5984	1678	2739	1681
1416	1680, 1684	5986	1239	2801	1676, 1710
1601	1680, 1684	5987	2167	3004	2050
1603	1680, 1684	5988	1681	3182	2595
1721	1680, 1684	5989	1681	3398	488, 966,
1903	1680	5990	1681		968, 987
2353	1680	5991	\$ 3399		488, 989,
2641	1310	5992	1680, 1684		1828, 2218
2642	2050	5993	1684	3401	488
2655	1304	5994	1684	3402	488
2656	1310, 1320		1271, 1680,	3403	488
2866	488	5996	1703	3404	2292
2893	2067	6000	1383	3405	2395
3277	1411	6128	1387, 1412	3406	2380
3502	2281	6157	2281	3407	2375
3635	150, 1680	7026	1062	3408	1909, 1910
3656	1644	7187	1837	3410	2201, 2207
3657	1680	7199	1382	3415	2210
3853	1675	7200	488, 968,	3416	987, 2210,
4054	2281	7201	987, 2272		2223, 2252
4056	2281	7203	488	3422	1411
4105	1225, 1651, 1676	7204	2061	3429	1411, 1856
4114	1681	7205	2039	3430	1382
4115	1681	7313	1873	3431	1389, 1411
4133	1239		1163	3432	912, 1387, 1389
4155	1239		1851	3433	1411
4158	1705, 1859			3434	1382
4286	1680	<i>Session Laws.</i>		3439-3442	1383
4734	516	1903, c. 17, § 111	1680, 1684	3443	1681
5017	1680	c. 58	150	3444	1387, 1389,
5343 d	2281			3446	1412, 1681
5590	1684	<i>NEVADA.</i>		3447	1828
5856	1163	<i>Constitution 1864.</i>		3448	1859, 2219
5902	488, 516,	Art. I, § 4	1828	3449	1208, 1223, 1225,
	2292, 2395	§ 8	2252		1230, 1680
5903	488	§ 19	2039		2525
5904	966				1681
5905	488				1681
5906	488	<i>General Statutes 1885.</i>			1681
5907	2292, 2395				2158
5908	488	304	1275, 1680	3450	1684
5909	2375	311	1275, 1680	3451	2596
5910	2223	322	1680, 2162	3452	1382, 1387, 1397,
5911	987, 2252	342	1680, 2162	3453	1411, 1413, 1680
5912	987, 1270	483	1644, 1680	3454	2252
5913	2113	599	2061	3455	1326
5916	1597, 1693	682	1681	3456	1326
5917	1302, 1310	705	1684	3457	1326
5918	2016	758	150, 1680	3458	1326, 1389, 1413
5919	1455, 1519	761	150	3459	1326
5920	1519	804	1680	3460	1837
5921	1676	900	2281	3461	1837
5922	1909	935	2154	3462	1326, 1382
5923	1675	936	2154	3463	2360
5928	2207	937	2154	3464	1873
5929	2201	950	1680	3465	488
5939	1828	1110	1640, 1680	3466	2056
5944	1710	1265	2281	3467	1163
5946	1411	1487	1639	3468	1800
5950	803	1695	1674	3469	2207
5952-5954	1382	1816	1674, 1680	3470	1411
5957	1387	2213	1665	3471	1382
5960	1411	2246	1675, 1680	3472	1411
5967	2596	2262	1326	3473	150
5968	1859, 2219	2598	1225, 1651, 1676	3474	488
5969	1859, 2219	2649	1651	3475	488, 2272
5970	1271, 1684,	2655	1651	3476	488, 2281
	1703, 2125	2685	1304, 1310	3477	488
5973	1859	2687	1304, 1310	3478	1828
5974	1859	2688	1310, 1320	3479	2281
5975	1859	2689	1326, 1413	3480	1625
5977	1710	2692	1681	3481	1339

TABLE OF STATUTES.

NEVADA (continued).

	Section	c. 224, § 26	Section 488, 987	Disorderly Persons, § 18	Section 488
4708	2281	c. 225, § 1	1411	Evidence, 1	488, 987
4734	488		1382	2	488, 916
4929	1326, 2281	4	1382	3	488, 966
4930	1326, 2281	5	803	4	488
5012	1684	7	1856	5	488
		11	1411	6	488
		13	1382	7	488
		14	1383	8	488
<i>Compiled Laws 1900.</i>		c. 226, § 3-5	1215, 1387	9	1270
4194	1851	9	1672	10	2252
4234	1851	c. 227, 8	1163	11	2218
4240	1851	19	2281	12	488, 1387
		c. 245, 43	1326	19	2016, 2018
		c. 252, 7	1326	20	1675
1865, c. 403	488	8	1326	22	1684
1881, c. 83	488	9	1837	23	1703
c. 84	488	11	2281	24	1163, 1862
1897, c. 106	1320	c. 260, 10	1326	25	803, 1382
	1304, 1310	c. 262, 12	2056	30	1382
§ 17	1304, 1310	c. 272, 4	2535	38	1382
19	2052	c. 274, § 7		42	1411
25	1644			51	488
1899, c. 35, 1	1644			53	488
1901, c. 6	1644			54	488
1903, c. 6	1310, 1710			57	488
				58	1225, 1639,
					1651, 1680, 1681
				59	803
				60	1644
				61	1680
				63	1382
				64	1411
				65	1684
				66	1382
				67	1411
				69	1680
				73	488
				75	2281
				Fences, § 17	1651
				Judgments, § 19	1651
				Juries, § 31	1163
				32	1163
				35	1163
				Justices' Courts, § 36	1856
				137	1856
				160	1856
				Leasehold Estate, § 8	1651
				Marriage, B. & D. § 23	1644, 1680
				Mortgages, § 18	1651
				32	1651
				56	1651
				Munic. Corpor. § 6	1680
				Orphans' Courts, § 6	1681
				21	1681
				22	1681
				24	1681
				140	1681
				247	1681
				248	1681
				253	1681
				Partition, § 10	1168
				Poor, § 27	1681
				Practice, § 157	1859, 2219
				158	1859, 2219
				159-166	1856, 2218
				163	916
				183	1800
				302	1681
				Promissory Notes, § 12	747, 1675,
					1680
				Secretary of State, § 8	1680
				Statutes, § 38	1684
				Usury, § 3	2281
				Wills, § 11	2050
				12	2050
				16	2050

NEVADA—NEW YORK.

Session Laws.

Session Laws.		Section		Section		Section	
1855, April 5, § 6		2361	1225, 1651	828		488, 2218	
1894, May 9, c. 163		1859	1651	829		488	
1896, c. 202		21	1828	830		1387, 1389,	
1898, c. 232, §§ 21-24		2220	1828			1413, 1669	
		1676	2685, sub-sect. 54	1859, 2219	831	488	
		1651	69	1848	832	488, 987, 1270	
		1651	120	2219	833	2395	
		57	121	2219	834	2380	
		58	122	2219	835	2292	
		64	123	2596	836	1411, 2292, 2380	
		68		2596	837	2223, 2252	
c. 237, § 54		2977		1859	838	916	
		1851		2596	841	2531	
		488		2595	845	1828	
		1163		2595	846	1828	
		21		2595	846	1828	
1900, c. 150, § 1		2990		783, 1873	847	1828	
		2		488	848	1828	
		3		488, 1828	849	1828	
		4		488, 935,	850	488, 1828	
		5		966, 987	852	2201	
		6		488, 2218	866	2373	
		7		2252	867	2200	
		488, 1270.		488	868	2200	
		2218		488	869	2200	
		8		289, 2218	870 ff.	1856	
		11		1263	871	1856	
		19		1028, 1037	872	1856	
		20		987, 1270	873	2220	
		21		900, 905,	881	1387	
		22		923, 1028	882	1411	
		24		1680	896	1382	
		25		1680	899	1382	
		26		1680	911	1389	
		27		1644, 2137	921	1678	
		28		1519	922	1674, 1680, 1710	
		30		1856	923	1675	
		31		1411	926	1710	
		38		1382	927	1710	
		45		1389	928	1644, 1680	
		51		1411	930	1213	
1901, c. 13		1644		1383	931	1273	
1902, c. 135		1382		1387, 1412, 1681	932	1684	
1903, c. 98		1651		1680	933	1680, 1681	
c. 216		488		488, 2065	934	1680	
c. 217		1676		1326	935	1225, 1651, 1676	
c. 247, § 140		1856		1837	936	1225, 1651	
		142		1651	938	1681	
		144		488, 2272	939	1681	
		158		488	940	1681	
		1800		1397, 2252	941	1680, 1684	
				1705	942	1684, 1703	
				1676	943	1681	
				1225, 1651	944	1639, 1680	
				1640, 1680	945	1225, 1651	
					946	1225, 1651	
					947	1225, 1651	
					948	1681	
					949	1681	
					2281	1186	
					952	1681	
					953	2158	
					955	1665	
					956	1680	
					957	1225, 1680, 2162	
					1659	1163	
					2252	2067	
					2281	2052	
					488	1859	
					2398	1710	
					2460	2281	
					2539	1310	
					2540	1310	
					1680	1304, 1310	
					2281	1310	
					406	1310, 1320	
					2596	1681	
					2630	1681	
					1859, 2219	1681	
						1681	
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						1681	

TABLE OF STATUTES.

[illegible]

NEW YORK—OHIO.

[illegible]

TABLE OF STATUTES.

OHIO (continued).

	Section	1750
5281	1411	1776
5289	1859, 2219	1850
5290	1859, 2219	1926
5291	1859, 2219	2002
5292	1859, 2219	2038
5293	1856	2139
5339 <i>a</i>	1660	2157
5339 <i>b</i>	1660	2303
5339 <i>c</i>	1660, 1705, 2109	2581
5339 <i>d</i>	1660, 1705	3034
5339 <i>e</i>	1660, 1705	3076
5339 <i>f</i>	1660, 1705	3131
5339 <i>g</i>	1660, 1705,	3155
5476	2281	3224
5615	1326	3244
5628	1413	3543
5697	488, 2067	3544
5698	2085	3547
5863	1413	4165
§ 5874-5876	1383	4167
5878	1387, 1412	4209
5926	1304	4210
5927	1810	4211
5928	1411	4212
5931	1681	4213
5946	1411	4218
5947	2106	4219
6055	1326	4228
6089	1710	4229
6399	1644, 1680	4234
6419	1710	4236
6428	1163	4240
7148	1837	4242
7205	2360	4243
7283	1163	4244
7284	488, 966, 987	4247
7285	488, 2272, 2281	4250
7287	1908	4257
7293	1382, 1411	4258
7296	2061	4259
7298	2039	4260
7299	1639	4261
7300	1873	4262

Session Laws.

1898, Apr. 13, p. 113	283
1903, Mar. 14, p. 56, § 3	1326

OKLAHOMA.

Statutes 1893.

245	150, 1680
333	2218
335	2292, 2380, 2395
705	1680
937	1680
1169	1680
1189	1304
1192	1326
1193	1304, 1310, 1320
1194	1413
1207	1326
1208	2052, 2106
1277	1681
1283	1681
1566	2085
1586	1669
1587	1215, 1681
1600	2201, 2207
1621	1225, 1651, 1676
1633	1681
1671	1639, 1680
1716	1665
1717	1665

	Section	Section
	1326	520
	1680	5210
2056,	2281	5211
	2281	5222
	488	5223
	2281	5228
	2281	5229
	2044	5286
	2281	5287
	2281	5344
	1680	5349
	1680	5351
	2281	5357
	1674	5358
	2085	5359
1644,	1680	5362
	1680	5371
	1710	5375
	2063	5456
	1873	6130
	1163	6170
	488	6185
488,	2219	

Revised Statutes 1903.

310	2218
5574	196

Session Laws.

1893, c. 66, § 331	966, 987
1411 c. 68, § 11	2272
1895, c. 41, § 5	1851, 2281
17	1851
29	488
c. 42	1275, 1660
1897, c. 8, § 25	1225, 1651,
	1676, 1683
c. 23, § 14	1644

OREGON.

Constitution 1859.

Art. I, § 6	1828
7	1828
11	1397, 2191
12	2252
24	2039

Codes and General Laws 1892.

196	1873
197	1163
201	1800
242	2567
1225, 1639, 520	1062
1651, 2373	1859, 2219
1383	2034
1383	657
1387, 1412, 1681	1480
2281	1455
1326	2113
1062	1230, 1269
2067, 2085	1195
1681	1225
1397	2025
2252	1597
1326	1430, 1455, 1480
1326	1387, 1413
2360	2016
2360	689, 1938
1873	1480
488	1480
488	2162
710	488, 966,
488	987, 1828

OHIO—PENNSYLVANIA.

	Section		Section		Section
§ 711	488	1361	488	Deeds 110	1660
§ 712	488	1362	488	112	1660
par. 4	2380	1364	488	117	1225, 1651
713	488, 2380	1365	488, 2272	162	1225, 1651
718	1680	1366	488	163	1225, 1651
725	1684	1368	831, 2071	178	1225, 1651
726	1680	1370	2056	Desertion 3	488
727	1271, 1703	1373	2061	Evidence 1	1387
730	1681	1374	2567	6	1859, 2219
731	1681	1549	1326	7	1212
732	2158	1593	1326	10	1225, 1651
743	1680, 1684	1599	852	11	1651, 1680
744	1651, 1680	1601	1837	12	1651, 1680
745	1639	1602	1326	15	1275, 1651
746	1681	1623	1326	16	1651
747	1681	1635	2276	17	1225, 1651
758	1597, 1693	1665	1326	18	1225, 1651
759	1206, 1207, 1208	1686	1750	19	1225, 1651
760	2125	1819	1339	20	1681
761	1290, 1300, 1302,	1820	1710	21-24	1680
	1304, 1310, 1320	1924	1620, 2066	22	2218
762	701	2221	1639, 1680	25	1225, 1651
765	2016	3023	1676	26	1680
766	2017	3028	1225, 1651	27	1275
767	1455, 1519, 1639	3035	1651	29	1680, 2373
768	1519	3037	1651	30	1225, 1239
769	1163	3039	1239	31	1680
776, par. 24	95	3045	1651	32	1275
par. 25	2529	3083	1681	33	1239
par. 35	2137			34	1275
778	2039, 2042, 2053			35	1680
780	2051			36	1680
792	2201			37	1680, 1684
795	1411, 2201, 2207			38	1223, 1680
808	1710			39	1223, 1519, 1710
810	1710			40	1223, 1519, 1710
811	1680			41	1223, 1710
814	1411, 1856			42	1680
817	1382			43	1644
821	1382			44	1675
822	1382			45	1213, 1644,
823	1382				1680-1683
824	803			46	1674
827	1389			47	1644
828	1382, 1411, 1856			48	1651
830	1837			49	1644, 1680
831	1837			50	1675, 1680
833	781, 1908			51	2162
835	770, 775			53	1681
836	736				1326
837	773, 914, 1890				1674
838	900, 905, 907				1163
839	1877, 1893,				1163
	1896, 1898				2162
§ 840	923, 987,				1680
	1270, 1985				1681
841	1028, 1263				1680
842	64, 1104				488
843	1861, 1883				488
845	1008, 2034, 2056				488
846	2201				488
847	285, 987, 2210,				2292
	2223, 2252, 2270				1263, 1330,
848	781, 2210				1387, 1413
856	1062				1339
857	2067				488
860	1333				488
862	1681				488
863	1387, 1389,				488
	1412, 1681				488
865	1383				488
867	1828				488
868	1828				488
869	1828				488
870	1828				488
1257	2360				488, 916
1260	1851				488, 2272
					2281

TABLE OF STATUTES.

[illegible]

PENNSYLVANIA — TEXAS.

	Section		Section		Section
5257	1680, 1710	§ 8667	1800	5581	1681
5258	1639	8672	2085	5582	1683
5265	1710	8673	1339, 1625	5583	1639
6254	1878	8806	2207	5584	1680, 1684
6257	1163	8812	1382	5585	1684
6369	1651	8818	1389, 1411	5586	2573
§ 6472-6476	1062	8823	1382	5587	1680
6481	2596	8832	1389, 1411	5588	1680
6482	1859, 2219	8897	1326	5590	1680
6483	1856			5592	488
6484	1856, 2218	<i>Edition 1901.</i>		5593	935, 1828
6485	1856, 2207	§ 6306	2354	5594	1909
6486	1856			5595	488
6487	916, 1856	<i>Session Laws.</i>		5596	488, 2336
6488	1856			5597	488
6489	916, 1856	1899, Feb. 21	1684	5598	488
6490	1856	1901, c. 105	488	5599	1837
6491	488, 2218	1903, c. 79, § 10	1680	5600	488
6496	2207	c. 122	488	5601	488, 1869, 2272
6497	2201			5608	2201
6506	2201			5624	1411, 1412,
6507	1828				2206, 2371
6512	1710	<i>TENNESSEE.</i>		5625	1411, 2206
6514	1411	<i>Constitution 1870.</i>		5626	1411, 1415,
6518	803				2206
6520	1382	I, 9	1397, 2191, 2252	5627	1382, 2206
6521	1382			5628	2206, 2371
6522	803	<i>Annotated Code 1896.</i>		5631	1411
6524	1387			5632	1382
6527	1411	§ 265	1880	5637	803
6533	1271, 1684, 1703	347	1674	5640-5647	1382
6534	1681	1045	1674, 1680	5657	803
6535	1710	1856	1163	5671	1383, 1387
6536	1681	2033	1672	5672	1383, 1387
6537	1681	2065	1680	5678	1412
6538	1676	§ 3203-3206	1675	5682	1387, 1412
6539	1225, 1651	3518	2054	5684-5693	1856, 1859
6540	1639	3689	1163	5694	1197
6541	1639	3704	1225, 1651	5695	1197
6542	1680, 1681	3711	1225, 1651	5696	1197
6543	2531	3748	1225, 1651	5785	2292
6544	2292, 2375	3761	2143	6665	488
	2380, 2395	3778	1225	6859	488
6545	2292, 2380, 2395	3786	1225	7017	1326
6546	1909, 1910	3793	1225	7020	1837
6547	1828	3896	2051	7021	1326
6549	1383	3899	2050	7043	2360
6552	1387, 1389,	3900	2050	7046	2281
	1412, 1681	3904	1290, 1304,	7047	2281
6570 a	1680		1310	7048	2281
6899	1304	3911	1267	7054	1851
6903	1304, 1310, 1320	3913	1681	7057	1851
6904	1326, 1413	3915	1681	7281	2203
6918	2106	3920	1681	7343	1710
7539	2281	3924	1681	7355	1397
7624	488	3929	1681	7356	1382, 1411
7660	2281	3930	1681	7357	1680, 1684
7763	2281	3931	1681	7574	1411
7856	2281	3932	1681	7575	1411
7960	2281	4608	1859	7576	1411
8241	2281	5363	1678	7581	488
8285	1397	5364	1678		
8287	2252	5551	1828	<i>Session Laws.</i>	
8301	1326	5552	1828	1784, c. 10, § 6	1658
8419	1326	5553	1828	1789, c. 23, 1	1313
8442	1851	5554	1828	1809, c. 14, 8	1225
8482	2360	5562	1519	1819, c. 27, §§ 1-4	1197
8483	2360	5563	1519	1887, c. 79	1869
8495	1851	5564	1519		
8639	1873	5565	1519		
8648	488	5569	1223	<i>TEXAS.</i>	
8649	488	5573	1651, 1680	<i>Constitution 1876.</i>	
8650	488, 2272	5574	1680	Art. I, § 5	1828
8653	2056	5575	1225	§ 10	1397, 2191, 2252
8654	2044	5578	1678	§ 22	2039
8655	2061	5579	1681		
8666	1163	5580	1681		

TABLE OF STATUTES.

TEXAS (continued).

		Section	Section	Section
<i>Revised Civil Statutes 1895.</i>		775	886	1633, 1639, 1680
		777	887	1639
		778	888	1680
		779	889	1639, 1680
645		781	890	1674, 1680
646		782	891	1680
1298		783	892	1680
1900	1304, 1310, 1320,	786	893	1680
	1411, 1710, 2051	788	894	1680
		789	895	1680
1901		790	896	1639, 1680
1903		791	897	1275
1905	1278, 2052	793	898	1275
1907		794	899-904	1660
1908	1413, 1681	795	900, 905	1680, 1681
1960		797	1382, 1389, 1411	1652, 1680,
2257		798	1389	1681
2271		805	1382	1680
2273		808	1382	1684
§ 2274-2276		812	1411	6
2277	1383, 1387	813	1411	1851, 1854
2285		814	1413	488, 516
2288		817, par. 8	2354	488
2290		941	1326	2162
§ 2292-2298		1028	1326	488, 516
2293	916, 2218	1049	1326	488
2300	488, 516		2140	516
2301	488		2165	1680
2302	488		2225	1680
2303	488, 1828		2229	1680
2304		91	488	1680
2305		348	2085	1680
2306	1680, 1681	352	2085	1641
2307	1665, 1680	391	2281	1641
2308	1678, 1680	770	2272	1641
2309	1675, 1680	713	246, 247	1641
2310	1639, 1680	773	2292	1641
2311	1225, 1651	776	4550	1641
2312	1225, 1651, 1676	983	4555	1641
2313		988 c	1626	1641
2314	1215, 1681		1626	2374
2315			4902	2201
2316			4908	1856
2318			4920	2061
2319			5351	488, 516
2320			5392	1641
2321			5465	
2322				
2323				
2324				
2325				
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2329				
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2637				
2638				
2639				
2640				</

TEXAS — VERMONT.

[illegible]

TABLE OF STATUTES.

VERMONT (continued).

	Section	
1924	1382	3167
1982	1837	3168
2216	1225, 1651	3244
2222	1225, 1651	3325
2310	1675	3327
2333	1681	3328
2343	1411	3329
2362	1304	3330
2363	1310, 1320,	3331
	1511	3332
2367	1681	3333
2640	1644, 1680	3334
2672	2067	3335
2715	2281	3342
2716	2281	3343
2898	1680	3344
2929	1225, 1680	3345
2935	1680	3350
3007	1275	3351
3008	1680	3353
3025	1680	3354
3094	1680	3355
3107	1680	3359
3765	1680	3360
3957	1680	3362
3992	1672	3363
4084	1074	3365
4089	488	3367
4136	1680	3369
4166	1674, 1680	3370
4219	1680	3371
4329	1672	3372
4387	1680	3373
4476	238	3376
4510	488	3377
4529	1620	3658
4541	2281	3679
4715	1326	3692
5060	2085	3897
5092	2281	3899
5273	2292	3901
		3942
		3967
		3968
		3984
		4091

Session Laws.

1896, No. 30	2395
1898, No. 61	1680
1902, No. 44	1646
No. 123	488
No. 162	1665, 1680

VIRGINIA.

Constitution 1869.

Art. I, § 10	1397, 2252
Art. V, § 14	1828

Constitution 1902.

Art. I, § 8	2191, 2252
-------------	------------

Code 1887.

207	1680
413	1411, 2371
2241	1644
2358	1710
2435	1378
2536	1681
2537	1411
2546	1411
2619	1378
2849	1675
2850	1675

Section

1163
1800
1859
1674
1684
1684
1684
1684
1680, 1684
2167
1225, 1651
1674, 1680,
1681, 2162
1680, 1681, 2162
1681
1680
1676, 1680, 1681
2218
2218
916, 2218
2200
2200, 2201
2200
1856, 2167, 2218
1856, 2167
1382, 1387
1382
1411
1389
1383
1856
1859, 2219
1856, 1859
2531
1225, 1651
1196, 2141
2039
2061
2281
2272, 2276
2281
852
1326
1837
1326
1851
2201

WASHINGTON.

Constitution 1889.

Art. I, §	Section
6	1828
9	2252
11	1828
22	488, 1397,
	1851, 2191
27	2039

Annotated Codes and Statutes 1897.

153	1680
160	1680
180	1672, 1680
250	1675, 1680
353	1680
421	1680
492	1665
532	1326
864	1684
1299	1684
1622	2201
2658	1674, 2371
3111	1639, 1680
3122	1639
3156	1680
3439	150, 1680
4364	2154
4365	2154
4366	2154
4532	1225, 1651
4605	2050
4793	1873
4926	2281
4998	1163
5001	1800, 1910
5990	488
5991	488, 966
5992	488, 987
5993	488
5994	488, 2292, 2375,
	2380, 2395
	2201, 2207
	2373
	1411
	916, 1856, 2218
§ 6009-6011	1856
6012	916, 1856
6013	1856
6017	1411
6019	1382
6020	1382, 2207
6024	1382
6025	803
6027	1389
6028	1411
6029	1387
6030	1387
6035	1383
6038	1387, 1412, 1681
6040	1681
6043	1680
6045	1684
6046	1225, 1651
6047	1859, 2219
6048	2596
6055	1828
6056	1828
6057	1828
6058	1828
§ 6063-6070	1660
900, 905	1411
1028, 1037	1310, 1320
6101	1310, 1320
6103	1326
6104	
6105	

Code Supplement 1898.

3345	488
3346	488
3346 a	488
3347	488
3348	488
3349	488
3742	488
3896	488
3897	488
3898	488
3899	488
3900	488
4187	488

Session Laws.

1776, Bill of Rights, Art. 10	2264
1887-8, c. 15, § 4048	1163
1897-8, p. 753, § 1	488
2	488
3	488
1899-1900, c. 117, § 1	900, 905
2	1028, 1037
3	1263
1901-2, p. 799, § 1	488
2	488

VERMONT — WISCONSIN.

	Section		Section		Section
6107	1681	c. 130, § 28	2200	§ 2642	1710
6108	1681		1710	2852	1163
6113	1413		2167	3033	2281
6117	2052		2167	3537	1710
6120	1681		1882	3637	1828
6138	1681		1411	3788	1304, 1310, 1820
6682	1326		1389	3932	1519
6699	1326		1383	4056	2207
6708	1326, 1382, 1411		2531	4057	2201
6742	2201	c. 148, 11	2281	4053	2201
6745	916, 1856, 2218	c. 152, 17	488	4068	488, 916
6746	916		488	4069	488
6748	488		488, 2272	4070	488
6749	1411		852	4071	488, 2272
6820	2360	c. 155, 4	1326	4072	488
6825	1851		1837	4073	488, 978, 1270
6925	1411	c. 156, 14	1326	4074	2395
6940	488, 516, 2380, 2395	c. 157, 8	1851	4075	2380
6941	488, 2272, 2276	c. 159, 1	1411	4076	2292
6942	831, 2071	c. 162, 1	2201	4077	2223
6948	1163			4078	2281
6950	488			4079	1076
7132	1339			4081	1828
7232	1680, 2085			4082	1828
7316	488, 516			4083	1828
				4084	1828
				4085	488
				4086	1382, 1411
				4089	803, 1411
				4093	1387
				4095	1411
				4096	916, 1382, 2218
				4096-4098	1856
				4098	916
				4100	2207
				4101	1411
				4102	1382
				4105	803
				4110	1411
				4113	1411
				4114	1382
				4115	1382
				4118	1383
				4121	1387, 1412, 1681
				4125	1383
				4128	1383
				4129	1412
				4131	1383
				4134	1387, 1412, 1681
				4135	1684
				4136	1684
				4137	1684
				4138	1271, 1703
				4139	1271
				4140	1681
				4141	1669
				4142	1681
				4143	1681
				4144	1681
				4145	1681
				4146	1681
				4147	1681
				4148	1680
				4149	1680, 1681, 2162
				4150	1681
				4151	1239
				4151 a	1239, 1680
				4152	1239, 1674
				4156	1225, 1651, 1676
				4160	1644
				4161	1639
				4162	1639, 1640
				4163	1678
				4164	1674, 1710
				4165	1239
				4166	1678

TABLE OF STATUTES.

[illegible]

TABLE OF CASES

TABLE OF CASES

[In the following Table, all titles of criminal cases in England are entered under "R. v.", even though commonly known as "Anderson's Trial" or "Case" or the like; except in those earlier reports in which it does not plainly appear whether the case was a criminal one. In the United States, similarly, criminal trials, by whatever name known, are entered under "U. S. v.", "Com. v.", "State v.", etc., according to the local term of the jurisdiction. But wherever in a ruling made on appeal a case becomes officially otherwise designated, the entry is here made by that title, *e. g.*, "Anderson v. U. S.", "Smith's Case." Accordingly a criminal case not found in this Table under one of these titles may be discovered under the other.]

A.		Section	Section		Section
—, <i>ex parte</i>		497	Acklen's Ex'r v. Hick-		Adams v. Porter
— v. Leadbetter		1161	man	735, 745,	v. Rainger
Aaron v. State		832		747, 754,	v. Russell
Abat v. Rion	1202, 1206,	1339	Ackley v. Sexton	759, 762, 763	v. Stanyan
Abbey v. Lill		2152	Acklin v. McCalmont Oil	1225	1582, 1588,
Abbey H. Ass'n v. Wil-			Co.	1873	1592, 1665,
lard		1876	Acme Brewing Co. v.		2144
Abbot v. Heath	688, 1721		Central R. & B. Co.	581	v. State
v. Plumbe	1288, 1300,		Acme Mfg. Co. v. Reed	2593	11 Ark.
	1302, 1308		Ada Dairy Ass'n v.		28 Fla.
Abbott, <i>re</i>		2218	Mears	2410	93 Ga.
v. Abbott			Adae v. Zangs	736, 753, 754	156 Ind.
41 Mich.	1302, 1304		Adair v. Adair	1404, 1668	34 Tex. Cr.
4 Sw. & Tr.		1644	Adam v. Kerr	1306, 1312,	
v. Coleman	2011, 2016			1513	v. Swansea
v. Com.	107, 108, 569,		Adams v. Arnold	896, 907	v. Swift
	1988, 2276		v. Bankart	1898	v. Thier River Falls
v. Mitchell		529	v. Betz	2555	1158
v. Muir		1084	v. Bleakley	2336	v. Thornton
v. People	246, 852, 1963		v. Board	749, 1230	1966
v. Striblen		1911	v. Brownson	1300	v. Turner
Abeel v. Van Gelder	378, 1778		v. Buhler	1225, 1651	2463
Abel v. Fitch		664	v. Canon	727, 728,	v. Wadleigh
v. Kennedy	2349, 2354			1364, 2032	v. Watkins
v. Light	1208, 1404		v. Carlisle	65	v. Way
v. Potts		1706	v. Coulliard	736, 747, 754	1681, 2164
Abend v. Mueller	34, 35, 451		v. Davidson	1086	v. Weaver
Abercrombie v. Allen		1072	v. Dickson	2139	1416
Abernathy v. State		1350	v. Eames	2119	v. Wheeler
Abernethy v. Com.	106, 1117		v. Elseffer	64	905
Abigny v. Clifton		1674	v. Elwood	19	v. Wordley
Abington v. Duxbury		2063	v. Ferguson	1873	530, 1635, 1675
v. N. Bridgewater		1587	v. Field	2016	Adams Express
Abland v. R. Co.		1078	v. French	1082	Co. v. Schlessinger
Able v. Shields		1031	v. Harrold	772	716, 1943
Abney v. Kingsland	335, 1779,		v. Hickox	1640	Adams Paper Co. v.
	1871		v. Ins. Co.	376, 1985	Cassard
Abraham v. R. Co.		2463	v. Jackson	2535	2536
Abrahams v. Bunn		529	v. Jones	2409	Adamthwaite v. Synge
Abrams v. R. Co.		455	v. Kelly	1237	2158
Abraeth v. Northeast-			v. Lawson	73, 76, 216	Addams v. Seitzinger
ern R. Co.	2494, 2539		v. Lisher	1681	1457,
Abshire v. Mather		928	v. Lloyd	1859, 2219,	1460, 1466
v. State		1225		2271	Addington v. Wilson
Academy of M. Co. v.			v. Lumber Co.	2154	229, 762
Davidson		1729	v. McBeath	2503	Addis v. Graham
Acerro v. Petroni		777	v. M'Millan	1065	1225
Ackland v. Pearce		1206	v. Morrison	1624	Addison v. People

TABLE OF CASES.

AFR

	Section		Section		Section
African Co. v. Parish	2250	Albert v. R. Co.	456, 994	Allegheny Co. v. Watt	2203
Agassiz v. Tramway Co.	1754	v. Twohig	1351	Alleman v. Stepp	984
Agnew v. Jobson	2265	Alberti v. R. Co.	792, 2315, 2388	Allen v. Allen	
v. U. S.	2495, 2511	Alberty v. U. S.	276	Prob.	916, 1076
Agricultural Bank v.		Albion v. Herrick	1951	73 Conn.	235
Bark Jane	1062	v. Maple Lake	581, 1605	2 Overt.	1304, 1317
Agulino v. R. Co.	416, 437, 461	Albright v. State	363	v. Armstrong	1354
Ah Doon v. Smith	1890	Albright v. Corley	660	v. Blunt	95
Ah Tong v. Fruit Co.	934	v. Jones	2146	v. Coit	1074
Ahern v. McCarthy	2437	Albritten v. Huntsville	2572	v. Duncan	1777
Aicardi v. Strang	1378	Albro v. Ins. Co.	2452	v. Hall	1490, 2063
Aiken v. Gale	2336	Alcock v. Ass. Co.	96, 748, 787	v. Hancock	15
v. Kennison	377	Alcorn v. Powell	406	v. Harrison	2317
v. Kilburne		Alden v. Goddard	2313	v. Hill	1304, 2411
27 Me.	527, 2310	Alderman v. Finley	2572	v. Holkins	529
v. Martin	2200, 2211	v. French	74, 1064	v. Hunter	569
v. Oil Co.	112	v. People	2304, 2327	v. Ins. Co.	770, 2307
v. People	988	Alderson v. Clay	1074	v. Killinger	1070, 1362
Ainsworth v. Barry	616	Aldous v. Olverson	1086, 2235	v. Kingsbury	2463
v. Lakin	660	Aldrich v. Aldrich	2066	v. McDonald	18
v. Wilding	2812, 2819	v. Chubb	1677	v. McKay	2427
Airey v. Stapleton	2144	v. Earle	1086	v. McKean	2592
Aiscough, ex p.	2220	v. Griffith	2145	v. Maddock	2452
Aitken v. McMeckan	1933	v. Pelham	458	v. Martin	1292, 1312
v. Mendenhall	1890	v. R. Co.		v. Merchants' Bank	1954
Aitkin, re	2297	67 N. H.	283	v. Mill Co.	2432
Akerley v. Haines	75	39 Or.	2053	v. Murray	1012
Akers v. Kirke	1062	v. Wetmore	1166	v. Parish	1189, 1256,
Akin v. St. Croix L. Co.	1976	Aldridge v. R. Co.	456		1676, 2143
Akins v. R. & B. Co.	456, 736	Alexander v. Alexander	1966	v. Pink	2429
Alabama F. Co. v.		v. Beadle	917	v. Potter	2447
Reynolds	1966	v. Byron	1877	v. R. Co.	1951, 1976
Alabama G. S. R. Co.		v. Campbell	2132, 2159	v. Rand	803
v. Clark	454	v. Coulter	1205, 1209	v. Read	1678
v. Collier	457	v. Foreman	1216, 1267	v. Root	2312
v. Hall	1951, 1977	v. Gibson	897	v. Rostain	1624, 1800
v. Hawk	1750	v. Gould	1086	v. Seyfried	788
v. Hill	2220	v. Grand Lodge	2103	v. Smith	1664
v. Johnston	455, 949	v. Handby	1957	v. State	
v. Linn	1976	v. Humber	2356	60 Ala.	492, 932
v. Taylor	2491	v. Kaiser	1021	72 Ala.	1781
Alabama Midland R. Co.		v. Mahon	1083	73 Ala.	1781
v. Guilford	1067	v. Smoot	1556	111 Ala.	2497
Alabama Mineral R. Co.		v. State	581	38 Fla.	246
v. Jones	1951	v. Steel Co.	2509	21 Ga.	1195, 2535
v. Marcus	2498	v. Thomas	2354	74 Ga.	2060
Alabama Nat'l Bank v.		v. U. S.	140, 2294, 2298	3 Humph.	705, 709
Chattanooga D. & S.		v. Vye	278, 697, 1005,	62 Miss.	1840
Co.	2165		1185, 2016	10 Oh. St.	580, 967,
Alabama State L. Co.		v. White	1302		2056
v. Kyle	1213, 2132	Alexandria A. & F. S.		v. Thaxter	2164
Alabama & F. R. Co.		R. Co. v. Johnson	2573	v. Trimble	736, 747, 1304
v. Burkett	1943	Alfonso v. U. S.	718, 719, 1948	v. U. S.	
Alabama & V. R. Co.		Alfred v. Anthony	1326	28 Ct. Cl.	1384
v. Beardsley	2506	Alger v. Andrews	1083	115 Fed.	987
v. Ins. Co.	455, 456	v. Castle	1021	150 U. S.	21
v. Sol Fried Co.	754	v. Turner	2318	164 U. S.	276, 278,
Alam v. Jourdan	2047	Alivon v. Furnival	1219, 1233,		2511
Alameda M. Co. v. Wil-			1271	v. Vincennes	1651, 1676
liams	1680	Allain v. Whitaker	1675	v. Voje	569
Alban v. Pritchett	2232	Allaire v. Allaire	1511	v. Watson	1684
Albany C. S. Bank v.		Allan v. McTavish	2143	Allen's Appeal	568
McCarty	2534	v. Morrison	2523, 2533	Allend v. R. Co.	2124
Albany C. S. Inst. v.		v. Tap	1858	Allensworth v. Coleman	406,
Burdick	2416	Allard v. R. Co.	456		1971
Albaugh v. James	613	Allay v. Hutchings	905	Allesbrook v. Roach	1994, 2002
Albers Commission Co.		Allbright v. Governor	1672	Allgood v. Blake	2470
v. Sessel	18	v. Hannah	1640, 2336	Allhusen v. Labouchere	916,
Albert v. Ins. Co.	1078	Allegheny v. Nelson	1458, 1466		2268

	Section		Section		Section
Allin v. Hiscock	1216	American Express Co. v. Lankford		Anchor Milling Co. v. Walsh	1555, 1560
v. Millison	321	1 Ind. T.	616	Andersen v. U. S.	246, 248, 1976
v. Whittemore	1028	2 Ind. T.	1078	Anderson v. Ackerman	1186, 1677, 2110
Allis v. Day	715, 1944	93 Fed.	616	v. Albertstamm	682
Allison v. Barrow	2336	American Fire Ins. Co. v. Hazen	64	v. Ames	1550
v. Com.	1450	v. Landfare	255	v. Anderson	
v. Horning	392	American Gas & V. M. Co. v. Wood	2443	141 Ind.	2579
v. Little	1225, 1311, 2143	American Life Ins. Co. v. Rosenagle	413, 564, 1195, 1213, 1644, 2109, 2167	9 Kan.	2341
v. Matthieu	321			23 Tex.	2573
v. Parkinson	715	American M. Co. v. Hill	2534	v. Bank	
v. People	2354	American Mge. Co. v. Mouse River L. S. Co.	1225	L. R. 2 Ch. D.	2291, 2317, 2319, 2380, 2394
v. Robinson	1681	American Oak Extr. Co. v. Ryan	715, 2498	6 N. D.	1892, 1943
v. U. S.	111, 247	American Steamship Co. v. Landreth	1951	v. Beeman	1548
Allison's Dev. v. Allison's Heirs	2106	American Surety Co. v. Pauly	331, 1530, 2553	v. Cecil	2579
Allison's Estate	1312	Ames v. Hoy	1267	v. Com.	276, 2575
Allman v. Owen	1698	v. McCamber	1703	v. Cuthbert	1651, 2520
Allmendinger v. McHie	1346	v. Phelps	1352	v. Duckworth	282
Allport v. Meek	1994	v. R. Co.	1350	v. Dudley	1216
Allred v. Elliott	1312	Ames' Succession	2237	v. English	748, 749
Almon v. Law	907	Ames' Will, re	682	v. Fisk	1651
Almy v. Church	2145	Ames Ironworks v. Pulley Co.	1078	v. Friend	614, 615
v. Reed	1199	Ames M. Co. v. Kimball S. S. Co.	1954	v. Green	2356
Alner v. George	2432	Ames & Frost Co. v. Strachurski	2496	v. Hamilton	2375
Alpaugh's Will	1511	Amey v. Long	2193, 2194, 2200, 2211	v. Irwin	291, 1267, 2106
Alpin v. Morton	406	Amherst v. Hollis	2276	v. Jarrett	2465, 2466
Alsabrooks v. State	398	Amherst Bank v. Root	1316, 1510	v. Leverette	1651
Alsager v. St. Katherine's Dock Co.	2477	Amick v. Young	1779	v. Life Ass'n	1074
Alsever v. Minneapolis & S. L. R. Co.	1750	Amidon v. Hosley	928, 1618	v. Long	64, 73, 75
Alsop v. Bowtrell	1645, 1674, 1917	Amis v. Marks	1219, 1677, 1680	v. Maberry	1198, 1817
Alston v. Alston	1487, 1492, 1605	Ammons v. Dwyer v. State	1677, 833	v. McPike	1066, 1779
v. State		Amor v. Stoeckele	749	v. May	1205, 1234
109 Ala.	2271	Amory v. Fellowes	527, 787, 1185, 1810, 1824	v. Mining Co.	879
41 Tex.	852, 1329	v. Melrose	463, 561, 714, 718	v. Mowatt	1164
v. Taylor	1456, 2164	Amos v. State		v. R. Co.	
Alt v. Fig Syrup Co.	715, 1944	96 Ala.	246	107 Ga.	1109
Altham v. Anglesea	1174, 1404, 1406	123 Ala.	1786, 2120	109 Ia.	1951
Altham's Case	2426	Amoskeag Co. v. Head	443, 463, 1864	87 Wis.	283
Althouse v. Jamestown	1280	Amperse v. Fleckenstein	1807	v. Reid	1668
Altoona v. Bowman	2534	Amsby v. Dickhouse	2349, 2354	v. Robson	1195
Alvarez v. State	2079	Amstein v. Gardner	1951	v. Root	1256, 1861, 2125
Alverson v. Bell	18	Amstell v. Alexander	905	v. Sanderson	2232
Alves v. Bunbury	1681	Amundson v. Wilson	2450, 2568	v. Snyder	613
v. Hodgson	1271	Anaconda C. M. Co. v. District Court	1862	v. State	
Alvord v. Alvord	1938, 2212	v. Henze	1873	79 Ala.	1450
v. Baker	2518	Anchor Line v. Dater	2415	89 Ala.	1364, 1389, 1398
v. Collin	736, 747			104 Ala.	1966
Alward v. Oaks	958, 1042			34 Ark.	987
Amberson's Estate	2477			72 Ga.	2071
Ambler v. Whipple	2494			117 Ga.	1451
American Accident Co. v. Fidler	568, 1983			26 Ind.	852
American Bible Society v. Pratt	2463			104 Ind.	62, 923
v. Price	1938			147 Ind.	276, 1157
American Bonding & T. Co. v. Takahashi	2465			v. Taft	458
American Exchange N. Bank v. First N. Bank	1381			v. Tribble	2570
v. N. Y. B. & P. Co.	2495			v. Vohner	665
American Express Co. v. Haggard	93			v. Walker	1225
				v. Weston	2520
				v. Whalley	745, 748
				v. White	1086

TABLE OF CASES.

AND

	Section		Section		Section
Andre v. State	206	Anon.		Answer of the Judges	
Andrew v. Fleming	1778	1 Bulstr.	575	2 How. St. Tr. and	
<i>v. Keenan</i>	1225	3 C. & P.	2230	2 Co. Inst.	2032, 2250
<i>v. Ledsam</i>	2250	4 C. & P.	850	22 How. St. Tr.	581, 661, 1699, 1963, 2458, 2557, 2569
Andrews v. Andrews	2067	5 C. & P.	848	Anthony v. Chapman	1651
<i>v. Askey</i>	166, 210, 1028, 1051	2 Chitty	1164	<i>v. Grand</i>	64
<i>v. Black</i>	1308	Comb.	1658	<i>v. R. Co.</i>	1640
<i>v. Com.</i>	1750	5 Cox Cr.	196	<i>v. State</i>	
<i>v. Davison</i>	1225, 1651	Dyer, 132 <i>a</i>	2036	Fla., 32 So. 1877, 2056,	
<i>v. Frye</i>	2273	" 288 <i>a</i>	2250	Ida., 55 Pac.	1899
<i>v. Hayden's Adm'r</i>	2015	" 29 <i>b</i>	1211	Meigs	1398
<i>v. Hoxie</i>	2575	6 East	1431	<i>v. Stephens</i>	73, 74
<i>v. Jones</i>	794	Gilbert	2122	<i>v. Stinson</i>	1554
<i>v. Marshall</i>	2167	Godb.	575, 1364, 1405	Apache Co. v. Barth	2167
<i>v. Mining Co.</i>	1078	1 Hill S. C.	73, 74, 518, 923, 957, 987, 1112, 1840, 1842,	Apel v. Kelsey	1651
<i>v. Palmer</i>	1402		1955	Apgar's Case	2528
<i>v. People</i>	1852, 2071	Jenkins	1193	Apollon, The	2575
<i>v. R. Co.</i>		T. Jones	2036	Apperson v. Ingram	1678
99 Ala.	461	1 Leach Cr. L.	1821	Applebee, re	2475
14 Ind.	2307	1 Leon.	1165	Appleby v. Brock	689, 1938
96 Wis.	346, 461	1 Lew. Cr. C.	101 760	<i>v. Secord</i>	1244
<i>v. Simms</i>	2303	" 322	774	Applegate v. Applegate	2086
<i>v. Solomon</i>	2300	Lib. Ass.	575	<i>v. Lexington & C.</i>	
<i>v. State</i>		Lofft	1645	C. M. Co. 2139, 2141	
134 Ala.	247	1 Ld Raym.	291, 1177, 1256, 1658	Appleton v. Boyd	2222
118 Ga.	18, 20, 198, 987	M. & M.	1258	<i>v. Braybrook</i>	5, 1677, 1681
<i>v. Youmans</i>	1164	McNally	1981	<i>v. People</i>	2512
Andrus v. Blazzard	2444	8 Mass.	2308	<i>v. State</i>	1755
<i>v. Foster</i>	2414	87 Miss.	133, 200, 662, 987	Apthorp v. Eyres	1417
Aneals v. State	953	58 Miss.	2245	Arbon v. Fussell	2011, 2016
Angell v. Angell	1832	1 Mod.	1199	Arbuckle v. Templeton	288, 1466, 2308
<i>v. Duke</i>	2425, 2442	2 Mod.	2067	Arcangelo v. Thompson	2152
<i>v. Rosenbury</i>	224, 655, 1254, 1623	3 Mod.	2529	Archer, re	2363
Angelo v. People	2272	6 Mod.	2143	<i>v. Haithcock</i>	2083, 2085
Angier v. Ash	321, 334	9 Mod.	1681, 2163	<i>v. Hooper</i>	1253
Anglesey v. Hatherton	380, 1595	11 Mod.	612	<i>v. R. Co.</i>	792, 794
Angling v. State	821, 852	12 Mod.	345 2165	<i>v. U. S.</i>	2008, 2020
Angus v. Smith	1029	" 607	1313	Arcia v. State	521
Anheuser-Busch B. Ass'n		4 Mo. L. Mag.	1268	Arderry v. Com.	1388
<i>v. Hutmacher</i>	1236, 1890	Pa. Col. Cas. 53	2220	Ardesco Oil Co. v. Gilson	561, 571
Ankersmit v. Tuch	1873	Pl. Abr.	1837	Arents v. R. Co.	1605, 1960
Annapolis & E. R. Co.		Rolle's Abr.	1873	Argabright v. State	1874
<i>v. Gantt</i>	455, 456	2 Salk.	566 1684	Arkadelphia Lumber Co.	
Annesley v. Anglesea	166, 272, 278, 280, 1009, 1013, 1130, 1154, 1361, 1362, 1364, 1431, 1487, 1605, 2214, 2290, 2291, 2294, 2298, 2310	" 665	1165	<i>v. Arkadelphia</i>	1684
Annis v. People	1111	" 691	1415	Arkansas M. R. Co.	
Anniston C. L. Co. v.		3 Salk.	1845	<i>v. Griffith</i>	1698, 1944
Edmondson	2105	Skin. 174	1215, 1275	Arkansas River P. Co.	
Anniston National Bank		" 404	2290, 2297, 2308, 2394	<i>v. Hobbs</i>	1158, 2220
<i>v. Committee</i>	2495	24 Sol. J.	2372	Arkansas Tel. Co. v.	
Anon.		1 Stra.	2232	Ratterree	2509
35 Ala.	2220	1 Vern. 60	2250, 2257	Armagost v. Rising	344
89 Ala.	2220	" 263	1816	Armendaiz v. Stillman	681
1 Ambl.	735, 787	3 Ves. & B.	986, 1982	Armil v. R. Co.	1750
2 And.	818	12 Vin. Abr.	1670	Armington v. Stelle	2436
5 B. & Ald.	2043	5 West. L. J.	1911	Armitage v. State	1205
Brooke's Abr.	2036	1 P. Wms.	1316	Armory v. Delamirie	285, 291
1 Brownl.	2227, 2235, 2239	v. Anon.	2063	Armour v. Ross	719
2 Brownl.	2250	<i>v. Moor</i>	73, 74	Armstrong v. Ackley	252, 1719
		Anslay v. Meikle	1680, 1681	<i>v. Advance T. Co.</i>	2153
		Anson v. Dwight	1943	<i>v. Armstrong</i>	2067
		<i>v. Evans</i>	283	<i>v. Burrows</i>	787
		<i>v. People</i>	318	<i>v. Canada A. R. Co.</i>	1750
		Ansonia v. Cooper	1889	<i>v. Granite Co.</i>	2463, 2464

	Section		Section		Section
Armstrong v. Hewitt	2139	Ashley v. Ashley	2446	Atkinson v. Atkinson	916
v. Huffstutler	1029	v. Root	1684	v. Burt	1552
v. Lewis	2123	v. West	1083	v. Morris	1736
v. People	2062	Ashley Wire Co. v. Ill.		v. Nash	1414
v. R. Co.	571, 1951	Steel Co.	95	v. R. Co.	463
v. State		Ashmead v. Colby	1521	v. Smith	1890
30 Fla.	1938, 2501,	Ashmore v. Hardy	1256, 1301	Atlanta C. S. R. Co. v.	
	2530	Ashton v. Ashton		Bagwell	461, 568
21 Oh. St.	1677	1 Vern.	2210	v. Bates	199, 283
33 Tex. Cr.	1018	11 S. D.	1036	Atlanta Journal v. May-	
v. U. S.	564, 1684	Ashworth v. Kittredge	1690,	son	2498
Armstrong's Lessees v.			1700	Atlanta K. & N. R. Co. v.	
Timmons	496, 1195	v. Roberts	2212	Strickland	1129
Arn v. Matthews	609	Aske v. R. Co.	2220	Atlanta R. & P. Co. v.	
Arnd v. Amling	1820	Askea v. State	2058, 2236	Monk	1003
Arnegaard v. Arnegaard	1085	Askew v. People	1021, 1852,	Atlanta St. R. Co. v.	
Arnett v. Com.	2336		1977	Walker	568, 1719
v. Griffin	747	v. Reynolds	1086, 1779	Atlanta & C. A. R. Co.	
Arnold v. Arnold	2433	v. Steiner	1301	v. Gravitt	1404
v. Arnold's Estate	1817,	Aslanian v. Dostumian	2536	Atlanta & S. R. Co. v.	
	1818	Aspinwall, re,	2319	Randall	1405
v. Bell	1779	v. Chisholm	1244	Atlanta & W. P. R. Co.	
v. Caldwell	1065	Aspy v. Botkins	2220, 2384,	v. Venable	
v. Chesebrough's Ex'r	2083		2385	45 Ga.	1387
v. Fruit Co.	461	Assignees of S. v. Boucher	1474	67 Ga.	1388
v. Gorr	2141	Astley v. Astley	238	Atlantic Ave. R. Co. v.	
v. Higgins	1271	Astor v. Ins. Co.	1947	Van Dyke	1951
v. McNeil	529	Atcheson v. Everitt	1818	Atlantic C. R. Co. v.	
v. Norton	251	Atchison v. King	1969	Goodin	2505
v. Nye	987	Atchison R. Co. v. U. S.	658	Atlantic & B. R. Co. v.	
v. Pawtuxet V. W. Co.	1859	Atchison, T. & S. F. R.		Reynolds	1616
v. Smith	1244	Co. v. Bayes	2354	Atlantic & D. R. Co. v.	
v. State		v. Blackshire	2572	Rieger	1897
53 Ga.	2085	v. Campbell	456	Atlantic & G. W. R. Co.	
5 Wyo.	905	v. Cattle Co.	1078	v. Campbell	1943
v. The Bishop	1639	v. Feehan	1087, 1263	Atterberry v. Knox	2268
v. White	581	v. Frazier	688, 1722	Attila, The	1951
Arnot v. People	1938	v. Headland	2580	Attix v. Minnesota S. Co.	792
Arrington v. Fleming	461	v. Huitt	714	Attorney-General v. —	2250
Arrott v. Pratt	1859	v. Logan	1750	v. Barstow	1351
Arrowood v. R. Co.	791	v. Osborn		v. Bond	1040
Arthur v. Arthur	701	58 Kan.	456, 747,	v. Bradlaugh	1817
v. Broadnax	2088		1078	v. Briant	2374, 2394
v. Gayle	1083	64 Kan.	1404	v. Brown	2268
v. Wells	2117	v. Phipps	1873	v. Bulpit	1842
Artope v. Goodall	1985	v. Potter	1053	v. Cast Plate Glass	
Artip v. Rasnake	2500	v. Retford	283	Co.	2566, 2569
Artz v. R. Co.	15, 911, 914,	v. Ryan	1698	v. Chambers	1862
	1890, 1893	v. Thul	2220	v. Coventry	1858
Aryman v. Marshall-		Atchison & N. R. Co. v.		v. Davison	1373
town	1719	Harper	463	v. Dean & Canons	291
Ash v. Ash	2350	Atherfold v. Beard	2373	v. Drohan	1351
v. Patton	1561	Atherton v. Defreeze	2113	v. Drummond	2470
v. Prunier	1730	Athlone Peerage	1644	v. Emerson	1859
v. State	2060	Atkeson v. Lay	2580	v. Gaskill	1856
Ashcraft v. Chapman	2165	Atkins v. Anderson	1388	v. Green	1163
v. Com.		v. Hatton	2139	v. Hitchcock	194, 497, 953,
Ky., 60 S. W.	987	v. Humphreys	1388		962, 979, 1002,
Ky., 68 S. W.	280,	v. Lewis	2109		1005, 1020, 1022,
	987, 1018	v. Meredith	1208		1864
v. De Armond	233, 1621,	v. Palmer	811	v. Joy	1350
	1958	v. Seeley	1547	v. Köhler	1501, 1502
		v. State		v. Le Merchant	4, 1177,
Ash v. De Rosset		60 Ala.	1910		1180, 1199,
5 Jones	736	16 Ark.	109, 111, 247,		1208, 1209
8 Jones	93		396, 761, 1021,	v. Lucas	2256
Asher v. Terr.	1270, 2277		1329, 1667	v. McQuade	2215
Ashford v. Thornton	9	69 Ga.	2098	v. Mico	2250
Ashland v. Marlborough	568,	Atkins' Examination	1395	v. Nethercote	787
	1722				

TABLE OF CASES.

ATT

	Section		Section		Section
Attorney-General v. New- castle upon Tyne		Austin v. State		Backus v. Ames	561
Co.	1859	101 Tenn.	2580	v. Barber	1896
v. Parnter	1933	v. Tennessee	2580	Bacon v. Charlton	1718, 1722
v. Pearson	2467	v. Thomson	2125	v. Frisbie	2321
v. Radloff	64, 2257, 2269, 2371	v. Willes	528, 1302	v. Harrington	1141
	1350, 2592	Austin & N. W. R. Co. v.	2220	v. State	2056
v. Shore	2462, 2467	Cluck	836, 852, 1267	v. Towne	75, 258, 259, 1416
v. Theakstone	1684	Austine v. People	836, 852, 1267	v. U. S.	321, 2183
v. Tomkins	1219	Austrian v. Springer	1263	v. Williams	2020
v. Warwick	1661	Autry v. Floyd	581	Bacot v. Lumber Co.	905
Attwell v. Lynch	1225	Avan v. Frey	1195	Badder v. Keefer	282
Attwood v. Small	1856, 2047	Avary v. Searcy	1960	Badgeley v. Bender	1665
Atwater v. Cardwell	2429	Avery v. Adams	1239	Badger v. Badger	1602, 1603
v. Schenck	2575	v. Burrall	451	v. Mills	2054
Atwell v. State	1029, 1781	v. Clemons	1779	Badische A. & S. F. v.	
Atwood v. Cornwall	570, 1969, 2012	v. R. Co.	1943	Klipstein	1271
	1239	v. State	1842	v. Levinstein	2484
v. Fricot	1239	v. Woodruff	1406	Baeder v. Jennings	157, 2139, 2143
v. Impson	922, 923	Avery's Ex'rs v. Avery	1530	Baer v. State	1873
v. Marshall	1890		1536	Bagard v. Consol. T. Co.	1075
v. Scott	89	Aveson v. Kinnaird	1714, 1718, 1747, 1754, 1795, 2233	Baggs v. Martin	1158
v. Welton	1022, 1817, 1820		2122	Bagley v. Eaton	1196, 1198, 1709
Atwood's Estate	2475	Awdley v. Awdley	2465	v. Kennedy	1651
Auberle v. McKeesport	1951	Axford v. Meeks	2016	v. McMickle	1192, 1198
Aubuchon v. Murphy	1651	Axon v. Belt	1352	v. Mason	235, 1719, 1721, 1974, 2220
Auburn Seminary v.		Ayer v. Ahlborn	2442	Bagwell v. R. Co.	2194, 2220
Calhoun	1302, 1304, 2049	v. Mfg. Co.	797	Baikie v. Chandless	1650
Auditor v. Haycraft	1350	Ayers v. Harris	1291, 1676	Bailey v. Barclay	1777
Auge v. Variol	2124	v. Hewitt	1066	v. Bidwell	1292, 2164
Augur, re	2523	v. Ins. Co.		v. Centreville	
Augur S. A. & G. Co. v.		v. Watson		108 Ia.	437, 438, 1974
Whittier	1201	132 U. S.	1031	115 Ia.	458
Augusta v. Hafers	458	137 U. S.	1567	v. Chesley	1141
Augusta Factory v.		Aylesbury v. Harvey	1177	v. Hammond	2531
Barnes	1750	Aylesford Peerage Case	2063	v. Hyde	74
Augusta & S. R. Co. v.		Aylett v. Jewel	2352	v. Kerr	2579
Dorsey	460, 1385, 1951, 1978	Ayres v. Ayres	1511	v. M'Dowell	1684
	2509	v. Duprey	923, 928, 1028, 1985	v. N. H. & N. Co.	461
v. McDade	199, 1750, 1807, 1896, 2206	v. Stewart	1678	v. Palmer	1267
v. Randall	745	Ayrey v. Davenport	2450	v. Seattle & R. R. Co.	914
Auld v. Walton				v. State	
Aulger v. Smith	1267, 2115	B.		107 Ala.	1966
Aulls v. Young	1704	B — v. I —	73	56 Ga.	2059
Ault v. Zehering	1681	B. v. B.	2220	36 Nebr.	2085
Aultman v. Ritter	2311	B. & Y. T. R. Co. v. Leon-		40 Tex. Cr.	821
v. Timm	2529	hardt	1951	42 Tex. Cr.	2081
Aultman Co. v. Ferguson	681	Baalam v. State	397	v. Trumbull	458
v. Mosloski	571	Babb v. Clemson	1085, 1293, 1779	v. Trustees	1684
Aumick v. Mitchell	2008, 2016	Babcock v. Babcock	1873	v. Woods	1873, 1386
Aurora v. Brown	458	v. Bank	660	Baillie v. Assur. Co.	714
v. Cobb	928, 1615, 1890	v. Booth	2341	Bain v. Case	1706
	660	v. People	111, 105, 904, 905, 907, 1042	v. Cushman	1944
v. Hillman	987	v. R. Co.	455	v. Hargrave	2223, 2254
Ausland v. Parker		v. Smith	1258	v. Mason	1644
Austin v. Austin	391, 397	Baber v. Rickart	451	v. Whitehaven & F.	
v. Chambers	1856	Baccio v. Pcople	1135, 1136, 1138	R. Co.	5, 18, 1074, 1845
v. Com.	1442	Bach v. Parmely	2232, 2239	Bainbridge v. State	341
v. Hanchet	73	v. R. Co.	451	Baines v. Higgins	1195
v. Hilliers	1152	Bachelor v. Nutting	1188, 1196	Baird v. Baird	2433, 2437
v. King	1640	Bachmeyer v. M. R.		v. Cochran	529, 2192, 2222, 2223
v. Rumsey	1312	F. L. Assoc.	2500	v. Daly	233, 458, 1951
v. Sawyer	1083			v. Gleckler	1896
v. State				v. Reilly	1521
14 Ark.	38, 863, 394, 1890				

	Section		Section		Section
Baird v. Rice		Baldwin v. Soule	406	Baltimore & Y. T. R. v.	
10 Call	1062	v. State		State	458
63 Pa.	1598, 1665, 2159	Fla., 35 So.	347	Barnfield v. Massey	75, 76,
Baird Lumber Co. v. Dev-		12 Mo.	1938		210, 1106
lin	754	v. Wentworth	1003	Banbury Peerage Case	68, 269,
Baiz, re	2568	Bales v. State	1693		1065, 1388,
v. Malo	2372	Balfour v. Chew	1681		1490, 1605,
Bakeman v. Rose	922, 923, 924,	v. Fresno C. & I. Co.	2463		1670, 2036,
	987, 1111, 1985	Balguy v. Broadhurst	2319		2063, 2494,
Baker v. Adams	1189, 1320	Balkum v. State	59		2527
v. Arnold	2317	Ball, re	1736	Bancroft v. Wentworth	2281
v. Baker		v. Gates	1544	Bane v. Gwinn	2008, 2016
16 Abb.	1729	v. Hardesty	1976	Banfill v. Leigh	1252
13 Cal.	2067, 2068,	v. Loomis	1086	Bangess v. Partee	6
	2069, 2527	v. U. S.	457	Banghart v. Hyde	392
202 Ill.	233, 1417,	Ballard v. Ballard	745, 748	Bank v. Brown	658, 1202,
	1958, 2500	v. State			1207, 2094, 2105
v. Blount	1808, 1312, 1316	31 Fla.	580	v. Clark	1777
v. Borello	67	19 Nebr.	682, 1852,	v. Cowan	736, 747
v. Com.			1853	v. Dandridge	2451, 2535
Ky., 17 S. W.	276	Ballenger v. Barnes	2098	v. Fordyce	1890
106 Ky.	987, 1434,	Ballentine v. White	620, 2027	v. Gifford	1404
	1442, 2277	Ballew v. U. S.	821	v. Henry	2260, 2279
v. Dobyns	2051, 2052	Ballinger v. Davis	1312	v. Hull	529
v. Fairfax	1409	Balliot v. Bowman	529	v. Jacobs	2005, 2008
v. Gas Co.	2507	Ballou v. Black	1350	v. Keeler	1985
v. Gausin	1754	Ballowe v. Com.	194	v. Kennedy	581, 1777
v. Hagey	451	Baltimore v. War	208, 2105	v. M'Williams	1210
v. Haines	2016	Baltimore City P. R.		v. Mumford	2444
v. Hancock	461	Co. v. Cooney	460, 1976	v. Plannett	1539
v. Humphrey	1082	v. Knee	1129	v. Salina	2280, 2282
v. Irish	97	v. Tanner	681, 1003,	v. Slemmons	987
v. Jamison	1879		1750, 1976	v. Stryker	924
v. Joseph	953, 1029	Baltimore Consol. R.		v. Zorn	735, 745, 749,
v. Kelly	1784	Co. v. State	1387		758, 759, 761
v. Lyman	1406	Baltimore Elev. Co. v.		Bank of British Colum-	
v. Madison	568, 1951	Neal	199, 250, 571, 1951	bia v. Trapp	1856
v. Massengale	1299	Baltimore P. & C. R.		Bank of British N. Amer-	
v. Miles	2355	Co. v. Stoner	1943	ica v. Delafield	1073
v. Mygatt	2579	Baltimore R. Co. v. Johnson	1943	v. McElroy	1911
v. Paine	1062, 2417	Baltimore Traction Co. v.		Bank of Columbia v.	
v. People	359	Appel	2507	Magruder	585
v. Preston	531, 1225, 1651	Baltimore Turnpike v.		Bank of Guntersville v.	
v. Pritchard	2268	State	1976	Webb	2416
v. R. Co.	2319	Baltimore & L. T. Co. v.		Bank of Middlebury v.	
v. Sherman	1976, 1978	Cassell	568, 571, 1951	Rutland	1623
v. State		Baltimore & O. R. Co.		Bank of Montreal v.	
122 Ala.	1969	v. Camp	250	Snyder	1205
4 Ark.	363	v. Colvin	65	Bank of N. Liberties	
Miss., 33 So.	62, 278	v. Glenn	1271, 1703, 2573	v. Davis	905, 907
v. Thompson	1909	v. Hellenthal	460, 1976	Bank of Newbury v. R.	
v. Towles	1248	v. Henthorne	96, 249	Co.	2572
v. Trotter	1270, 1986	v. Kreager	1354	Bank of New Zealand v.	
Balbec v. Donaldson	2529	v. Polly	1164	Simpson	2465
Balbo v. People	823, 851	v. Rambo	280, 568, 987,	Bank of Nova Scotia v.	
Balcetti v. Serain	318		1270, 1719	Robinson	377
Balding v. Andrews	1018, 1750,	v. State	104	Bank of Rochester v.	
	1756, 1976	v. Thompson	571, 681,	Gray	1675, 2165
Baldney v. Ritchie	1200		728	Bank of Salina v. Henry	2282
Baldrige v. Penland	1549, 1558	Baltimore & O. S. W. R.		Bank of State of N. Y. v.	
Baldwin v. Bricker	1700	Co. v. Tripp	454	Southern N. Bank	224
v. Burt	1195	Baltimore & P. R. Co. v.		Bank of the Metropolis v.	
v. Gregg	1066, 1067	Landrigan	2510	Jones	529
v. Hale	1216, 2555	Baltimore & S. P. Co. v.		Bank of U. S. v. Dandridge	2535
v. McKay	1246	Hackett	1951	v. Dunn	529
v. Parker	2337	Baltimore & S. R. Co. v.		v. Sill	1198
v. R. Co.		Woodruff	15, 456	v. White	1673
4 Gray	65, 1621, 1984	Baltimore & Y. T. R. v.		Bank of Utica v. Hillard	529,
68 Ia.	1415, 1951	Leonhardt	458		1858, 2200

TABLE OF CASES.

BAN

	Section		Section		Section
Bank of Utica v. Merse- reau	2294, 2298, 2315, 2321, 2328	Barker v. Bushnell	1062	Barnett v. State	
Bank of Washington v. Kurtz	1206	v. Coleman	568, 1722, 1974	83 Ala.	2061
Bank of Wilmington and B. v. Wollaston	1684	v. Com.		117 Ga.	2239
Bankhead v. State	1750	Ky., 50 S. W.	1839	v. Wilson	1256
Banking House v. Darr	749,	90 Va.	1620	Barnewall v. Murrell	1302, 1310, 2452
	1060, 1640, 1677, 1680	v. Comins	1938	Barney v. State	1853, 2497
Banks v. Burnam	2579	v. Dixie	2228, 2242	Barney's Will	1739, 2503
v. Darden	2109	v. Haskell	750, 1550, 1555, 1558	Barnhart v. Riddle	2465
v. Farquharson	1312	v. Kuhn	2327	Barnstable, The	2465
v. Jacobs	2016	v. McFerran	1511	Barnum v. Barnum	
v. State		v. Mackay	2322	9 Conn.	2115
84 Ala.	838, 857	v. Mfg. Co.	437	42 Md.	1492, 1603
96 Ala.	2506	v. People	1354	Barnwell v. Merion	2578
Bannen v. State	398, 1136	v. Perry	792, 795, 1157, 1158	Baron v. Reading Iron Co.	283
Banning v. Banning	2155	v. Pope	689, 1621, 1938	Barough v. White	1084
v. Marleau	1085, 1086	v. Ray	21, 291, 1471, 1476	Barr v. Armstrong	1206, 1234
v. R. Co.	1164	v. Sterne	2419	v. Gratz	2141
Banta v. Banta	2066	Barkley v. Bradford	1869	v. Graybill	1511
Bantley v. Finney	2427	v. Screven	1664	v. Hack	74, 988
Barabasz v. Kabat	2496	Barkly v. Copeland	958, 960, 1126, 1128, 1874	v. Moore	406
Baran v. Reading Iron Co.	2509	Barkman v. Hopkins	1271, 1634	v. People	2270
Barataria & L. C. Co. v. Field	461	v. State	363, 389, 390, 987, 1157	v. Post	93
Barbar v. Martin	321	Barley v. Byrd	1525, 1651	v. State	1819
Barbat v. Allen	604, 619	Barley's Case	1193	Barranger v. Baum	2569
Barber v. Anderson	2117	Barlow v. State	2354	Barrara v. State	2060
v. Bennett	1548, 1777	v. Vowell	583	Barrenberg v. Boston	437
v. Gingell	377, 1391	v. Waters	1738	Barrett v. Featherstone	1067
v. Goddard	619	Barlow B. Co. v. Parsons	784	v. Fish	2183
v. Holmes	1641, 2529	Barbmy v. Plummer	1203	v. French	1080, 1082, 1086
v. International Co.	690, 1676, 1677, 1680, 2104, 2165	Barnwell v. Hannegan	1112	v. Hammond	458
v. McKay	1681	Barnard v. Crosby	1225	v. Kelly	1565, 1956
v. Manchester	561, 1951	v. Gantz	2503	v. Long	404, 406
v. Merriam	688, 1719	v. Kellogg	2440	v. Murphy	791
v. People	21, 2231, 2242	v. State	905, 1037	v. R. Co.	1042
v. R. Co.	2463	Barnes v. Barnes	2505	Barrickman v. Marion Oil Co.	451
Barber's Appeal	229, 681, 682, 1548, 1576, 2132, 2500	v. Com.		Barrie v. Smith	2434
Barber Co. v. Ullman	1415	101 Ky.	318, 1249	Barringer v. Barringer	2239
Barbour v. Archer	1708	110 Ky.	1442	v. Ryder	2536
v. Duncanson	1085	Ky., 70 S. W.	1111	Barron v. Daniel	1681
v. Watts	1280, 1651	v. District	2535	v. Grillard	2232
Barbre v. Goodale	2438	v. Harris	2300, 2302	v. Mason	2539
Barcello v. Hapgood	1677, 1680	v. Ingalls	379, 571	v. People	276
Barclay v. Com.	2239	v. Kelly	2117	Barrow v. State	416
Bardin v. Stevenson	1248, 2132	v. Lynch	1210	Barrows v. Downs	564, 1271, 1684
Bardsley v. Sternberg	1672	v. Martin	613	v. White	1456
Barelli v. Lytle	382	v. Mawson	378	Barrus v. Phaneuf	2203
Barfield v. Britt	1432	v. Rumford	1750	Barry v. Alexander	1858
v. Hewlett	1312, 1320	v. Simmons	1362, 1521	v. Babbington	1472, 1476
Barhight v. Tammany	2539	v. State		v. Barry	2067
Barhyte v. Summers	1908	88 Ala.	108, 398, 1841	v. Bennett	1876
Baring v. Reeder	530, 607, 2234, 2235	111 Ala.	2497	v. Butlin	2502, 2503
v. Shippen	529	36 Tex.	826, 833, 855	v. Colville	2437
Bark Havre, The	1841	v. Trompowsky	702, 1288, 1311, 1312, 1313, 1320	v. Crowley	2165
Barker v. Barker		v. Trust Co.	2104	v. Hoffman	1302, 1651, 1676
16 N. H.	2115, 2120	Barnes' Case	2287	v. People	1005
14 Wis.	1204	Barnet v. Woodbury	1678, 1680	v. Rhea	1678
v. Bell	911	Barnet's Lessee v. Day	1490	v. Ryan	1299
		Barnett v. Barnett	2046	v. Snowden	2573
		v. People	1398	v. Sturdivant	620
		v. Stanton	1966	Barrymore v. Taylor	2104
				Bartelott v. International Bank	2494
				Bartels v. Brain	2465
				Barth v. State	821, 851

	Section		Section		Section
Bartholomew v. Bank	2580	Bastrop State Bank v. Levy	289, 1531	Baumer v. French	1352
v. Edwards	1189, 1195	Bayse v. State	59, 194, 247, 826, 934, 968, 988, 1442, 1867, 2303, 2326	Baumier v. Antiau	783
v. Farwell	1521			Baunen v. State	770
v. People	987, 1270			Bauskett v. Keith	905
v. Stephens	1214			Baustian v. Young	790, 792
Bartlett v. Boyd	1352	Batchelder v. Batchelder	1021, 1028, 1738	Baxendale v. Bennett	2420
v. Clough	609	v. Sanborn	1543	Baxter v. Abbott	232, 569, 1511, 1938
v. Decreet	253	v. Taylor	1919	v. Baxter	2069
v. Delprat	21, 1085, 1795	Batchelor v. Honeywood	702, 704	v. Camp	1124, 2535
v. Emerson	1362, 1567	Bate v. Hill	210, 986, 1106	v. Cedar Rapids	2390
v. Falk	581	v. Kinsey	1204, 1207, 2307, 2308, 2309	v. Doe	442, 457
v. Gale	2123	Bateman v. Bailey	1081, 1783	v. Hamilton	2016
v. Gillard	2122	v. Bateman	1189, 1225	v. Knowles	1133
v. Hoyt	18, 772, 1062, 2550	v. Phillips	1858	v. Knox	682
v. Lewis	2251, 2268, 2272	v. Rutland	457	v. McDonnell	2580
v. Patton	2354	Bates v. Ableman	1082, 1086	v. Pritchard	2450
v. Remington	2472	v. Barber	691, 1111, 1985	v. R. Co.	438, 571, 792
v. Smith	1872, 2550	v. Bates	1738	v. State	1398
v. Tarbox	1062	v. Cain's Estate	2518	Bay State Iron Co. v. Goodall	2268
v. Wheeler	1280	v. Cilley	616	Bayha v. Munford	2529
v. Wilbur	1048	v. Coe	1161, 1856	Bayley v. Bates	1670
Bartley v. People	825, 862, 2071	v. McCully	1681, 2573	v. Wylie	1215, 2111
v. State	53	v. Morris	288	Baylis v. Atty.-Gen'l	2473
55 Nebr.	1230, 2497, 2511	v. Preble	736, 745, 754	Bayliss v. Cockcroft	581
55 Nebr.	784, 2511	v. R. Co.	2456	Baylor v. Smithers	1668
Barto v. Morris	1195	v. Ryland	585	Bayne v. Stone	1245
Barton v. Bruley	62, 75, 212, 357, 1021	v. Sabin	616, 754, 1249, 1835	Bayonne K. Co. v. Um-benhauer	2165
v. Com.	925, 2277	v. Sharon	1925, 1978	Bays v. Herring	1908
v. Dundas	1525, 1556	v. State	987	v. Hunt	1908
v. Kane	462, 770, 1204	Bateson v. Hartsink	2307	Beach v. Brown	1730
v. Morpheus	979, 987, 988	Bath v. Bathersea	1388, 2121	v. Catlin	1080, 1082
v. Murrain	1225, 1239	Bath and Mountague's Case	1991, 1992, 2047	v. Fulton Bank	1898
v. Osborn	2232	Bathrick v. Detroit Post	73, 392, 692, 2097	v. Mills	1537, 1549
v. State	154 Ind. 276, 1003	Batre v. Simpson	1530	v. O'Riley	2025
18 Oh.	347	Batt & Co.'s Reg. Trade-marks	1666	v. U. S.	2272
v. Thompson	604	Batte v. Stone	1651	v. Wise	1083
Bartow v. Brands	496	Batten v. State	276	v. Workman	2166
Barwell v. Adkins	406	Battersbee v. Calkins	291, 2516	Beachcroft v. Beachcroft	2463
Bas v. Steele	1859	Batthews v. Galindo	2230	Beachinall v. Beachinall	2426
Bascom v. Bascom	2067, 2069	Battin v. Woods	1240	Beacon L. v. F. Ass. Co.	2462
Basham v. Com.	276	Battle v. State	1083	Beadles v. Alexander	1511, 1736, 1738
Bashford v. Barstow	2373	Battles v. Holley	2144	Beakes v. Da Cunha	95
Basket v. Univ. of Cambridge	1684	v. Landenslager	64	Beal v. Nichols	915, 1888, 1890
Baskin v. Vernon	1652	Batturs v. Sellers	1056	v. Robeson	64
Bass v. Gobert	1547	Baty v. Elrod	2232	Beale v. Bird	1858
v. Sevier	2138	Baucum v. George	1215, 1651	v. Boston	463, 1943
v. State	37 Ala. 2060	Baudin v. Pollock	1186	v. Brown	607
29 Ark.	1667	Bauer v. Indianapolis	458	v. Posey	273, 660, 1977
103 Ga.	398	Bauer's Estate	2312	Beall v. Barclay	1212
136 Ind.	736, 2098	Baerman v. Radenius	1076	v. Bealls	1662
v. U. S.	581	Baugh v. Read	2474	v. Cunningham	1081
Bass Furnace Co. v. Glass-cock	728	Baughan v. Graham	1684	v. Dearing	1213, 1225, 2143
Bassell v. Elmore	406	Baughman v. Baughman	29 Kan. 2088, 32 Kan. 1938	v. Dick	1225, 1651
Bassett v. Glass	944	Baulec v. R. Co.	199, 250	v. Ledlow	1779
v. Marshall	1352	Baum v. Lynn	2433	v. Poole	1248
v. Shares	461	Baum Iron Co. v. Berg	770	Beam v. Link	2363
v. Spofford	1539, 1549	Baumann v. Trust Co.	2575	Beamer v. Darling	2313
v. U. S.	2239			Beamish v. Beamish	2082
Bassham v. State	914, 1890			Beamon v. Ellice	1842
Basterach v. Atkinson	1195			Bean v. Evans	2115
				v. Green	2386
				v. Quimby	803, 2300
				Beard v. Boylan	2435

TABLE OF CASES.

BEA

	Section		Section		Section
Beard v. Kirk	717, 1943	Beebe v. McNeill	1225	Bell v. State	
v. Ryan	1225, 2141	v. Parker	380, 1592,	44 Ala.	1842
Beard's Lessee v. Talbot	1564		1670	74 Ala.	390, 1036
Beardslee v. Columbia Tp.	437,	Beebees, <i>ex p.</i>	2204, 2205	124 Ala.	1109, 2498
	792, 1951	Beech v. Haynes	2123	91 Ga.	2582
Beardsley, <i>re</i>	2195	v. Jones	735, 753	93 Ga.	1072
v. Bridgman	406	Beeche Dene, The	2508	100 Ga.	1109, 1807
v. Foot	1820	Beecher v. Denniston	291, 677	72 Miss.	1442
v. Wildman	1022	Beeching v. Gower	586	31 Tex. Cr.	2277
Beardstown v. Clark	1951	Beedle v. People	1013	33 Tex. Cr.	852
v. Virginia		Beekman v. Hamlin	1640	v. Stewart	1876
76 Ill.	1712, 2421	Beeler v. Young	1339	v. Terr.	2063, 2527
81 Ill.	1678, 1712	Beemer v. Kerr	1046	v. W. C. S. Co.	283
Bearrs v. Copley	571, 1038	Beer v. Ward	1645, 2323	v. Wetherill	1257
Beasley v. Clarke	1239	Beers v. Aylsworth	1082	v. Woodman	1021
Beason v. State	1821	v. Hawley	1082	v. Young	382, 1194, 1195,
Beatson v. Skene	2375, 2376	Beery v. U. S.	822, 836, 855,		2105
Beattie v. Browne	2445		858, 865	Bell's Case, 1 Browne	987
Beatty v. Gilmore	1951	Beeson v. Beeson	2303, 2313	Bellamy v. Hawkins	2110
Beaty v. Knowler	2572	v. Green	2442	Bellamy's Case	1228, 1252
Beaubien v. Cicotte	689, 761,	v. Moore	1817	Belle of N. D. Co. v.	
	957, 1041,	Beets v. State	736, 749, 753,	Riggs	2220
	1160, 1738, 1920,		1450	Bellefontaine & I. R.	
	1934, 1938	Beever v. Hanson	283	Co. v. Bailey	675, 1951
Beauchamp v. Perry	1084	Befay v. Wheeler	392	Beller v. Jones	689, 1938
v. State	1126	Beggarly v. State	830, 834, 852,	Bellerophon, The	2375
Beaufort v. Smith	1591		855	Bellet, <i>ex p.</i>	2220
Beaumont v. Fell	2477	Beggs v. State	1644	Belleville Stone Co. v.	
v. Field	2478	Beglin v. Ins. Co.	2387, 2390	Comben	461
v. Mountain	2572	Behn v. Young	2164	Bellinger v. People	1263,
v. Perkins	1993	Behrens v. Behrens	1786		1667, 2260
Beauvais v. Wall	1289	Behrman v. Terry	1842	Bellows v. Todd	1219
Beavan v. M'Donnell	233	Beiderbecke v. Transp. Co.	93	Belmont v. Morrill	2572
Beaver v. Slegar	2442		93	v. Vinalhaven	1784
v. Taylor	1777	Beitman v. Hopkins	2336	Belote v. State	858
Beavers v. State	792	Belair v. R. Co.	1951	Belt v. Lawes	221, 991
Bebee v. Tinker	1893	Belcher v. Fox	2143	v. State	1051, 1186
Beberstein v. Terr.	347	v. Magnay	586	Belt E. L. Co. v. Allen	2220
Beck v. Hood	960	Belden v. Allen	1874	Belton v. Briggs	1195
v. State	2512	v. Carter	2408	Beltran v. Gauthreaux	613
Becker v. Cain	1040	Belk v. Meagher	1269	Beltzhoover v. Blackstock	2294
v. Koch	905, 907, 1006	Belknap v. Stewart	778	Bemis v. Bishop	1976
v. Quigg	1384, 1635, 1709	Bell v. Ansley	1081	v. Charles	1208
v. R. Co.		v. Bank	95, 736, 747	v. R. Co.	561, 1951
		v. Bell		v. Temple	444, 458, 461
		34 N. Br.	1817, 2066	Ben v. Peete	1225, 1651, 2141
		12 Pa. St.	1911	v. State	1434
Beckett v. Aid Ass'n	457, 561	v. Bowdoin	1681	Benaway v. Coyne	1839, 1840
Beckham v. State	824, 833	v. Brewster	2008, 2145	Bender v. Montgomery	93
Beckman v. Souther	258	v. Chambers	1891	v. Pitzer	1567, 1568,
Becknell v. Hosier	2389	v. Chandler	1203		1584
Beckwith v. Benner	2313	v. Chaytor	1297	v. State	1350
v. Butler	2123	v. Clarion	19	Benedict v. Boulton	1911
v. R. Co.	2220	v. Davidson	2118	v. Flanagan	2008, 2016
v. Sydebotham	672, 1917	v. Denson	1248	v. Fond du Lac	1951
v. Talbot	1640	v. Farwell	2165	v. Heineberg	1677
Bedard v. Hall	1350, 2577	v. Hearne	1207	v. Matthews	2016
v. Berkeley	792, 796	v. Ingestre	2409	v. Nichols	1326, 1667, 2121
v. Chase	581	v. McCawley	1676, 2141	v. State	106, 2800
v. R. Co.	720	v. Parke	74	v. Union Agricultural	
Bedford Case	1712	v. Porter	1573	Soc'y	461
Bedgood v. McLain	2525	v. Prewitt	1890	Benefiel v. Aughe	1651
v. State	200, 398,	v. R. Co.		Bener v. Edgington	1086
	987, 2282	64 Ia.	455, 1204	Benglesdorf v. Hanaway	391
Bedtkey v. Bedtkey	1890	86 Mo.	613	Benham v. Cary	334
Bee Pub. Co. v. Shields	406	v. Radford	392	v. Dunbar	463
v. World Pub. Co.	1230,	v. Rinker	75, 210	v. Richardson	133
	1978	v. Rinner	934	Benjamin, <i>re</i>	2531
Beebe v. De Baum	1974	v. Spokane	437	v. Coventry	2328
v. Knapp	987				

	Section		Section		Section
Benjamin v. Hathaway	2223	Berberich v. Bridge Co.	461	Bethea v. Byrd	1564, 1566
v. R. Co.	1415, 1951	Berckmans v. Berckmans	460	Bethel v. Moore	1306, 1312
v. Wheeler	1021	Berd v. Lovelace	2290	Bettis v. Logan	1275, 1677
Benje v. Creagh	1587	Berdel v. Egan	1195	Betts v. Badger	1298
Bennet v. Paine	1679	Berg v. R. Co.	1698	v. Betts	
v. Robinson	1300, 1316	v. Spink	717	113 Ia.	1958
Bennett v. Adams	2098	Bergen v. Bergen	2067	1 John.	2067, 2069
v. Bennett	2526	v. People	1405, 2071	v. Davenport	1778
v. Eddy	944	Bergen Co. T. Co. v. Bliss	1978	v. Grand T. R. Co.	2319
v. Fail	568, 675	Berger v. Booth	1897	v. Jackson	1196, 1787, 2523
v. Griffiths	1862	Bergere v. U. S.	1736, 2520	v. Menzies	2319
v. Hyde	73	Berges v. Daverede	2054	v. R. Co.	1951
v. Ins. Co.		Bergstrand v. Townsend	987	v. State	278
43 Minn.	1040	Berkeley Peerage Case	1023,	v. Stevens	1554
107 Tenn.	2047	1124, 1260, 1362, 1367,		v. Venning	2447, 2556
v. Jones	1387, 1666	1377, 1481, 1482, 1483,		Bettys v. Denver Tp.	1976
v. McDonald	844	1484, 1486, 1487, 1495,		Betzner v. Coleman	2054
v. Marion	2577	1500, 1588, 1839, 2286		Bevan v. M'Mahon	1898
v. Mathewes	709, 1991,	Berkey v. Judd	581	v. Waters	2309
	2008, 2016	Berles v. Adsit	2240	Bevelot v. Lestrade	608
v. Needham	1976, 1978	Berlin v. Berlin	2245	Bever v. Bever	2437
v. O'Byrne	1029	v. Cantrell	620	v. Spangler	229, 233, 1974
v. People	1781	Bermon v. Woodbridge	2121	Beveridge v. Minter	2237
v. Runyon	2141	Bernard v. Lewis	2167	Beverly v. Walden	1938
v. State		Bern R. Co.	2509	Beverly v. Burke	1225, 1651, 2141
52 Ala.	664, 1976	Bernasconi v. Atkin-		v. Williams	728, 1977
62 Ark.	1399	son	2474, 2477	Bewicke v. Graham	1859
3 Ind.	2354	v. Fairbrother	905	Bey's Succession	2500
Mart. & Y.	2167, 2576	Berneker v. State	1983	Beyer v. Hermann	1873
1 Swan	1817	Bernett v. Taylor	1316	Beyerline v. State	2337
32 Tex. Cr.	2098	Berney v. Wilmore	291	Bias v. R. Co.	460, 1163
57 Wis.	681	v. Mitchell	1404, 1406	Bibb v. Thomas	1737
v. Stout	1085	Bernhard v. State	2060	Biccard v. Shepherd	1641
v. Tillmon	2444	Bernhardt v. Brown	1298	Bickenstaff v. Perrin	73, 74
v. Walker	2105, 2192	Bernstein v. Humes	2141	Bickley v. Bank	1204
v. Whitehouse	1862	Berry v. Clark	1665	Bicknell v. Mellett	1081, 1230
Bennifield v. Hypres	613	v. Com.	2100	Biddis v. James	1684
Benning v. Nelson	334	v. Hull	1712	Biddle v. Shippen	1665
Bennison v. Walbank	791	v. Jourdan	759, 760, 1195	Bidinger v. Bishop	581
Benoist v. Darby	253	v. R. Co.	1350	Bielschowsky v. People	321
Benoit v. R. Co.	2494	v. Raddin	2144, 2145	Bierbach v. Rubber Co.	1976
Benson v. Bellasis	2426	v. Safe D. & T.		Biesenthall v. Williams	2109
v. Files	1960	Co.	232, 1958	Bigcraft v. People	357
v. Lundy	1086	v. State		Bigelow v. Bear	1784
v. McFadden	660	63 Ark.	1447	v. Blake	1678
v. Morgan	2242	10 Ga.	1806, 1963	v. Hall	759, 761, 763
v. Olive		Berryhill v. Kirchner	2008, 2016	v. Maynard	2358
Bunb.	2138, 2139	Berryman v. Wise	2535	v. Sickles	2237, 2336
2 Str.	1417	Bersch v. State	318, 987, 1022	v. Young	1188, 1878, 1898
v. R. Co.		Bertha Mineral Co. v. Mor-		Biggins v. Brockman	614
98 Cal.	2580	rill	1060	Biggs v. Stueler	1073
23 R. I.	461	Bertha Zinc Co. v. Mar-		Bigham v. Coleman	1186
v. Shotwell	1404	tin's Adm'r	1877, 1951	Bigler v. Reyher	2327
v. State		Bertholf v. Quinlan	2354	Biles v. Holmes	1714, 1718
79 Miss.	1985	Berthon v. Loughman	1947	Billin v. Henkel	1195
Tex. Cr., 69 S. W.	2265	Bertie v. Beaumont	2139, 2145	Billing v. Flight	2257
v. U. S.	580, 586	Bertoli v. Smith	951	Billings v. Billings	2067, 2069
Bent v. Allot	2227	Bertrand v. Heaman	1086, 1456	v. Ins. Co.	1031, 1263
v. Baker	529, 583	Bessela v. Stern	1072, 2061	v. State	216, 396, 1037
Bentley v. Cooke	2227, 2231,	Bessemer L. & I. Co.		Billingslea v. Smith	748
	2239	v. Dubose	1003	Bills v. Keesler	1651
v. Fleming	2355	Bessette v. State	987	v. Ottumwa	1951
v. O'Bryan	1085	Best v. Best		Bindley v. Martin	291, 2504
v. Ward	1558	Poynter	2046	Bines v. State	2071
Benton v. Craig	1245, 1248	22 Wash.	521	Binfeld v. Lambert	1304
v. Martin	2410	Bestor v. Roberts	2016		
v. Starr	1141, 1476	Bethany Hospital Co. v.			
v. State	1164, 1803	Hale	2527		
Benton's Estate	1669				

TABLE OF CASES.

BIN

	Section		Section		Section
Binfield v. State	1839	Birmingham Union R. Co.		Blackburn v. Ins. Co.	2498
Binford v. Dement	586	v. Alexander	437, 458	v. Mann	928
v. Young	1062	v. Hale	923	v. State	
Bingel v. Volz	2477	Birmingham Waterworks		71 Ala.	1816
Bingham v. Bernard	1614	Co. v. Hume	2536	23 Oh. St.	143, 144,
v. Foster	2354	Birney v. Hann	1605		394, 2071
v. Rogers	716, 1943	Birt v. Barlow	1644, 2084,	Blackett v. Ins. Co.	2440
v. Walk	2317, 2328		2085, 2088, 2529	Blackington v. Johnson	1890
Binney v. Russell	1213	v. White	1404	v. Rockland	1256
Binns v. State		Birum v. Johnson	1623	Blackman v. Collier	451, 1976
46 Ind.	1447	Bischof v. Mikels	1871	v. Dowling	1273
57 Ind.	390	Bish v. Ins. Co.	1248	v. Johnson	568, 1974
66 Ind.	41, 1244	Bishop v. Averill	1890	v. Riley	1665
Binyon v. U. S.	367, 1852	v. Clay Ins. Co.	1954	v. State	
Binz v. Weber	1350	v. Cone	2534	36 Ala.	68
Birch v. Depeyster	2465	v. Morgan	2477	78 Ga.	288
v. Ridgway	2016	v. People	347	80 Ga.	1878
v. Rogers	2529	v. Spining	681	v. Stogner	1290
Birchall v. Bullough	754	v. State		v. West Jersey & S. R.	
Birchard v. Booth	815, 1066	30 Ala.	2016	Co.	1078, 1807
Birchett v. Bank	2016	41 Fla.	580	Blackwell v. Bull	2463
Birchfield v. Bonham	1225	9 Ga.	2349, 2354	v. Glass	1271, 1681
Bird v. Butler	1304	55 Md.	318	v. State	
v. Com.	2086, 2088, 2573	v. Tucker	1387	67 Ga.	2265
v. Davis	619	v. Williamson	2349	11 Ind.	1821
v. Halsy	987, 1391	Bishop of London v.		Tex. Cr., 73 S. W.	2349
v. Hardwicke	2250	Fytche	2257	Blackwell D. T. Co. v.	
v. Hueston	619, 1471	Bishops, Case of the	2250	McElwee	1072
v. Miller	2008, 2016	Seven; see R. v. Seven		Blackwood v. Damer	2452
v. Smith	1225, 2105	Bishops.		Blade v. Noland	1198
v. State		Bissell v. Beckwith	1576	Bladen v. Cockey	1564, 2349
36 Ala.	2060	v. Cornell	1908	Blagrove v. Blagrove	1415
50 Ga.	1842, 1851,	v. Starr	987	Blague v. Gold	2477
	2272	v. Wert	1943	Blair v. Bank	1379
104 Ind.	222, 1168	Bitner v. Boone	608	v. Brown	1195, 1779
v. U. S.		Bittick v. State	1874	v. Caldwell	1681
180 U. S.	106	Bixby v. Bent	1239	v. Charleston	1943
187 U. S.	1854	v. Bridge Co.	1693	v. Hopkins	1476
v. Veith	1841	v. Carskaddon		v. Madison Co.	1719
Bird's Case	564	55 Ia.	1225, 2168	v. Pelham	792
Birdsall v. Carter	1202	63 Ia.	1086	v. R. Co.	
v. Dunn	616, 2232	v. Ins. Co.	1641, 1647	89 Mo.	2388
v. Patterson	605	v. R. Co.	1951	20 Wis.	1976
Birdsell v. Johnson	2065	Bizer v. Bizer	1974	v. Sayre	1644, 1646, 2109
Birdsong v. Brooks	1352, 1353,	Blabon v. Gilchrist	2240, 2245	v. Seaver	1817
	1662	Black v. Bachelder	2465	v. State	946, 968, 1760,
v. State	293, 1732	v. Bank	1890, 2445		1873
Birkel v. Chandler	715	v. Baylees	1023	Blaine Co. v. Heard	1350
Birmingham v. McPoland	750,	v. Besse	1842	Blaisdell v. Bickum	1605
	770	v. Black	787, 1391	v. Davis	1213
v. Pettit	1672	v. Braybrook	5, 1677, 1681	Blake v. Assurance Co.	4, 10,
v. Starr	458	v. Crozier	2222		216, 302,
Birmingham M. R. Co. v.		v. Dale	2027		304, 321
Harris	2509	v. Fizer	1540	v. Damon	394, 948, 950
v. Smith	1640	v. Pate	222, 1712, 2215	v. Everett	1082, 1133
v. Wilmer	223, 1698	v. R. Co.	2415	v. Fash	1198
Birmingham Nat'l Bank		v. R. M. B. Tel. Co.	1951,	v. Graves	604, 1086,
v. Bradley			2354		1779, 2242
108 Ala.	1808, 2012	v. State		v. Howard	334
116 Ala.	570	1 Tex. App.	1398	v. Page	1364
Ala., 30 So.	571, 1404	59 Wis.	2056	v. People	728, 1890
Birmingham R. & E.		v. Woodrow	2098	v. Pilfold	2375
Co. v. Ellard	1984	Black's Estate	2383	v. Powell	1867, 1889, 1890
v. Franscomb	1974	Blackburn v. Blackburn	1269	v. Rourke	689
v. Jackson	1951	v. Crawfords	18, 1213,	v. Russ	2125
v. Mason	1818		1244, 1491,	v. Stoddard	1028, 1044
v. Wildman	2324		1644, 1646, 2314	v. White	1082, 1086
Birmingham Southern R.		v. Com.	905, 907, 2059	Blake's Case	2455
Co. v. Cuzzart	223	v. Hargreaves	2201	Blakemore, re	2220

	Section		Section		Section
Blakeslee v. Hughes	76	Blood v. Light	571	Boardman v. Reed	1388
Blakesley v. Wheildon	1862	v. Rideout	1777	v. Spooner	2053
Blakey v. Porter	1858	Blood's Estate	1958	v. Woodman	64, 680, 689, 1174, 1509, 1933, 1984, 1938
Blakey's Heirs v. Blakey's Ex'r	664, 1007, 1021, 1022	Bloom v. State	1013	Boatman v. Curry	2083
Blalock v. Miland	1085	Bloomer v. State	1127	Boatner v. Scott	1680
v. Randall	318	Bloomington v. Legg	252, 283, 451, 458	Boatright v. Porter	64, 1664
v. State	826	v. Osterle	913, 1893	Bob v. State	836, 1072
Blanchard v. Bank	1951	v. Schrock	1696, 1700	Bobo v. Bryson	2294
v. Blanchard	953, 1963, 2503	Bloor v. Delafield	461	Bock v. International Nav. Co.	1856
v. De Graff	1267	Blossom v. Barrett	15	Boddie v. Pardee	1239
v. Lambert	2505, 2506	v. Dodd	2415	v. State	2061
v. Moors	2240	Blough v. Parry	905, 987, 1021, 2500	Boddy v. Boddy	398
v. Pratt	1012	Blount v. Burrow	2122	Bodine v. State	987
v. Steamboat Co.	463	v. Kimpton	2311, 2327	Bodman v. American Tract Society	2472
v. Young	1225	v. Layard	1640	Bodwell v. Swan	73, 209, 406
Bland v. Armagh	787	v. Riley	1084	Body v. Jewson	382
v. R. Co.	1976	Blow v. Maynard	1257	Boecker v. Naperville	463
v. State	1750	Blower v. Hollis	2110	Boehm's Goods	2421
v. Warren	1466, 1561	Bloxam v. Elsie	1256	Boehlinc v. Schneider	1271
Blandy-Jenkins v. Dun- raven	157, 2145	Bluck v. Gompertz	1859	Boelter v. Ross Lumber Co.	2220
Blanton v. Miller	1196	Blue v. R. Co.	561	Boerlein v. Bank	16
v. Ray	1226	Blum v. Jones	787, 803, 1230, 2264	Boeshore, re	2201
Blasini v. Blasini	2083	v. State	2236, 2242	Boetge v. Landa	2355
Blatch v. Archer	285	Bluman v. State	228, 1938, 2272	Boettger v. Iron Co.	1984
Blatz v. Rohrbach	2582	Blumenthal v. Craig	1951	Bogan v. McCutchen	1195
Blazo v. Cochrane	2051	v. Meat Co.	463, 2581	Bogard v. Johnstone	2016
Bleckley v. White	1960	v. R. Co.	2552	Bogardus v. Trinity Church	378, 382, 437, 1282, 1587, 1598
Bleecker v. Johnson	289, 290	v. Ralls	1956	Bogart v. Brown	1210
Blessing v. Dadds.	1072	Blumer, ex p.	1727	v. Green	1256
v. Galveston	1350	Blundell v. Gladstone	2463	Bogert v. Bogert	913, 1890, 2317
Blethen v. Bonner	2536	v. Howard	380	v. Phelps	1082, 1086
Blevins v. Pope	770, 774, 1212	Blunt v. Strong	1392	Bogie v. Nolan	1416
Blewett v. Bash	1676, 2525	Blurton v. Toon	528, 1991	Boggs v. Ass'n	2451
v. Gaynor	1877	Blyth v. L'Estrange	2256	v. Harper	2531
v. Tregonning	15, 1896	Blythe v. Houston	1239	v. Thompson	1890
Blewitt v. Boorum	2410	v. State	1808	Boggus v. State	2016
Blight v. Ashley	1768, 2119	Boak, re	2065	Bogle v. Kreitzer	1985
v. Schenck	2408, 2420	Boals v. Shields	1873	v. Sullivan	1511
Bliss v. Brainard	2201, 2202	Board v. Chambers	715	Bogue v. Bigelow	2529
v. Franklin	2336	v. Coler	1350	Bohan v. Avoca	1890
v. Johnson	89, 253, 1623	v. Dillard	463	Bohanan v. Shelton	1225
v. Long	2098	v. Estrella	2573	Bohannon v. Com.	246, 247
v. Nichols	1066	v. Harlev	1867	Bohlman v. Coffin	1185
v. Shuman	770	v. Heenan	1350	Bohner v. Bohner	2239
v. State	1750	v. Hendricks	1943	Boice v. Palmer	966
v. Stevens	1195	v. Hernandez	1677, 1680	Boies v. McAllister	568, 1020
v. Wareham	1951	v. Lee	2203	Boileau v. Rutlin	1065, 1066, 1075
v. Winston	1778	v. May	1275, 1641	Boit v. McKenzie	1352
Blitz v. U. S.	944	v. Meagher	1195	Bolan v. Bolan	1664
Blizzard v. Applegate	770	v. Meisenheimer	701, 2008	Bold v. Rayner	2463
Block v. Hicks	1072	v. Merchant	1354	Bolden v. R. Co.	2354
v. Jacksonville	1684	v. Moore		Boldon v. Thompson	951
v. R. Co.	688	Ky., 66 S. W.	615, 1802	Boldron v. Widdows	461
Blocker v. Burness	1817	17 Minn.	1202	Boldt v. State	367
Blodget v. Jordan	1681	v. Nelms	463, 714	Bole v. State	855
Blodgett Paper Co. v. Farmer	571, 581	v. Nichols	1721	Bolen v. People	1852, 1878, 2269, 2270
Bloede Co. v. Bancroft Co.	1859	v. O'Conner	1108	Boles v. State	923, 987
Blogg v. Kent	1858	v. Pearson	283	Boling v. Boling	2411
Blois v. State	2059	v. People	1350		
Blomgren v. Anderson	392	v. Reinhart	1244		
Blomquist v. R. Co.	571	v. Smith	2159		
Blondeau v. Sheridan	1195	v. State	2575		
Blondel v. R. Co.	561	v. Verburg	1062		
		v. Vickers	1129		
		Boardman v. Ins. Co.	1164		
		v. Jackson	2122		

TABLE OF CASES.

COL

	Section		Section		Section
Bolling v. Faunin	747, 1560	Booth v. Lenox	1065	Boulden v. State	1195, 1441,
v. State	233, 238, 1142	v. Swezey	1083		1450, 2512
Bollinger v. Gallagher	1953	Boothby v. Lacasse	1978	Bouldin v. Massie's	
Bollo v. Navarro	1082	Boothe v. Dorsey	1188	Heirs	93, 728, 1195
Bolton v. Cummings	1224, 1225	Bootle v. Blundell	1302, 1304	Boulter v. Peplow	1255, 1256
v. Liverpool	1857, 2294	Boots v. Canine	1066, 1067	Boulton v. Robinson	2047
Bolton Case	2287	Boozer v. Teague	1778	Bound v. R. Co.	1850
Boman v. Plunkett	2016	Borden v. Keverberg	377	Bounds v. Bounds	1226, 1778
Bomar v. Rosser	15, 321	Boreing v. Boreing	2239	Bourda v. Jones	748, 2034
Bomford v. Wilme	1817	Borges Inv. Co. v. Vette	1549, 1560	Bourne v. Boston	1225
Bomgardner v. Andrews	682		1779	v. Gatliff	377
Bonaparte v. Thayer	987, 1616	Borland v. Mayo	736, 747, 2016	Bousfield v. Godfrey	1858
Bond v. Central Bank	1248	v. Walrath		Bovard v. Wallace	787
v. Douglas	406	Born v. Rosenow	944, 987, 1079, 2512	Bovill v. Moore	1862
v. Fitzpatrick	1084	Borrego v. Terr.		Bowden v. Achor	463, 784, 1085, 1213, 1269, 1938
v. Montague	1651				
v. State		Borst v. Enipie	1653	Bowditch v. Boston	463
21 Fla.	111, 246, 247	Borum v. Fouts	2297	v. Jordan	2531
20 Tex. App.	1841	Boske v. Comingore	2375	v. Soltyk	1271
v. Whitfield	2105	Bosley v. Ins. Co.	2349	Bowdle v. R. Co.	494, 495, 497
Bond Debt Cases	1350	Bost v. Bost	1958	Bowen v. Allen	2477
Bondurant v. Bank	736	Bostain v. Separator Co.	95	v. Bowen	712
Bone v. State	1842	Boston v. Coon	1684	v. Huntington	681, 682, 1976
Bonebrake v. Board	1951	v. Hewitt	1976	v. Jones	2016
Bonelli's Goods, re	690	v. Richardson		v. R. Co.	455, 561
Boner v. Com.	1668	13 All.	1066	v. Rutherford	1624
Bones v. State	2497	105 Mass.	157	Bower v. Bower	229, 233, 1938, 2382
Bonesteel v. Lynde	2219, 2220	v. State	293, 579, 1144, 1750	v. Earl	1778
v. Sullivan	1677	v. Weymouth	393, 2145	v. State	2100
Bonet v. Stowell	607	Boston Massacre Trial	1123	Bowers v. Briggs	2312
Bonfield v. Smith	1971	Boston Water P. Co. v.		v. State	
Bonnell v. Mawha	1558	Hanlon	1567, 1573, 1586	29 Oh. St.	205, 401, 2311, 2321
Bonnemort v. Gill	1040, 1042	Boston & W. R. Co. v.		Tex. Cr., 71 S. W.	987, 2194
Bonner v. Ins. Co.	1213	Dana	154, 991, 1072, 1230, 2349, 2354	v. Van Winkle	1186, 1225
v. Phillips	1678			Bowersock v. Adams	1219
v. State		v. O. C. & F. R. C.	463	Bowes v. Broadhead	1350
55 Ala.	825, 860, 861	Bostwick v. Ins. Co.	260, 2415	Bowie v. Findley	1414
107 Ala.	2497	Boswell v. Blackman	1615	v. Hume	1409
Bonnet v. Devebaugh	1082, 1085, 1573, 1633	v. State	687	v. O'Neale	1387, 2098
v. Glattfeldt	736, 749, 760, 1890, 1898	Bosworth v. Bryan	1225	v. State	246, 248
Bonsall v. State	347	v. Clark	1212	Bowker v. Burdekin	2408
Booby v. State	1800, 2354	Boteler v. Allington	2256	v. Johnson	2437
Boody's Estate	2526	Botham v. Swinger	1258	Bowler v. Washington	1802
Booge v. Parsons	1225, 2105, 2159	Bothomly v. Usborne	2307, 2308, 2311	Bowles v. Bingham	2063
Boogher v. Neece	1225	Botkin v. Cassidy	934	v. Eddy	1271
Booker v. Booker	1417	Botna V. S. Bank v. Silver		v. Johnson	2201
v. Bowles	1302, 1309	C. Bank	2530	v. Langworthy	1298, 1300
Boomer v. Lane	2450	Botsford v. Chase	406	v. State	276
Boon v. Weathered	922, 923, 987, 1612, 1614, 1615, 1985	Bottomley v. Forbes	2440	Bowles' Succession	1681
Boone v. Dyke	2447	v. Goldsmith	1195	Bowlin v. Pollock	1678
v. Oakland T. Co.	1750	v. U. S.	194, 302, 334, 341, 2439	Bowling v. Bowling	689, 1304, 1938
v. People	2252	Bottoms v. Kent	52, 63, 64, 194, 1983	v. Com.	2059
v. Purnell	1603, 2083, 2085	Botts v. Wood	291, 1033	v. Hax	1299, 1301
Boone Co. Bank v. Wal-		Bouchaud v. Dias	2159	v. Helm	1339
lace	1083, 1779	Boucher v. Clark Publ.		v. State	2089
Boorman v. Express Co.	2537	Co.	1890	Bowlus v. State	111, 246, 248, 1983
v. Relief Ass.	689	v. Robeson Mills	437	Bowman v. Bartlett	1273, 1312
Boorn's Case	867, 2081	Boucicault v. Fox	1244	v. Bowman	917, 1933
Boosey v. Davidson	1234	Boudereau v. Mont-		v. Dewing	1640
Booth v. Beckley	1890	gomery	1388, 1483	v. Montcalm Circuit	
v. Cook	1225	Boudinot v. Winter	2118	Judge	2374
v. Fire-Engine Co.	1074	Bouker v. People	2079	v. Norton	2301, 2328
v. Hart	1141	Boulden v. Hebel	1911	v. Patrick	2339

	Section		Section		Section
Bowman v. Sanborn	694, 702, 1880, 2008, 2016	Boynton v. Kellogg	52, 75	Bradshaw v. People	2528
v. Wettig	378, 1207, 1225	v. Miller	1082	Bradston's Case	2250, 2256
v. Woods	1693	v. Pierce	2445	Bradstreet v. Baldwin	1883
Bowser v. Cravener	1573, 2141	v. Trumbull	2354	Bradt v. Rommel	2354
v. Warren	1225, 1320 1321, 1651	Bozeman v. Browning	1213	Brady v. Brady	716
Boyce v. Chapman	285	Brabbits v. R. Co.	1976	v. Cassidy	2465
v. Foster	2219	Brabo v. Martin	1984	v. McArdle	461
v. Mooney	1225	Bracegirdle v. Bailey	73, 209, 1891, 1893	v. Nally	18, 2592
v. People	2062	Bracken v. State	205, 1198	v. Parker	1783
v. R. Co.		v. Wells	1651	v. Shirley	1163, 1696
42 N. H.	455	Brackett v. Edgerton	717	v. State	2304
43 N. H.	455	v. Hoitt	2450	v. U. S.	861
v. Stage Co.	2354	v. Norton	2573	v. West	1850
v. Stambaugh	2167	v. People	1681	Bragg v. Colwell	2008, 2021
Boyd v. Bank	1128, 1668	v. Weeks	1021	v. Massie	1777
v. Boyd	318	Brackney v. Fogle	2386	Bragge v. Dyer	2452
v. Com.	2158	Bradburn v. U. S.	276, 907	Brailsford v. Williams	95
v. Jones	1779	Bradbury v. Dwight	392	Brain v. Preece	1675
v. Ladson	1543	Braddee v. Brownfield	1106, 1108, 1109, 1514, 1664	Brainard v. Brainard	2067, 2069
v. M'Lean	2054	Braden v. McCleary	969	v. Buck	1072
v. Petrie	1859	Bradford v. Barclay	1035	v. R. Co.	714
v. State		v. Bush	1966	Braintree v. Battles	1195, 1225
2 Humph.	836	v. Cooper	728	v. Hingham	1383
14 Lea	143, 144, 457	v. Cunard S. S. Co.	2570	Brakefield v. State	1440
94 Tenn.	1270	v. Ins. Co.	340, 451	Brakehill v. Leonard	1680
33 Tex. Cr.	2239	v. People	2012, 2016, 2018, 2276	Braley v. Braley	1969, 2097
v. U. S.		v. Russell	1681	Bray v. Henry	1890
116 U. S.	1859, 2183, 2264	v. S. S. Co.	1533	Bram v. U. S.	142, 821, 823, 832, 865, 1976, 2266
142 U. S.	523	Bradford's Case	1199	Bramlett v. Flick	1976
Boyden v. Moore	1779	Bradford Glycerine Co.		Bramwell v. Lucas	2296
Boydston v. Morris	1225, 1651	v. Kizer	561, 2509	Branch, ex p.	2206, 2207
Boyens' Will	1505	Bradford S. Co. v. Joost	2442	v. Libbey	458
Boyer v. Norris	1320	Bradley v. Arthur	1684	Branch Bank v. Black	2123
v. St. Louis S. F. &		v. Bank	1675, 1684	v. Kinsey	1871
T. R. Co.	1058, 1640	Bradley		v. Parker	253, 1623
v. Sweet	1538, 1539, 1552	4 Dall.	2352	Brandao v. Barnett	2580
v. Teague	1712, 1757, 2196, 2215	11 Me.	2067	Brander v. Ferriday	253
v. Weimer	1086	v. Clark	2271, 2281	Brandon v. Cabiness	1856
Boyett v. State	1665	v. Crackenthorp	1406	v. Mullenix	1389
Boykin v. Boykin	2063	v. Cramer	406	v. People	987, 2276
v. People	273, 274, 1852, 2497	v. Dinneen	1871	Brandt v. Klein	1257, 2309
v. Smith	1651	v. Gardner	2120	Brannin v. Force's Admr's	1559
v. State	2153	v. Geiselman	1415	Brannon v. Hursell	905
v. Wright	1225, 2138, 2143	v. Gibson	73, 74	Brannum v. O'Connor	1067
Boylan v. Meeker	271, 1033, 1505, 1514, 1736, 1738	v. Goodyear	1549	Brant v. Gallup	1963
Boyle v. Boyle	2523	v. Lightcap	2143	v. Lyons	1951
v. Columbian F. Co.	1576	v. McIntosh	2374, 2376	Brantly v. State	457
v. Mahanoy City	2552	v. Morris	529	Brard v. Ackerman	2309
v. Relief Assoc.	2386	v. Myrick	1371	Brashear v. Barton	1291, 1299
v. Saginaw	252	v. Obeare	321	Brashears v. Orme	1938, 2500
v. Smithman	2264, 2272	v. R. Co.	451	Bratt v. Lee	1196
v. State		v. Ricardo	897, 907, 908	Braun v. Campbell	1109
97 Ind.	246, 248, 1445	v. Silsbee	1239	Brawdy v. Brawdy	2047, 2054
105 Ind.	1445, 1447, 2276, 2277	v. Spofford	1779	Braxton v. Hilyard	2237
57 Wis.	1700	v. State	232	Bray v. Flickinger	1188
61 Wis.	397, 1976	v. Steam Packet Co.	2462, 2465, 2470	v. State	1138
v. Wiseman	1213, 1223, 1872, 2268, 2272	v. Veazie	2210	Brayton v. Goulman	1879
Boyles v. M'Eowen	2232	v. West	1350	Brayley v. Kelly	2596
Boynton v. Boynton	2200	Bradley T. Co. v. White	1186	v. Ross	2104, 2120
		Bradshaw v. Atkins	714	Brayton v. Chase	2300
		v. Bennett	1297, 2434	Brazier v. Fortune	2312
		v. Combs	774	Brazil v. State	56
		v. Hedge	1675	Breadalbane v. Chandos	1697
		v. Murphy	2259	Breadalbane Case	1602, 2083, 2505
				Breck v. Blanchard	2355
				Bredlau v. York	1719
				Bredon v. Gill	1364

TABLE OF CASES.

BRE

	Section		Section		Section
Breed v. Gove	2245	Briesenmeister v. Su-		Brocas v. Mayor	1186, 1219
v. Nagle	1233	preme Lodge	2333, 2384	Brock, re	1511
Breeden v. Fem	1388	Briggs v. Ainsworth	1873	Brock v. Brock	
Breedon v. Gill	2032	v. Briggs		116 Pa.	2336, 2341
Breen v. Richardson	1198, 1278	80 Cal.	1388	92 Va.	1085
Brees v. U. S.	759	20 Mich.	2384	v. Cottingham	1195, 1196
Breinig v. Metzler	1558	v. Campbell	1678	v. Ins. Co.	1208
Breitenwischer v. Clough	1608	v. Henderson	1651, 2143	v. Kent	1070
Brembridge v. Osborne	2513	v. McBride	285	v. Milligan	1817
Bremer v. Freeman	1271, 1697,	v. Morgan	2220	v. Saxton	1290, 1661
	1953, 1984	v. Murdock	1633	v. State	
Brennan v. People	1013, 1079	v. Partridge	2400, 2438	26 Ala.	354, 1042
Brenner v. Luth	1271	v. Rafferty	736	123 Ala.	288, 2273
Bressler v. People	2079, 2363	v. Stafford	530	Tex. Cr., 71	
Breton v. Cope	1245, 1256	v. Taylor	1042, 1219, 2535	S. W.	2242
	1268, 1291	v. Whipple	2572	Brockbank v. Anderson	585
Brett v. Beales	1592, 1662,	Brigham v. Clark	1040	Brockett v. Bartholomew	1031,
	2139	v. Fayerweather	1042		2442,
v. Brett	2048	v. Palmer	1299, 1801		2465
v. Rigdon	2413, 2471	Bright v. Pennywit	1225	Brocklebank v. Thompson	1584,
Bretto v. Levine	2430, 2454	v. Tel. Co.	581		2522
Bretton v. Prettiman	575	v. White	1681, 1684	Brocklebank's Will	2500
Brevaldo v. State	398	v. Woodward	1912	Broder v. Saillard	451
Brewer v. Bowersox	18	Bright's Ex'rs v. Swinebroad	617	Broderick v. Higginson	68, 201,
v. Ferguson	2336	Brighthope R. Co. v. Rogers	456		2232
v. Huntingdon	1350	Brill v. Car Co.	290	Brodhead v. Wiltse	1693, 1694
v. Knapp	2518	v. Christy	1678, 2152	Brodnax v. Groom	1350
v. Palmer	2447	v. Flagler	663, 1943	Brody v. Chittenden	2463
v. Porch	905	Brind v. Hampshire	2409	Brogan v. Savage	1226, 1651
v. R. Co.	392	Brindle v. M'Irvine	933, 1610,	Brogay's Case	1135, 1136,
v. State	2086		1621		1362
Brewers' Co. v. Benson	1858	Bringloe v. Goodson	1296, 1297	Brolley v. Lapham	907
Brewster v. Sewall	1180,	Brink v. Ins. Co.	1947	Bromage v. Price	1994
	1194, 1228	v. Stratton	894, 935,	Bromley v. Wallace	211
v. Thompson	2354		951, 953	Brookbank v. State	1226
Brewton v. Glass	2442	Brinx's Express Co. v.		Brookbard v. Woodley	1992,
Brice v. Bauer	282, 1063	Kinnare	1976		1993,
v. Miller	1330	Brinton v. Seevers	1635		2002
v. Smith	1512	Brisbane v. Pratt	1083	Brooke v. Berry	1938
Briceland v. Com.	136	Briscoe v. Baillie Ham-		v. Brooke	660
Bricheno v. Thorp	2323	ilton	2421	v. Jordan	1195
Brick v. Brick	2437	v. Lomax	1593	v. People	150, 1877, 2513
Brickell v. Hulse	1075	Brister v. State	833, 857, 2097	v. R. Co.	458
Bricker v. Lightner's		Bristol v. Cox	2319	v. Townshend	689, 1938
Ex'r	689, 1938	v. Dann	1083	v. Winters	39, 437
Bride v. Clark	1684	v. Warner	2113, 2115	Brookes v. Tichborne	2024
Bridge v. Eggleston	336, 1080,	Bristol Co. Bank v.		Brookfield v. Warren	1784
	1082, 1085,	Keavy	714	Brooking v. Dearmond	1225
	1086, 2355	Bristor v. Bristor	1124	Brooks v. Acton	438, 952,
v. McCarthy	2447	Bristow v. Cormican	157, 378		1022
v. Oshkosh	568, 1719	v. Sequeville	5, 687, 690	v. Brooks	398
v. Wellington	585	British Empire S. S.		v. Cannon	1387
Bridger v. R. Co.		Co. o. Somes	2212	v. Clay	1225, 1501
25 S. C.	1951	Britt v. State	352	v. Com.	106
27 S. C.	252, 458, 461	Brittain v. Allen	406	v. Crosby	1873
Bridges v. Branan	2164	Britton v. Lorenz	2294, 2312	v. Daniels	1186
v. McClendon	794	v. R. Co.	1807	v. Duggan	1777
v. R. Co.	2494, 2552,	v. State		v. Francis	2341
	2570	54 Ind.	1186	v. Hall	1719
v. State		115 Ind.	1890	v. Hazen	657
103 Ga.	392	Broach v. Kelly	1407	v. Holden	1576, 2329
110 Ga.	1672, 2118	v. Sing	2050	v. Jenkins	1225
Bridgewater v. Plymouth	2349	Broad v. Pitt	2291, 2294,	v. Lowenstein	1779
v. Roxbury	1521		2297	v. Marbury	1225
	1523, 1531	Broadnax v. R. Co.	2533	v. McMeekin	1195
v. State	1168	Broadrup v. Woodman	1065	v. R. Co.	1041
Bridgewater Case	2287	Broadwell v. McClish	1313	v. Sioux City	1951
Bridgewood v. Wynn	2355	v. Stiles	1198	v. Somerville	2494
Brierly v. Davol Mills	451	Brobston v. Cahill	2008, 2016	v. State	1142, 2513

	Section		Section		Section
Brooks v. Weeks	905, 906	Brown v. Jewett	1066, 2309	Brown v. State	
v. Wilcox	1873	v. Jones	738	76 Ga.	1330
Brooks, Estate of	1938	v. Kennedy	2525	71 Ind.	1829
Broom v. Broom	2239	v. Kenyon	1777	72 Md.	62, 782, 923,
Broquet v. Tripp	569, 1975	v. Kimball	1513, 2529	1028, 1897	
Brotherline v. Hammond	2529	v. King	2515	32 Miss.	826, 1445,
Brotherton v. Livingston	1651	v. Kingsley	987	2071	
v. Mart	1269	v. Kohout	1164	72 Miss. 93	62
v. People	1447	v. Leach	439	72 Miss. 997	200
Brott v. State	177	v. Livingstone	2529	78 Miss.	1072
Brough v. Perkins	1698	v. Luehrs	736, 749	62 N. J. L.	1270, 2512
Broughton v. Harpur	605	v. Lutz	2577	18 Oh. St.	580
Brouillette v. R. Co.	97	v. Mailier	1083	26 Oh. St.	363
Brounker v. Atkyns	1598, 2169	v. Markland	2465	1 Tex. App.	2081
Broussard v. Mallet	1335	v. Marshall		3 Tex. App.	1840
Brown, <i>ex p.</i>		120 Ind.	1873	42 Tex. Cr.	905
97 Cal.	2215	47 Mich.	1873	v. Thornton	
72 Mo.	2200, 2287	v. Matthews	2303	6 A. & E.	5
<i>re</i>	2220	v. Mendonca	1297	1 Myl. & Cr.	2121
Brown v. Anderson	747	v. Metz	2529	v. Tourtelotte	136, 907,
v. Bellows	897, 907	v. Mitchell		2498	
v. Benson	455	87 Tex.	1938	v. Tucker	1195
v. Booth	1206	88 Tex.	667, 1738,	v. U. S.	
v. Brown			1958	150 U. S.	21, 1079
38 Ala.	2067	v. Mooers	1108, 1109	164 U. S.	1616
8 E. & B.	1267, 2523	v. Mt. Holly	1719	v. Upton	2099
v. Burnham	2540	v. Nash	1350	v. Walker	2255, 2258,
v. Burrus	1867, 1890, 1896	v. Norton	620, 2245	2281	
v. Butler	1576, 2294	v. Oattis	1213	v. Warner	1589, 1540
v. Byam	1389	v. Oldham	2522	v. White	1387
v. Byrne	2425, 2431,	v. Owen	1021	v. Wightman	1560
2440, 2462		v. Payson	2308, 2313	v. Wiley	2444
v. Cady	1225, 1226, 1651	v. People		v. Wood	
v. Castellan	2530	3 Colo.	1061	17 Mass.	1304
v. Chenoweth	2015	17 Mich.	1126, 2079	121 Mass.	2336
v. Chicago M. & St. P.		36 Mich.	1136	19 Mo.	907, 1213
R. Co.	2220	v. Perez	928	6 Rich. Eq.	1312, 2141
v. Cockerell	254	v. Perkins	15	v. Woodman	1268
v. Cole	2349	v. Piper	2580	v. Woodward	2015
v. Collins	1676	v. R. Co.		v. Wren	382
v. Com.		5 Gray	1640	v. Wright	2536
14 Bush	1922, 1938	94 Ia.	1977	v. Zachary	1388
102 Ky.	200	Ky., 53 S. W.	1750	Brown's Case	2100
2 Leigh	2056	66 Mo.	1012, 2382	Brown v. Crashaw	519
73 Pa.	1398, 1433,	32 N. Y.	1719	v. Hickie	581
2098		22 Q. B. D.	65, 461	v. Moore	
76 Pa.	414, 660	12 R. I.	714, 1943	3 Bligh	1862
v. Corey	1943	v. Reed	2419	32 Mich.	716
v. Crandall	1624	v. Richmond	1267	v. Phila. Bank	2165
v. Dean	1018	v. Road Co.	1951	v. State	142
v. Doubleday	1978	v. Schiappacasse	2468	v. Steck	1873
v. Doyle	2463	v. Schock	4, 38, 289	Brownell v. Black	1700
v. Drake	2495	v. Scott	1677	v. Briggs	334
v. Driggers	1239	v. Selwin	2475	v. Curtis	2268
v. Eaton	2110	v. Sheppard	1690, 1700	v. McEwen	2351
v. Edson	1651, 1680	v. Shields	1062	v. People	111, 194, 246,
v. Farley	1210	v. Simpson	2143	247, 1974, 1976	
v. Foster		v. Smith	399	v. R. Co.	1482, 1747,
1 H. & N.	2306, 2308	v. Stanton	1272	1756	
113 Mass.	1160	v. Swanton	1951	Brownfield v. R. Co.	1976
v. Frat. A. Assoc.	95	v. Swineford	1159, 1806	Browning v. Aylwin	1858
v. Giles	1876	v. State		v. Flanagan	1244, 1267,
v. Greenly	1409	46 Ala.	1618	1347, 1521, 1689,	
v. Griffith	1225, 1239	52 Ala.	2086	1664, 2107, 2450	
v. Hicks	1312, 1651, 2105	124 Ala.	861	v. Gosnell	2015
v. Hooper	2260	Fla., 27 So.	2056	v. Hanford	1664
v. Huffard	675	Fla., 35 So.	18, 1029	v. Huff	1238, 1876,
v. Ins. Co.	688, 792, 2384	28 Ga.	761, 1893,	1890, 2158	
v. Isbell	1204, 1254		2354	v. State	2595

TABLE OF CASES.

BRO

	Section		Section		Section
Brownsword v. Edwards	2250, 2258	Buard v. Buard	1316	Bullard v. Lambert	988, 1022, 1971, 1985
Broyles v. Prisock	1164, 1719, 1840	Bubster v. State	2089	v. Pearsall	779, 900, 904, 905, 907
v. State	1072, 1349	Bucclench v. Metropolitan Board	1909, 1912, 2349, 2358	v. R. Co.	290, 1807
Brubaker v. Taylor	916, 1028, 1051	Buchanan v. Atkinson	2097	v. Smith	1003
Bruce v. Beall	561, 795, 1951	v. Cook	1878	v. Thomas	1186, 1215, 2158
v. Nicolopulo	1213, 2167	v. Grocery Co.	1302	v. Wilson	736, 745
v. State	1350	v. Moore	1362	Bullen v. Michel	21, 1195, 1304, 1484, 1472, 1592, 2139, 2143
Brucker v. State	246	v. Rucker	1271, 1681, 2163	Bulley v. Bulley	1053
Bruckman v. Taussig	1684	v. State		Bulliner v. People	1842, 1852
Bruendl's Will	2382	55 Ala.	2086	Bullinger v. Marshall	1127, 1131
Bruger v. Kelsey	1086	109 Ala.	415, 692, 2277	Bullions v. Loring	1312
Bruley v. Garvin	2303	41 Tex. Cr.	276, 1841	Bullis v. Easton	702, 1213
Brundred v. Del Hoyo	1684	Bucher v. Jarratt	1249, 1647	v. Montgomery	1082, 1083
v. Paterson M. Co.	1959	Buchman v. State	2201, 2203	v. R. Co.	1890
Bruner v. Wade	2015	Buck v. Appleton	529	Bullitt v. Overfield	1280
Bruni's Case	2372	v. Ashbrook	613	Bullock v. Corry	2323
Brunnell v. H. S. M. Co.	377	v. Boston	463	v. Hunter	760
Bruns v. Clase	1195	v. Gage	1225	v. Knox	2527
Brunson v. Lynde	73	v. Grimes	1681	v. Lake Drummond	
v. State	118	v. Maddock	1051	C. & W. Co.	451
Brunswick & A. R. Co. v. McLaren	1943	Buckholts v. Buckholts	2067	v. Richardson	2257
Brunt v. Thompson	2575	Buckingham v. Harris	1873	v. State	194, 822, 855, 861, 1005
Brunsvarg v. R. Co.	454, 456	v. Roar	2235, 2341	v. Wilson	2168
Brusch v. R. Co.	1719	Buckinghamshire v. Drury	1625	Bulstrode v. Letchmere	2286, 2308
Brush v. Cook	2168	Buckley v. Buckley	1890	Bumgardner v. R. Co.	1750
v. Gibbon	1858	v. Express Co.	201	Bunberry v. Brett	1083
v. Smith	567	v. Smith	1316	Bunbury v. Bunbury	2317
v. Taggart	1269	v. Thomas	1917	v. Matthews	2168
Brush E. L. & P. Co. v. Wells	1018	v. Wood	2250	Bunce v. McMahon	1015, 2354
Bruton v. State	2059	Bucklin v. State	923, 1608, 1985	Bunch v. Hurst	1213
Bryan v. Duff	2445	Buckmaster v. Job	2167	Bunckley v. Jones	289
v. Farnsworth	1681	Buckminster v. Perry	1938	v. State	2272
v. Forsyth	1672, 1684	Buckner v. Armour	1339	Bundy v. Hyde	16, 18, 785, 2406
v. Malloy	1388	v. Finlay	1675	Bunel v. O'Day	2527
v. Moring	736, 754	Budd v. R. Co.	561	Bunker v. Shed	736
v. O'Connor	1888	Buel v. New York Steamer	1877	Bunker Hill Co. v. Schmel-ling	791
v. Smith	1256	v. State	140, 983, 987, 2081, 2497	Bunn v. Bunn	2260
v. State		Buell v. Cook	1256	Bunnell v. Butler	1908
41 Fla.	961	v. Warner	2572	v. Studebaker	1779
Fla., 34 So.	905, 1036	Buffalo Co. v. Van Sickle	1013	Bunz v. Cornelius	1066
v. Wagstaff	1208	Buffalo L. T. & S. D. Co.		Bunzel v. Maas	996, 1003, 2103
v. Walton		v. Knights T. & M. M.		Burbank v. Dennis	736
14 Ga.	1035, 1195, 2143, 2535	A. Ass'n	2390	Burch v. Stovall	2050
20 Ga.	167, 1605, 1873, 1922	Buffum v. Harris	571, 1923, 1951	Burchfield v. State	664
v. Wear	1680, 2167	v. R. Co.	1943	Burden v. Taylor	2450
Bryant v. Foot	2522	v. York Mfg. Co.	2120	Burdette v. Burdette	2239, 2245, 987, 1270, 2277
v. Ingraham	803	Buford v. Bostick	1678	Burdge v. State	861
v. Kelton	1271, 1677, 1680	v. M'Luny	70, 73, 209	Burdick v. Hunt	694, 1021, 2008, 2363
v. Owen	1273, 2426	v. Tucker	2580	Burditt v. Howe	2429
v. Pierce	1738	Buie v. Carver	2098	Burdon v. Rickets	1186
v. R. Co.	65, 461	Builders' Co. v. Cox	1078, 1124	Burford v. McCue	2529
v. Ritterbush	529	Bulger v. Ross	2502	Burg v. R. Co.	460, 1385, 1693
v. State	1781, 2497, 2511, 2513	Bulkeley v. Butler	18, 20, 2529	Burge v. Hamilton	1736, 2052, 2452
v. Stilwell	1182	Bulkley v. Landon	1076		
Bryant's Estate	413	Bull v. Com.	2349		
Bryce v. R. Co.	458	v. Loveland	2193, 2211, 2222, 2223		
Bryden v. Taylor	1624	Bullard v. Billings	1085, 1779		
Bryne v. Van Tienhoven	2410	v. Brewer	2434		
Brynjolfson v. Elev. Co.	1290	v. Bullard	1051		
Bryson v. Hamilton	2098	v. Hascall	778		

	Section		Section		Section
Burger v. R. Co.	716, 717, 720	Burlington & M. R. Co. v.		Burrell v. State	1108, 1398
v. State		Schluntz	1943	v. Uncapher	2232, 2235
83 Ala.	950	Burlton, <i>ex p.</i>	2268	Burridge v. Sussex	1670
81 Ga.	2071	Burnaby v. Baillie	1213, 1644	Burris v. State	276, 278
Burgert v. Borchert	1086, 1779	Burnand v. Nerot	2529	Burrit v. Com'rs	1350
Burgess v. Bennett	762	Burnap v. Sharpsteen	1900	Burrough v. Martin	735, 745, 748
v. Blake	1225	Burnell v. Weld	1681	Burrowes v. Lock	1292, 1303, 1304
v. Bosworth	1141	Burnet v. Brush	1225	Burrows v. Lake Crystal	252, 458
v. Burgess		Burnett v. Lynch	1297, 1298	Burrus v. Kyle	770
2 Hagg. Cons.	2067	v. McCluey	1244	Burson v. Edwards	406
47 N. H.	2067	v. People	68, 866	v. Huntington	2098, 2420
v. Clark	2152	v. R. Co.	682, 953, 1021, 1028, 1124	Burt v. Burt	1974
v. Langley	2352	v. Simpkins	75	v. Gwinn	1969
v. Quimby	1086	v. State		v. Palmer	1070
v. Sims Drug Co.	2386, 2389	87 Ga.	2098	v. Place	1416
v. Tel. Co.	2536	32 Tex. Cr.	398	v. R. Co.	1350, 2154, 2577
Burghardt v. Turner	1225	v. Thompson	1225, 1306	v. State	
Burghart v. Angerstein	1646	v. Wilm. N. & N.		23 Oh. St.	1136, 1138, 1871
v. Brown	2115	R. Co.	1131, 1122	38 Tex. Cr.	821, 1873
Burgin v. Chenault	2141	Burney v. Allen	1976	v. Walker	1313
Burglacy v. Ellington	2426	v. State		Burton v. Anderson	1684
Burgoyne v. Showler	1302, 1512	87 Ala.	2059	v. B. S. C. Co.	1944, 1955
Burk v. Andis	1842	100 Ga.	2497	v. Com.	1441
v. Putnam	7	v. Torrey	1938	v. Driggs	18, 1213, 1230, 1532
v. Tregg	1216	Burnham v. Ayer	694, 702, 728	v. Griffiths	2553
v. Winters	1244	v. Brennan	1086	v. March	66
Burke v. Burke	1664	v. Cornwell	1770	v. Mills	613
v. Dulaney	2409	v. Hatfield	2363	v. Payne	1200
v. Elliott	2535	v. Mitchell	238, 1938	v. Pettibone	1677, 2166
v. Ellis	507	v. Morrissey	2211	v. Plummer	735, 745, 748
v. Miller		v. Roberts	2311, 2312	v. Railway	1411
6 Blackf.	73, 406	v. Webster	2572	v. Scott	1938
7 Cush.	1890	v. Wood	1213	v. State	
v. Ryan	1664, 2138	Burns v. Barenfield	672	107 Ala.	104, 791, 841, 851, 861, 1157, 1404, 1405, 1974
v. Scribner	76	v. Burns		115 Ala.	106, 664, 791, 1013, 1404, 1913
v. Shaver	1898	13 Fla.	2085	118 Ala.	1750
v. Shelby	1208	68 N. H.	398	v. Young	2257, 2260, 2268, 2272
v. State	1966	4 S. & R.	2051	Burwell v. Corbin	2049
v. T. M. W. Co.	1208	v. Campbell	1073, 1681, 1966	v. Sneed	791, 1665, 1960
v. Voyles	1195	v. Fay	1539	Bush v. Barnett	1058, 2509
Burke Co. v. Fowler	1003	v. Kempshall	2260	v. Bush	1738
Burkett v. Scarborough	1651	v. Kerr	1062	v. Com.	1828, 2098
Burkhalter v. Edwards	907	v. Paine	2052	v. Delano	1738, 2502, 2508
Burkhardt v. Loughridge	1677	v. Sennett	461	v. Hicks	2417
Burkhart v. Gladish	228	v. State		v. Jackson	457
Burkholder v. Casad	1085	43 Ala.	111	v. Livingston	2123
Burks v. State		49 Ala.	2100	v. Prosser	406
117 Ala.	2497	61 Ga.	1750	v. Roberts	1086
120 Ala.	770	v. Stuart	1124	v. Stanley	1267
Tex. Cr., 49 S. W.	759	v. Superior Court	2195	v. State	1434, 1451
Burleigh v. Stubbs	1256	v. Welch	660, 1976	v. Van Ness	1651
v. Stott	1077	Burns' Will	229	Bush & M. Co. v. Helbing	1086
Burleson v. Reading	1722	Burns & S. L. Co. v. Doyle	2409	Bushell v. Barrett	520
Burley v. Bethune	1416	Burnside v. Terry	2311	Bushnell v. Colony	1208
Burling v. Paterson	2520	Burpee v. Carvill	1219	v. Simpson	1560
Burlingame v. Central R. Co.	2355	Burr v. Com.	216	Buskett, <i>ex p.</i>	2261, 2282
Burlingim v. State	318	v. Harper	1993, 1999, 2002, 2007	Bussey v. Whitaker	1513
Burlington C. R. & N. R. Co. v. Dey	1354	v. Kase	2105	Bustin v. Rogers	1549
v. Sherwood	2120	v. Ross	1350	Bustros v. White	2319
Burlington G. Co. v. Greene	1248	v. Smith	1778	Buswell v. Davis	1777
Burlington Lumber Co. v. W. C. & M. Co.	1203	v. Wilson	224, 1623		
Burlington Nat'l Bank v. Beard	1086	Burr's Trial; see U. S. v. Burr.			
Burlington & M. R. Co. v. Beebe	1943	Burrast v. Bank	2296		
		Burrell v. Bull	603		
		v. North	1182		

TABLE OF CASES.

BUS

	Section		Section		Section
Buswell v. Fuller	2508	Byrne v. Fagan	1239	Calkins v. Lee	2286
Buswell T. Co. v. Case	392	v. Harvey	208	v. State	1999, 2000, 2002, 2008
Butcher v. Bank of Brownsville	2573			Calkins' Estate v. Calkins	1738
v. Coats	2205	C.		Call v. Dunning	1288, 1301
v. R. Co.	455, 456	Cabanné v. Walker	1856	Callaghan v. Chipman	1350
Butcher's Company v. Jones	1258	Cabell v. Holloway	1195	v. Myers	371
Butler v. Boyles	784	Cable v. R. Co.	2495	v. S. P. C. A.	461
v. Butler		Cable Co. v. Parantha	1063	Callaghan's Estate	2475
3 Day	585	Caddell v. State		Callahan v. Ingram	1971
5 Harringt.	2106	129 Ala.	106, 1938	Callan v. Bull	1978
v. Carver	1221, 1258	Ala., 34 So.	390	v. Gaylord	2016
v. Dunagan	1225, 1651	Caddy v. Barlow	2188	Callanan v. Hurley	1354
v. Durham	1677	Cade v. Hatcher	770, 773	v. Shaw	946, 1013, 1029, 1263, 2034
v. Estrella R. V. Co.	1530	Cadge's Goods	2525	Callary v. Transit Co.	916
v. Fayerweather	6, 2311, 2314, 2326	Cadieux v. Beauchemin	371	Callaway v. Fash	1635, 1651, 1684
v. Ford	2535	Cady v. Shepherd	1078	v. McMillian	1548
v. Ins. Co.	681, 1639, 1672, 1938	v. State	885	Callen v. Rose	1062
v. Iron Co.	1521	v. Walker	2312	Callihan v. W. W. Power Co.	1129
v. King	1944	Caffey v. State	2501	Callison v. Smith	1890, 1893
v. Moore	2192, 2394	Cagle v. State	2062	Calloway v. Cossart	1573
v. Mountgarret	1182, 1481, 1482, 1483	Caha v. U. S.	2572	v. Gibbins	1225
v. Owen	1681	Cahill v. Cahill	2515	v. Henderson	2465
v. R. Co.		Cahn v. Ladd	1013	Calisen v. Hope	2573
87 Ia.	1984	Cahoon v. Marshall	1086	Calverley v. Williams	2463
85 Mich.	1651	v. West	944	Calvert v. Fitzgerald	786, 1778
130 N. C.	1700	Cahow v. R. Co.	1951	v. Flower	1199, 2125
143 N. Y.	1755	Cain v. Cain	2354	Calvin's Case	518
v. State		v. State	860, 861	Cambers v. Lowry	2464
34 Ark.	952, 1008, 1963	v. Uhlman	571	Camden v. Belgrade	268, 1645, 2105
97 Ind.	1908	Cain Bros. Co. v. Wallace	2354	v. Cowley	1954
Miss., 24 So.	821	Caine v. Horsfall	2463	v. Doremus	18, 586
7 Tex. App.	2060	Cairo & F. R. Co. v. Parks	1354	Camden & A. R. Co.	1081, 1698
v. Tufts	588	Calahan's Will	2052	v. Williams	
v. Warren	1196	Calcraft v. Guest	2319, 2325	Camden & S. R. Co. v. Stetson	6, 2220
v. Watkins	321	Calder v. Bull	7	Camerlin v. Palmer Co.	668
Butt v. Tuthill	2349	Calderon v. O'Donahue	1861	Cameron v. Blackman	759, 760
Butte & B. C. M. Co. v. Montana O. P. Co.	2466	Caldwell v. Davis	2297	v. Cameron	583, 1378
Butterfield v. Gilchrist	1021	v. Drummond	1067	v. Estabrooks	2416
Butterworth v. Bailey	2121	v. McDermit	1551	v. Forsyth	1911
Butts v. Eaton Rapids	252, 1721	v. McVicar		v. Kersey	1195
v. Newton	616	9 Ark.	1378	v. Lightfoot	2158
v. State	1842	12 Ark.	529	v. Peck	1274, 1275
v. Swartwood	1817	v. Meltveldt	2311	v. State	2086
Buxton v. Cornish	2447	v. Murphy	1718, 1719	Cameron Lumber Co. v. Somerville	1521
v. S. P. Works	1951	v. Perkins	2434	Camfield v. Bird	406
Buzard v. McAnulty	797, 1065, 1066	v. Pollak	1312, 1651	Camp v. Hall	1951
Byars v. Mt. Vernon	1684	v. State		v. Randle	1672, 2566
Byers v. Orensstein	2103	17 Conn.	78, 204, 928, 1620	v. Ristine	1944
v. R. Co.	460, 1385, 1700	43 Fla.	2582	v. State	62
v. State		63 Ind.	1182	Camp's Estate	2052, 2106
105 Ala.	390, 923	v. Stuart	2237	Campau v. Dewey	1871, 1888, 1889, 1890, 1893
87 Tex.	1362	v. Ward	1350	v. Dubois	1062
v. Wallace	1484, 1502	v. Williams	1036	v. Moran	392
Byerts v. Robinson	1519, 2065	Caledonian F. I. Co. v. Traub	1062	v. North	2383
Byington v. Oaks	1225	Calhoun v. Belden	1247	Campbell v. Ayres	2110
Bynon v. State	2085	v. Com.	925	v. Bank	2535
Byrd v. Hudson	1131	Calhoun v. Akeley	1944	v. Bannister	73, 209, 406, 987
v. State	2245	v. Calhoun	1188, 1213	v. Brown	1873
Byrket v. Monokon	66	v. Hays	2279	v. Burns	2498
Byrne v. Boadle	2509	Calivada C. Co. v. Hays	6		
		Calkins v. Ann Arbor R. Co.	923		
		v. Hartford	458		

	Section		Section		Section
Campbell v. Butts	406	Canwell v. Curtis	2535	Carpenter v. Hollister	1082,
v. Campbell		Capehart v. Huey	610		1257
3 Head	18	Capen v. Stoughton	2355	v. Laswell	454
54 Wis.	73	Capital Nat'l Bank v.		v. Leonard	253
v. Carruth	2520	Williams	2016	v. Lingenfelter	21, 1003
v. Chace	2336	Capital & Counties		v. Moore	607
v. Com.	2060	Bank v. Henty	2556, 2557	v. Nixon	987
v. Coon	1083, 1085	Carbone v. Cotton	1992	v. People	205
v. Dearborn	2437	Card v. Foot	1773	v. Sawyer	530, 1275, 1352
v. Fidelity & C. Co.	1974	v. State	318	v. Snow	2475
v. Garven	1304	Carden v. McConnell	1253	v. State	1028
v. Gilbert		Cardigan Case	1842	v. Transp. Co.	1951
57 Ala.	571, 1978	Carey v. Adkins	2232	v. Wait	571
5 All.	1263	v. Hubbardston	792, 794	v. Wall	75, 210, 953, 1028
v. Hodgson	2436	v. Pitt	702, 704,	v. Ward	1007
v. Holland	1086		1993, 2026	v. Willey	2354
v. Kalamazoe	252, 438	v. State	2081	Carpenter's Appeal	905, 1081
v. Mayor	1951	v. Williams	1074, 1188	Carpenter's Estate	689
v. Miller	2354	Cargile v. Wood	2083	Carpmael v. Powis	2294, 2297,
v. Moore	2447	Cargill v. Atwood	1549, 1554		2317
v. People		v. Com.	200	Carr v. Burdiss	1297
16 Ill.	111	v. Thompson	1955	v. Carr	1232
159 Ill.	2056, 2071,	Carhart v. Clark	2167	v. Coke	1350, 2592
	2081	Carico v. Com.	247	v. Cornell	619
v. R. Co.	455, 456	Carkhuff v. Anderson	1225,	v. Dooley	2442
v. Rusch	1955		1818, 1651	v. Gale	586
v. Russell	561	Carl v. State	2073	v. Griffin	852
v. Skidmore	2349	Carland v. Cunningham	1207	v. Hilton	1072
v. State		Carle v. People	246, 918,	v. Miner	1195
23 Ala.	276, 293, 493,		2079	v. Moore	463, 901
	791, 794, 905,	Carlisle v. Eady	1253	v. Sellers	1543, 1549
	987, 994, 1044,	v. Hunley	1029	v. Smith	
	1977, 2529	v. State	2079	58 Ga.	1203
55 Ala.	1072, 1163	Carlos v. Brook	1003, 1982	129 N. C.	1022
133 Ala.	1760, 2236	Carlson v. Benton	795	v. State	
38 Ark.	248	v. Holm	778, 2115	43 Ark.	987, 1079,
11 Ga.	1397, 1398,	v. Winterson	691, 923, 1985		1750
	1431, 1438,	Carlton v. Carey	1530	Fla., 34 So.	276
	1442	v. Carlton	493, 689	96 Ga.	2354
100 Ga.	2497	v. Hescox	460	135 Ind.	59
160 Ind.	2513	v. Litton	1212	Carr Land & L. S. Co. v.	
3 Kans.	1009, 1014	v. People	140, 2081	U. S.	1239
42 Tex. Cr.	857	Carlyle v. Plumer	770	Carradine v. Hotchkiss	1877,
v. Twemlow	2230	Carmack v. Drum	2446		2125
v. Wallace	1681, 2529	Carmalt v. Post	658, 728, 787	Carrall v. State	2497
v. White	613	Carman v. Dunham	1549	Carre's Case	1991
v. Wilson	1481	Carmel N. G. & I. Co. v.		Carren v. Breed	2201
v. Wood	2572	Small	2486	Carrick v. Armstrong	2110
v. Woodstock Iron Co.	702	Carmichael, re	689, 1938	Carrico v. Neal	728, 1304
v. York	1698	Carmody v. Gaslight Co.	2509	v. R. Co.	1158, 1330,
Campbell Co. v. Marder	1347	Carnahan v. Wood	1085,		1398
Canada C. R. Co. v.			1086, 1778	Carrier v. Hampton	693
McLaren	456, 1524,	Carnarvon v. Villebois	1584	Carrington v. Cornock	1415
	2319	Carne v. Litchfield	2273	v. Eastman	1290
Canale v. People	1271	v. Nicoll	1458, 1778	v. Holabird	1911
Cancemi v. People	21, 55	Carnell v. State	321	v. Payne	1304, 1312
Canfield v. Jackson	438	Carnes v. Crandall	1503, 1605	v. St. Louis	2388
v. Thompson	1225	Carney v. Gleissner	2245	v. Ward	728
Caniff v. Myers	1911	v. State	1974	Carroll v. C. B. & N. R. Co.	2509
Cannady v. Lynch	492, 494,	Carnie v. Murphy	613	v. Peake	1232, 1256
	495, 496, 497	Caroline, Trial of Queen;		v. Nodine	2445
		see Queen's Case.		v. Norwood	1651, 2141
Cannell v. Ins. Co.	1947	Carpenter v. Ambrosion	771	v. Sprague	2311
Cannon v. Cannon	166	v. Calvert	1938, 1963	v. State	
v. Iowa City	1874, 1943	v. Corinth	451, 561, 1976	23 Ala.	111, 247,
v. State	2354	v. Dame	610, 934, 1268		824, 839
Cantley v. Platt	704, 1991	v. Dexter	1651	45 Ark.	2060
Canting v. R. Co.	1943	v. Groff	1404	3 Humph.	246, 1725
Canton v. Bentley	2063, 2235	v. Hatch	561, 1938	74 Miss.	1620
Canty v. Sumter	529				

TABLE OF CASES.

CAR

	Section		Section		Section
Carroll v. State		Cartmell v. Walton	1300	Cathcart v. Rogers	716, 1876
5 Nebr.	580, 1803	Cartwright v. Cart-		Catherina Maria, The	1639
53 Nebr.	1853	wright	690	Catherwood v. Caslon	2085
3 Tex. App.	2056	v. Green	2232, 2260	Cathay v. Shoemaker	1005
32 Tex. Cr.	921, 923,	v. Vandry	2463	Catlett v. Ins. Co.	
	987	Caruthers v. Eldridge	2141	1 Paine	1240, 1681,
Carrollton R. Co. v. Mu-		Carver v. Carver	1676, 2489		2164
nicipality	1665	v. Huskey	107, 108	1 Wend.	1680
Carruth v. Bayley	1021	v. Jackson	1080, 1082,	v. R. Co.	2494
Carskadden v. Poorman	401,		1257, 1318, 1573,	Catlin v. R. Co.	1018
	1503		1651, 1662, 1676	Catlin Coal Co. v. Lloyd	2525
Carson v. Canning	249	v. People	318	Cato v. Hunt	1738
v. Hawley	2200	v. Pinkney	1199	Caton v. Carter	1871
v. Smith	2573	v. Pinto Lette	2212	v. Lenox	2098
v. State	1842	v. Tracy	2115, 2117	Catt v. Howard	735, 2118
Carson's Appeal	693, 1290,	v. U. S.	21, 1032,	Cattell v. Dispatch	
	2048		1033, 1439, 1442,	Pub. Co.	2356
Carstens v. Hauselman	1158		1443, 1446	Cattison v. Cattison	1730
Carte v. Dennis	415, 1388	Carville v. Stout	912, 1035	Caudrian v. Miller	73
Carter, ex p.	2282	v. Westford	1028	Cauffman v. Cong. of C. S.	1195,
v. Bailey	2165	Carwile v. House	1186		1564
v. Beals	286, 1856, 2271	Cary v. Cary	2109	Caujolle v. Ferrie	1436
v. Bennett	1058	v. Hotaling	321	Caulfield v. Sanders	1195, 1558
v. Boehm	1917, 1918, 1947	v. White	2326	Caulkins v. Whisler	2419
v. Buchannon	1072, 1777	Casat v. State	105	Causey v. Wiley	1911
v. Carter		Case v. Burrows	749, 1040	Cavallaro v. R. Co.	2536
152 Ill.	660	v. Case	2085	Cavan v. Stewart	1681
79 Ind.	1126, 1127	v. Lyman	1695, 2105	Cavanah v. State	1263, 1807
44 Mo.	1466	v. McGee	1681	Cavanaugh v. Noble	406
v. Cavanaugh	62, 75, 922,	v. Mobile	2572	Cavasos v. Gonzales	811, 1839
	923, 987, 1985	v. Perew	1698	Caven v. Bodwell G. Co.	1978
v. Chambers	287	v. Potter	1549	Cavender v. Guild	2573
v. Clark	1587, 1960	Case Plough Works v.		v. State	392
v. Com.	1618	N. & S. Co.	2434	Cavendish v. Troy	1976
v. Davidson	1651	Casey v. Leggett	770, 1073	Cavin v. Smith	1086
v. Doe	2141	v. O'Shaughnessy	1487	Caviness v. State	1842
v. Edwards	1195	v. State	580, 609,	Cawley v. State	246
v. Gregory	1783		2059	Cayford's Case	1339, 2067,
v. Hill	617	Cash v. Cash	1070		2086
v. Hornback	1219, 1346,	v. Taylor	377	Caykendoll, ex p.	2349
	2427	Casley v. Mitchell	1644, 2088,	Cazenove v. Vaughan	1371
v. Jackson	2008, 2016,		2506	Cazier v. Hinchey	1225
	2020	Cass v. R. Co.	461	Cecil v. Henderson	963
v. McDowell	406	Cassady v. Old Colony		Cecil Bank v. Snively	1245
v. Montgomery	1501, 1605	St. R. Co.	2509	Cedar Rapids N. Bank v.	
v. People	987, 1106	v. Trustees	1404	Lavery	2232
v. Pryke	377	Cassem v. Galvin	770	Central B. Co. v. Lowell	2593
v. Robinett	1651	v. Heustis	614	Central Bank v. Copeland	530
v. Saunders	1082	Cassilly v. Cassilly	2432	v. Veasey	1681
v. Seattle		Castellano v. Peillon	521, 1270	Central Branch U. P. R.	
19 Wash.	65	Castello v. Castello	2239	Co. v. Andrews	1911
21 Wash.	283	v. Landwehr	283	v. Butman	1062
v. State		Castle v. Bullard	321, 338	v. Nichols	715
63 Ala.	1821	v. Fox	2467	v. Walters	1234
106 Ga.	1079	Castleberry v. State	507, 987	Central City Ins. Co. v.	
2 Ind.	391, 687,	Castles v. McMath	1675	Oates	677
	1700	Castner v. Sliker	259, 571,	Central Coal & C. Co.	
23 Tex. App.	821		1754, 1755,	v. Good	2446
Tex. Cr., 76			1974, 1976	v. Henry Shoe Co.	657
S. W.	367, 987	Castor v. Bavington	1890	Central El. Co. v. Sprague	
v. Tinicum Fish-		Castro v. Gill	2355	El. Co.	1213
ing Co.	2522	Caswell v. R. Co.	461	Central Grain & S. Exch.	
v. Troy Lumber Co.	291	Cates v. Hardacre	2280	v. Board of Trade	286
v. West	2297	v. Kellogg	1062	Central M. T. R. Co.	
v. Wilson	2555	v. Loftus	2529	v. Rockafellow	1817, 1820
Cartery's Estate	2008	v. McKinney	1770	Central Pacific R. Co.	
Carthage Turnpike		v. Winter	1177, 1208	v. Pearson	463, 720
Co. v. Andrews	689, 1722,	Cathcart v. Com.	59	Central R. Co. v. Hearne	1350
	1975	v. Gibson	1196	v. Ingram	438

	Section		Section		Section
Central R. Co. v. Mitchell	665	Chambers v. Prince	1784	Chapman v. Taylor	2530
v. Phillips	1841	v. State	2100	v. Tiffany	715
v. Richards	1698	v. Thompson	2260	v. Twitchell	1056, 1070, 1587
v. Skellie	712, 718, 719	v. Watson	2472	v. Walton	1946, 1947
v. Whitehead	1246	Chambles v. State	276	Chappell v. Smith	1911
v. Wolff	712	v. Tarbox	1573	Chappell's Goods	2474
Central R. & B. Co.		Chamness v. Chamness	715	Charbonnel v. Seabury	581
v. Kelly	1944	Champ v. Com.	457, 681, 905, 907, 1021	Charles v. R. Co.	613
v. Murray	1408	Champaign v. Patterson	461	v. State	1042
Central Railroad v. Moore	1671	Champion v. Atkinson	380	Charles, Trial of King	1177, 2250
Central Stock & G. Ex- change v. Board of Trade	2273	Champeys v. Peck	1523, 1526	Charles L. Jeffrey, The	2507
Central Vt. R. Co.		Chan Sing v. Portland	1951	Charles Morgan, The	905, 1263
v. Ruggles	65, 199, 249	Chance v. Gravel R. Co.	928, 2008, 2016	Charleston v. Hunt	1416
v. Soper	451	v. Hine	585	Charlesworth v. Tinker	1387
Central of G. R. Co.		Chancellor v. Milly	167, 1154, 1905	v. Williams	1684
v. Bond	771, 1680, 1977	Chandler v. Allison	1888, 1889, 1890	Charley v. Potthof	1729
v. Duffey	1898	v. Aqueduct Co.	437, 463	Charlotte v. Chouteau	21 Mo. 1651, 1654, 1677
v. Joseph	571	v. Beal	1890	25 Mo. 1271, 2558, 2573	
v. Trammell	456, 1041	v. Brainard	803	33 Mo. 1671, 1699, 1703, 2558	
Cessna v. Meyers	1712	v. Freeman	916	Charlotte O. & F. Co.	
Chadbourn v. Franklin	2354	v. Horne	1842	v. Rippy	1076
Chaddock v. Chaddock	2336	v. J. P. Aqueduct	714, 1943	Charlton v. Barret	408
Chadron v. Glover	2220	v. Le Barron	2016, 2018	v. Coombs	2298
v. Harris	2032	v. Mason	529	v. Unis	1002, 1003, 1007, 1018
Chadsey v. Greene	1070	v. Moulton	529	Charnock v. Dewings	1841
Chadwick v. Bowman	2318, 2319	v. Spear	1352	v. Lumley	1858
v. Bunning	2169	v. Thompson	1951	v. Merchant	986, 2276
v. Chadwick	2260	Chanoine v. Fowler	564, 1271, 1684	Charter v. Charter	2474, 2477
v. Fonner	1082, 1083	Chant v. Brown	2312	Chartered Bank v. Rich	2319
Chaffe v. Cupp	1510, 1513	Chanter v. Hopkins	2434	Chartiers & R. T. Co. v. McNamara	6
Chaffee v. Baptist M. C.	1512	Chapron v. Electric Co.	2509	Chase v. Blodgett	522, 987, 1117
v. Taylor	702	Chapin v. Dobson	2434	v. Blodgett Milling Co.	461
v. U. S.	291, 1362, 1530	v. Lapham	764	v. Caryl	1225, 1226, 1652
Chahoon v. Cone	2327, 2328	v. Marlborough	1722	v. Chase	1784
Challis v. Lake	461, 987, 1951	v. Mitchell	1554	v. Lincoln	1933, 1938
Chalmers v. Mfg. Co.	283, 681, 683, 1003	v. Siger	1028	v. Lowell	252, 266
Chamberlain, ex p.	2201	Chaplain v. Briscoe	5 Sm. & M. 1212, 1225, 2200	v. Maine Central R. Co.	2570
re	2115	5 Sm. & M. 1212, 1225, 2200		v. Pitman	617
v. Chamberlain	2083	11 Sm. & M. 1292		v. R. Co.	1074
v. Enfield	68, 201	Chaplin v. Hartshorne	1141	v. Smith	1463
v. Gorham	1196	Chapman, re	2195	v. State	246
v. Lesley	2442	v. Bennett	1664	v. Surry	95
v. Maitland	2109	v. Callis	2443	v. Vandegrift	1669
v. People	2063, 2245, 2336, 2341	v. Chapman	1362, 1481, 1483, 1484, 1486, 1487	v. Winans	1938
v. Pierson	142	v. Coffin	950	Chastang v. State	2183, 2264
v. Sands	736, 745, 748, 905	v. Cooley	921, 1023, 1108, 1109, 1985	Chatfield v. Bunnell	2097
v. Torrance	1514, 2146	v. Dodd	1416	v. Lathrop	585
Chamberlaine v. Turner	2477	v. Floyd	1651	Chatsworth v. Rowe	1976
Chamberlin v. Ball	1681	v. Holding	619, 2340	Chattanooga R. & C. R. Co. v. Owen	2570
v. Ossipee	745	v. James	1884	Chauncey v. Tahourden	2256
v. Vance	406	v. Ordway	73, 209	Chauraud v. Angerstein	1271, 1947
Chambers v. Bernasconi	1075, 1524	v. Peebles	2309	Cheatham v. Hatcher	1302, 1938, 2049
v. Dickson	2083	v. Pointon	2202	v. Riddle	1207, 2132
v. Handley	1309	v. R. Co.	55 N. Y. 250	Cheek v. James	1278
v. Haney	1225	26 Wis. 1053			
v. Hill	664, 2097	v. State, 109 Ga.	1072, 2059		
v. Hunt	18, 770, 1244, 1245		3693		
v. Oehler	2199				
v. People	5 Ill. 2164				
105 Ill.	2276, 2277				

TABLE OF CASES.

CHE

	Section		Section		Section
Cheek v. Lisle	2426	Chicago v. McKechney	1073	Chicago W. D. R. Co.	
v. State	389	v. Peck	1960	v. Becker	1750, 1754
v. Wheatly	1029, 1038	v. Pennsylvania Co.	1662	Chicago & Alton R. Co.	
Cheever v. Congdon	667	v. Powers	252	v. Am. Strawboard	
Chelsea Water Works		v. Smith	1013	Co.	749, 750
v. Cowper	1311,	Chicago B. & Q. R. Co.		v. Buttolf	1012
	2138, 2141	v. Dickson	2441	v. Clausen	1159
Chenall v. Palmer B.		v. Hyatt	2578	v. Corson	792
Co.	2509	v. Jones	1354, 1680	v. Davis	2415
Chenault v. Walker	1959	v. Kellogg	1839	v. Eaton	283
Chenery v. Goodrich	1954	v. Lewis	1239, 2169	v. Glenny	681
Cheney v. Watkins	1225, 1651	v. Martin	688	v. Keegan	
Chenie v. Watson	1168,	v. Roberts	1062	152 Ill.	665, 1705, 2163
	1181	v. Shafer	714	185 Ill.	2531
Chenowith v. Chamberlin	1635	Chicago City R. Co.		v. Lewondowski	667, 1976
Cheny v. State	347	v. Allen	1005, 1013	v. Pearson	65
Cherokee v. Land Co.	463,	v. Carroll	17, 150, 949,	v. R. Co.	1921, 1943, 1960
	714, 720		1877, 2509	v. Shannon	252
Cherokee Co. v. Dick-		v. McMahon	278, 280	v. Sullivan	96, 249
son	249, 1078,	v. Taylor	461	Chicago & E. I. R. Co.	
	1984	v. Tuohy	1053	v. Beaver	2570
v. Boyd	1362, 1585, 1587	v. Van Vleck	568	v. Bivans	715
v. Slade	1727, 1768	Chicago D. D. Co. v. C.		v. Chancellor	1726
v. State		D. Co.	371	v. Donworth	1721
68 Ala.	1481, 1493,	Chicago Great W. R. Co.		v. Grimm	1951
Miss., 20 So.	2497	v. Price	1976	v. Randolph	1974
Cherry Point Fish Co. v.		Chicago K. & N. R. Co.		v. Wallace	18, 682
Nelson	1698	v. Ellis	2336	Chicago & E. R. Co.	
Chesapeake Club v. State	2271,	v. Stewart	463	v. Blake	714
	2276	Chicago K. & W. R. Co.		v. Holland	2220
Chesapeake Ins. Co. v.		v. Anderson	613	v. Thomas	949
Starke	2553	v. Farsons	1168, 2570	Chicago & N. W. R. Co.	
Chesapeake & O. C. Co.		Chicago Lumbering		v. Calumet Stock Farm	716
v. B. & O. R. Co.	2573	Co. v. Hewitt	750, 751,	v. De Clow	1041
Chesapeake & O. R. Co.			1530	v. Hart	460
v. Patton	2354	Chicago M. & St. P. R.		v. Ingersoll	1195, 1951
v. Riddle	96	Co. v. Artery	1028,	v. Moranda	1951
v. Smith	1078		1040, 1263	v. Simon	2537
Cheseldine v. Brewer	2083	v. McArthur	1653	Chicago & R. I. R. Co. v.	
Chesley v. Chesley		v. Minnesota	1354	N. Ill. C. & I. Co.	1890
54 Mo.	2240	v. O'Sullivan	1976	Chicago & W. C. Co. v.	
10 N. H.	66, 406	v. Staff	1671	Liddell	736
v. Murdock	2065	Chicago P. & M. R. Co.		Chicago & W. I. R. Co. v.	
Chesmer v. Noyes	1675	v. Mitchell	1943	Maroney	463
Chesnut v. People	150	Chicago R. Co. v. Adler	736, 745,	Chick v. Robinson	1074
Chess v. Chess			749, 760	Chicot Co. v. Davies	1350
1 Pa. St.	233	v. Provine	657	Child v. Grace	1072
17 S. & R.	736, 1409,	Chicago R. I. & P. R. Co.		v. Kingsbury	1566
	2098	v. Buel	714, 791	Childers v. State	2059
Chester v. Bowen	1841	v. Clark	65, 461	Childress v. Allin	1267
v. Wilhelm	907	v. Collier	1910	v. Cutter	1644, 1672,
v. Wortley	2256, 2268	v. Farwell	1168		1677
Chesterfield v. Ratliff	2553	v. Holmes	1951	v. R. Co.	1951
Chetwind v. Marnell	1858	v. Langston	2220	v. State	1807, 2060
Chetwynd v. Lindon	2257	v. Moffitt	1921	Childs v. Merrill	2279
Chew v. O'Hara	581	v. Young	2509	v. Muckler	1974
Cheyney's Case	2426, 2470,	Chicago St. L. & P. R. Co.		v. O'Leary	571
	2472	v. Champion	442, 451	v. State	1614
Chicago v. Babcock	2435	v. Spilker	688, 1719	Chiles v. Drake	2083
v. Baker	1803	v. Wolcott	1230	Chillicothe F. R. & B.	
v. Dermody	2354	Chicago St. P. M. & O. R.		Co. v. Jameson	2304
v. Drexel	1777	Co. v. Gilbert	455	Chilton v. State	1124, 1977
v. English	1674	v. Myers	1404, 2098	Chin Bak Kau v. U. S.	1354
v. Greer	720, 1951	Chicago St. P. & K.		Chipman v. Peabody	2573
v. Jackson	463	C. R. Co. v. Chambers	1976	v. People	367
v. Le Moyne	791	Chicago Telephone Co. v.		v. R. Co.	571, 1076, 1977
v. McGiven	1951	Northwestern T. Co.	1350	v. Tucker	2409
v. McGraw	1244	Chicago Terminal T. R.		Chippendale v. Masson	783
		Co. v. Bugbee	463, 720, 1908	Chirac v. Reinicker	2313

	Section		Section		Section
Chisholm v. Ben	1267,	Cilley v. Bartlett	1257, 1778	Clark v. Brown	73, 406
	1511, 2090	v. Cilley	689	v. Butts	1185
v. Machine Co.	1530	v. Van Patten	1267	v. Carter	2349, 2354
v. Sheldon	1297	Cincinnati C. I. & St. L.		v. Clark	
Chism v. State	905	R. Co. v. Lutes	1890	168 Mass.	1938
Chittenden v. Evans	1012, 1013	Cincinnati I. St. L. &		1 Mo. & Rob.	2294
Chitty v. Dendy	2578	C. R. Co. v. Grames	2507	65 N. C.	1021, 1022
Choctaw O. & G. R. Co.		Cincinnati N. O. & T. P.		v. Cochran	5
v. Deparade	716	R. Co. v. Disbrow	1233	v. Com.	
v. McDade	283	Cincinnati & F. M. Ins.		Ky., 32 S. W.	276
Choice v. State	683, 689, 1621,	Co. v. May	681, 1618,	111 Ky.	359, 1621,
	1873, 1922, 1938,		1951		1700, 1984
	1974	Cincinnati & G. R. Co. v.		90 Va.	910, 2079
Cholmondeley v. Clinton		Mims	1943	v. Ducheneau	2437
19 Ves. Jr.	2323	Cincinnati & Z. R. Co. v.		v. Ellsworth	715, 1944
2 Jac. & W.	2463	Smith	1951	v. Field	2363, 2375
Choteau v. Raitt	1201, 1204	Cire v. Rightor	2355	v. Fisher	229
Chouteau v. Chevalier	1219,	Citizens' Bank v. Fromholz	783	v. Fletcher	89, 2125
	1651	v. Rhutasel	1389,	v. Freeman	702
v. Searcy	657		1890, 2103	v. Fry	1676
Chouteau L. & L. Co. v.		Citizens' Gaslight Co. v.		v. G. T. R. Co.	1062
Chrisman	987	O'Brien	660	v. Hall	1680
Chowning v. State	150	Citizens' R. T. Co. v. Dew	68,	v. Harmer	1391
Christ v. Webster City	2349		1706	v. Hedden	2054
Christ's College v. Wid-		Citizens' S. R. Co. v.		v. Hills	1582, 1587,
drington	2047	Burke	1800		1588
Christensen v. U. T. Line	199,	v. Willooby	1158	v. Holmes	749
	283	City Bank v. Bateman	2222,	v. Hornbeck	1195, 1196,
Christensen's Estate	1938		2223		1198
Christianson v. Furniture		v. Kent	1841, 1871	v. Houghton	2105
Co.	1750	v. Young	1041	v. Huffaker	1133
Christie, re	497	City Fire Ins. Co. v.		v. Hull	1665
v. T. Junction	2358	Carrugi	811, 2206	v. Irwin	689
Christman v. Pearson	2012	City National Bank v.		v. Krause	2242, 2245
Christopher v. Covington	1086	Bridgers	1779	v. Locomotive	
Christy v. Badger	2477	City of Washington, The	1951	Works	1951, 1955
v. Cavanagh	1194	Claffin v. Dodson	908	v. Longworth	1212
v. Kavanagh	1225	v. R. Co.	2522	v. Lowe	2465
v. Minor	1664	Claffin's Will	87, 1511	v. Lumber Co.	1672
Chubb v. Salomons	2375	Claffin Co. v. Rodenberg	2498	v. Manchester	2354
v. Westley	406	Clagett v. Easterday	571	v. Mix	1225
Chumaseo v. Gilbert	2573	v. Phillips	2294	v. Morrison	2578
Chung Sing v. U. S.	59	Clague v. Hodgson	571, 651	v. North American Co.	76
Chunot v. Larson	616	Claborn v. R. Co.	258	v. Owens	2141
Church, ex p.	1676	Clancy's Case	2372	v. Patterson	2526
v. Burghardt	1778	Clanton v. Jones	1684	v. People	605
v. Case	2406	Clapp v. Fullerton	1938	v. Perdue	1651
v. Cherryfield	2509	v. Norton	791	v. Read	2355
v. Drummond	64	v. Peck	907	v. Reese	987, 2277
v. Hubbart	1271, 1674,	v. State	2276	v. Rhodes	2008, 2016
	1677, 1680, 1681	v. Wilson	952, 1044,	v. Sanderson	1312, 1513
v. Milwaukee	792, 1943		1261, 1263	v. Sawyer	1664
v. Shelton	1065	Clapton, re	2446	v. Slidell	1256
Church of Jesus Christ		Clara, The		v. Smith	
v. Watson	1082	Clardy v. Richardson	1312,	10 Conn.	2115
Churchill v. Corker	1225, 1658,		1320, 1652	72 Vt.	376
	1911	Claremont v. Carlton	1778	v. Spence	716, 1943
v. Fulliam	1532	Claridge v. Hoare	2257, 2260	v. State	
v. Smith	2232	Clark v. Arnold	1082	105 Ala.	1442
v. Suter	529	v. Bailey	923	117 Ga.	1108
v. White	1051	v. Baird	1924, 1943	4 Ind.	736
Churchwell v. State	1013	v. Bank	748	47 N. J. L.	387
Chute v. State	738, 753,	v. Beach	1082	12 Oh.	568, 1938
	1163, 1164	v. Bigelow	658, 726	v. Stevenson	2356
Chytraus v. Chicago	1873	v. Board	2464	v. Trinity Church	1640,
Cicely v. State	276	v. Bond	1108		1644, 1646
Cicero v. State	852, 1329	v. Boyd	1312, 1320,	v. Troy	1651
Cicero & P. S. R. Co.			1505, 1513	v. Turner	1738
v. Priest	1719	v. Bradstreet	166, 167, 1154	v. Van Riemsdyk	2047

TABLE OF CASES.

CLA

	Section		Section		Section
Clark v. Vorce	736, 2098	Cleavelands v. R. Co.	456	Clifford v. Huntly	2250, 2256
v. Water Power Co.	451, 1943	Cleavland v. Burton	2105	v. Richardson	1918, 1923, 1976
v. Willett	451	Clegg v. Fields	1956, 1963	v. Taylor	1858
v. Wilmot	1464	v. Levy	1271	Clifton v. Granger	2270
v. Wright	1267	Cleghorn v. R. Co.	89, 96	v. Lilley	1195, 1213
v. Wyatt	702, 2007, 2017	Cleland v. Thornton	438	v. U. S.	285, 291, 2273
Clark, Estate of	1010, 1013	Clem v. State	1108	Clinch Co. v. Willing	2444
Clark's Lessee v. Hall	522	Clemens v. Conrad	987, 1247, 1270, 2184	Cline v. Broy	2354
Clark's Petition	2203	Clement v. Brooks	987	v. Lindsey	1938
Clark Co. v. Kerstan	2203	v. Cureton	1966	v. State	1398
Clarke, ex p.	2282	v. Kimball	68, 950, 1042	Clinton v. Estes	233, 1079
v. Bank	1684	v. Packer	1567, 1587	v. Hooper	2475
v. Bartlett	1290, 1312, 2051	Clement, The	681	v. Howard	261, 1976, 1978
v. Clarke	1890	Clementi v. Golding	2582	v. McKenzie	1873, 1874, 1890
v. Courtney	1308, 1320, 2141	Clementine v. State	78, 987, 1025	v. State	1816, 1817, 1828
v. Dunnivant	1302, 1511, 1512, 2049	Clements v. Benjamin	1390	Cliver v. Heil	2442
v. Magruder	1518, 1521	v. Kyles	378, 1568	Cliquot's Champagne	719, 1704
v. Mead	1354, 2534	v. McGinn	492, 493, 497	Close v. Olney	2279
v. Periam	194, 195, 202	v. Marston	2336	v. Sann	1154, 1168
v. Robinson	1181	v. Moore	2123	Cloud v. Patterson	1247
v. Saffery	770, 774	v. Pearce	794	Clough v. Bowman	1225
v. Shee	526	Clemmons v. Clemmons	1842	v. Little	751, 1555
v. State		v. State	1434	v. State	760, 852, 914, 1890
78 Ala.	106, 276	Clemons v. State	858	Clouse v. Coleman	2220
87 Ala.	2273, 2276	4 Lea	1869	v. Elliott	613
117 Ala.	2239	92 Tenn.	1871	Cloyes v. Thayer	2260, 2270
v. Waite	1080, 1082, 1085	Clendenen v. Ross	2475	Cluck v. State	105, 1807
v. Warwick C. M. Co.	1256	Clennell v. Lewthwhite	2311	Cluett v. Rosenthal	2183
Clarkson v. Woodhouse	157, 2138, 2139	Clergue v. McKay	2477	Cluggage v. Swan	2353, 2354
Clary v. Clary	689, 1919, 1933, 1934, 1938	Clergy Society, The	2063	Clukey v. Electric Co.	1700
v. Grimes	1082	Clerk v. Wright	2026	Clum v. Smith	2354
v. Hardeeville		Clermont v. Tullidge	1993, 1268	Clune v. U. S.	1079
Brick Co.	905, 1891	Cleveland v. Burnham	2477	Clunnes v. Peggy	291
v. O'Shea	1203	v. Spillman	1195	Clutch v. Clutch	2067
Clason v. Morris	2123	v. Worrell		Clute v. Small	736, 747, 1198
Clauser v. Stone	18	Cleveland C. C. & I. R. Co. v. Newell	438, 1721, 1722	Cluverius v. Com.	1725, 1729
Clavey v. Lord	1881	Cleveland C. C. & St. L. R. Co. v. Gray	568	Clyde v. Clyde	529
Clawson v. State	2501	v. Hornsby	2509	Clymer v. Cameron	1186
Clay v. Alderson's Adm'r	2008, 2016	v. Jenkins	2580	Coagler v. Rhodes	772
v. Holbert	1292	v. Monaghan	792, 794	Coal C. M. & M. Co. v. Ross	1664
v. Langslow	1076	v. Patton	1157	Coale v. Harrington	1082
v. Robinson	2005, 2006, 2008, 2016, 2017	v. Prewitt	1719	Coan v. Flagg	1674
v. State	2276	v. Walter	461	Coates v. Chapman	1003
v. Tyson	2312	Cleveland C. & C. R. Co.	1750	v. Early	2415
v. Williams	2297	v. Mara		v. R. Co.	283, 1698
Clayes v. Ferris	1873	Cleveland Paper Co. v. Banks	1807	v. Semper	2315
Clayton v. Gregson	2464	Cleveland R. Co. v. Wynant	461	v. Sulan	21 Kan. 923
v. Nugent	2467	Cleveland Ref. Co. v. Dunning	2410		46 Kan. 928, 1612
v. Rhem	1240, 1273	Cleveland T. & V. R. Co.	654	v. Wilkes	916
v. State	2592	v. Marsh		Coats v. Elliott	1067
v. Wardell	2083, 2086, 2505	Cleveland & P. R. Co. v. Ball	1943	v. Gregory	1878, 2104
Clayton Co. v. R. Co.	1955	Cleveland & T. R. Co.	719, 1232, 1704	v. Lynch	770
Claytor v. Anthony	1086	Cleverly v. McCullough	735	Cobb v. Boston	736, 747, 754
Claxton's Adm'r v. R. Co.	1951, 1978	Clevinger v. Hill	1256	v. Haynes	2529
Clealand v. Huie	1388, 2098	Clewser v. Samuel	1777	v. Makee	1641
Cleave v. Jones	2312, 2318, 2550	Clifford v. Brooke	2032	v. Tirrell	2211
		v. Burton	2232	Cobban v. Hecklen	1890
		v. Drake	736, 749, 760	Cobbe v. Garston	2067
		v. Hunter	1893	Cobbett v. Hudson	1842, 1911

	Section		Section		Section
Coburn v. Storer	1079	Coldwater N. Bank v.		Collier v. Collier	2250
Cochran v. Cochran	1195	Buggie	1779	v. Corbett	2105
v. Linville I. Co.	1651	Cole v. Andrews	2296	v. Dick	1072
v. State		v. Cheovenda	1205, 2309	v. Hicks	1834
113 Ga.	579, 770, 949	v. Cheshire	1784	v. Jeffreys	1389
7 Humph.	2349	v. Clarke	1943	v. Nokes	1061, 1861
v. Street	2349	v. Cole		v. Poe	1777
Cochrane v. Com.	714	153 Ill.	2231	v. Simpson	690, 1690
v. McEntee	2065	33 Me.	1062	v. State	609, 1450
v. W. D. Co.	392	v. Com.	349	Colling v. Treweek	1205, 1206,
Cockerel v. Wynn	1678	v. Dial	1537, 1549		1234
Cockerham v. Nixon	251	v. Fall Brook C.		Collins v. Bane	2120
Cockrill v. Cox	1938	Co.	682, 1976,	v. Bayntun	1298
v. Hall	987		2220	v. Bennett	2508
Cocks v. Nash	1858, 2325	v. Gibson	1177, 1252	v. Blantern	2414
v. Purday	1271	v. Gray	2227	v. Com.	1404, 1447
Coddington v. Jenner	1267, 2106	v. Hadley	1075	v. Dorchester	458, 1672
Codman v. Caldwell	1542	v. Hall	1379	v. Elliott	1304, 1513,
Cody v. Conly	701	v. Jessup	736, 747		1736
Coe v. Darknell	392, 1890	v. R. Co.		v. Godefroy	2203
Cofer v. Scroggins	1186, 1219	81 Mich.	289	v. Grantham	1483, 1503
Coffee v. Neely	1681, 2110	95 Mich.	1012, 1963	v. Hoehle	905
Coffin v. Anderson	1124, 1126	105 Mich.	655	v. Kilroy	2503
v. Bradbury	1051	19 Ont. Pr.	283	v. Lemasters	747
v. Bucknam	1466	v. Rawlinson	2470	v. Lynch	2518
v. Collins	1074	v. State		v. Mack	619, 620, 1028,
v. Jones		105 Ala.	1442		1051, 2383
13 Mich.	607	59 Ark.	1329	v. Mathew	2555
14 Pick.	803	6 Baxt.	398, 1028,	v. Maule	1224, 1650
v. Plymouth	1062		1029, 1037	v. Nalleau	1225
v. U. S.	2511	v. Varnor	1083	v. People	
v. Vincent	748, 759, 760	Cole's Lessee v. Cole	522	98 Ill.	580, 2056
Coffrin v. Cole	2465, 2466	Collee v. State	689, 1922,	194 Ill.	568, 1440
Cogan v. Edden	2355		1938	v. R. Co.	454, 456, 1978
v. Frisby	1651	Coleman v. Applegarth	2410	v. Richart	1379
Cogdell v. R. Co.		v. Breaud	1225	v. Shaw	1541
129 N. C.	2494	v. Com.	499	v. State	
130 N. C.	1951	v. Davis	1225	137 Ala.	1079, 1750
132 N. C.	1976, 2490,	v. Dobbins	1350, 2577	94 Ga.	2570
	2510	v. Frazier	1476	98 Ill.	580
Coggsell v. Davis	770	v. Ins. Ass'n	1540	46 Nebr.	1442, 1750,
v. Dolliver	1548, 1551	v. Lewis	1623		1896, 2497
Coghill v. Kennedy	1738, 2503	v. People	15, 216, 278,	115 Wis.	1062
Coghlan v. William-			301, 326	v. Stephenson	1022, 1730
son	1312, 1513	v. Perry	1951	v. Todd	2120
Coglan v. Beard	1351	v. Slade	2349	v. Valleau	1275
Cohen, ex p.	2281, 2282	v. Southwick	1174, 1362	v. Voorhees	2505
v. Dubose	2355	v. State		v. Waters	1722
v. Goldberg	344	79 Ala.	1296, 1300	v. Wilson	607
v. Templar	2307	28 Ga.	2349	Collis v. Bowen	1076
Cohn v. Kingsley	1350	94 Ga.	987	Colman v. Trueman	2319
v. Mulford	1086	111 Ind.	288, 2272	Colorado C. C. M. Co. v.	
v. Saidel	38, 1079, 2539	55 N. Y.	194	Turck	2494
Coit v. Millikin	1681	44 Tex.	2059	Colorado Electric Co. v.	
Coke v. Fountain	1388	v. Wise	529	Lubbers	283
Cokeley v. State	1021	Coleman's Case	492, 494, 495	Colorado F. & I. Co. v.	
Coker v. Ferguson	1299, 1651	Coleman's Will	2315	R. Co.	1802
v. Guy	2470	Coleman & Burden Co. v.		Colorado M. & I. Co. v.	
v. Hayes	770, 1898, 2349	Rice	2530	Rees	252, 437,
v. Merritt	1164	Coler v. Tacoma R. & P.			1976
v. State	111, 247	Co.	2536	Colpoys v. Colpoys	2470
Colburn v. Groton	1061, 1062	Coles v. Brown	905, 907	Colquit v. State	1671, 1732,
v. Spitz	987	v. Perry	26		2115
Colby v. Kenniston	1188, 1267,	Coley v. State	2073	Colquitt v. State	
	1269, 1314	Colf v. R. Co.	461	61 Ala.	2081
Colchester v. Culver	1651, 2141	Coll v. Transit Co.	1755	34 Tex.	1750
Colchester Sav. Bank		Collagan v. Burns	271, 1737	Colson v. Bonzey	1352
v. Brown	1651	Colledge v. Horn	1063	Colt v. McConnell	2312, 2437
Colclough v. Rhodus	1878	Collett v. Lord Keith	850, 2098	Colter v. Calloway	1064

TABLE OF CASES.

COL

	Section		Section		Section
Columbia v. Harrison	735, 754, 866	Commonwealth v. Anthes	2557	Commonwealth v. Campbell	225, 792, 2100
Columbia, Dist. of, see District of Columbia.		v. Armstrong	2115	155 Mass.	
Columbia Bank v. Rice	1028	v. Arnold	1669	v. Cardoze	78
Columbia R. Co. v. Hawthorne	283	v. Bachelder	1817, 1820, 2214	v. Carey	
Columbia & P. S. R. Co.		v. Barry	2215	12 Cush.	1398
v. Hawthorne	2496	v. Bell		2 Pick.	705
Columbian Ins. Co. v. Lawrence	29	102 Mass.	2513	v. Carney	382
Columbus v. Dahn	581	145 Pa.	2271, 2281	v. Casey	1445
v. Ogletree	1668, 2158	166 Pa.	398	v. Castles	261, 1291
v. Sims	1698	v. Bentley	2130, 2529	v. Certain Intox.	
Columbus & R. R. Co.		v. Berchine	2501	Liquors	2183
v. Christian	250, 1984	v. Berry	382	v. Certain Lottery	
Columbus & W. R. Co.		v. Best	1244	Tickets	2183
v. Tillman	1205	v. Bezek	233	v. Chabbock	836, 1476
Colvill v. R. Co.	1943	v. Biddle	363, 1876	v. Chance	499, 1164, 1476, 1774, 1775, 2100, 2363
Colvin v. McCormick C. O. Co.	18	v. Bigelow	818, 1243	v. Chaney	770
Coman v. State	1240, 1268	v. Billings	437, 928, 1010	v. Chase	
Combe v. London		v. Birriols	397, 1448	6 Cush.	1680
1 Y. & C.	2294	v. Bishop	655, 1442, 1451, 2056, 2100	147 Mass.	106, 2059
4 Y. & C.	1846	v. Blair		v. Choate	88, 216, 238, 1978
Combs v. Breathitt Co.	1213	123 Mass.	289	v. Churchill	923
v. Com.		126 Mass.	1873	v. Clancy	736
97 Ky.	1615	v. Blanchette	2515	v. Clark	
90 Va.	728	v. Blood		14 Gray	285
v. Dowell	1650	11 Gray	1182	130 Pa.	852, 865
v. Hodge	1066	141 Mass.	216, 321	v. Cleary	
v. State	111, 390, 1807	v. Bolkom	2450	152 Mass.	2336
v. Winchester	1020, 1021, 1038	v. Bond	851, 861	172 Mass.	1135, 1136, 1138
Comer v. Comer	1235	v. Bonner	890, 987, 2276	148 Pa.	1398
v. Hart	1188	v. Borden	26, 1807	v. Clemmer	524
v. Way	2553	v. Bosworth	2056, 2059	v. Clifford	238
Comfort v. People	1781, 2100	v. Bowers	239	v. Clune	1010, 2056
Comingore, re	2375	v. Boynton	2060	v. Coe	321, 2020
Comins v. Comins	1778	v. Bradford	216, 354	v. Cole	1141
Commander v. State	106, 390, 396, 1910	v. Brailey	1072	v. Collier	150, 415
Commercial Bank v. Barksdale	1635	v. Braley	1160	v. Connors	792, 794
v. Ins. Co.	581, 1947	v. Brayman	1938	v. Cooley	664, 1976
v. Sparrow	1350	v. Brelsford	1159, 2183	v. Cooper	934, 1441
v. Union Bank	787, 1185, 1392	v. Brennan	2277	v. Corkery	108, 1275, 1680
Commercial & F. Bank		v. Brewer	1442, 1451	v. Corkin	216, 359
v. Patterson	1684	v. Briggs	2232	v. Costello	
Commerell v. Poynton	2211	v. Brogy	1398, 1404	119 Mass.	290
Commissioners v. Clark	2495	v. Brooks		120 Mass.	413, 2591
v. De Rosset	1350, 2592	9 Gray	2056	v. Costley	2497
v. Higginbotham	1350	109 Mass.	415	v. Cotton	104, 367
v. Snuggs	1350	v. Brothers	153	v. County Com'rs	1351
Commissioners of Marion Co. v. Clark	2494	v. Brown		v. Crane	2572
Commons v. Walters	73, 74	121 Mass.	221, 1072, 1696	v. Cressinger	841, 1938
Commonwealth v. Aaron	660	193 Pa.	689	v. Crossmire	1976
v. Abbott	141, 142, 397, 1732	90 Va.	1842	v. Crowe	107, 108, 266
v. Acton	276, 2183	v. Brownell	2273	v. Crowley	
v. Alburger	1598, 1665, 2159	v. Buccieri	689	165 Mass.	1732
v. Allen	951, 2018	v. Burke		167 Mass.	1977
v. Alley	1725, 2243	12 All.	1157	168 Mass.	1842
v. Andrews	198, 232, 1621, 1862	16 Mass.	935, 2241	v. Cuffee	824, 851, 855
v. Antaya	861	114 Mass.	762	v. Cullen	855
		v. Burroughs	861	v. Culver	860, 861
		v. Burton	759, 760	v. Curtis	398, 832, 835
		v. Buzzell	935, 1003, 1004, 1007, 1818	v. Daily	278
		v. Byrnes	2183	v. Dam	1873
		v. Byron	950	v. Dame	520
		v. Call	256, 1072	v. Damon	
		v. Campbell		128 Mass.	1335
		7 All.	363	136 Mass.	406

	Section		Section		Section
Commonwealth v. Dana	2183	Commonwealth v. Gorman	238	Commonwealth v. Hurley	
v. Davidson	2125	v. Gray		14 Gray	2085
v. Dearborn	382	Ky., 30 S. W.	390, 396,	158 Mass.	153, 2183
v. Dedham	1346		1726	v. Hutchinson	505, 506
v. Desmore	1476	129 Mass.	68	v. Ingraham	1104, 1108, 1109
v. Desmond		v. Green		v. Jackson	
5 Gray	2060, 2588	17 Mass.	522, 586,	5 Bush	1350
103 Mass.	2575		1270	11 Bush	2086
v. Devaney	154, 278, 851	126 Pa.	2364	132 Mass.	194, 216, 301, 318, 321
v. Dill	2088, 2245	2 Pick.	2514	v. James	
v. Dillon	822, 835	v. Griffin	2339	99 Mass.	1124
v. Donahoe	905, 1022	v. Hackett	1756	1 Pick.	2089
v. Dorsey	568	v. Haley	762	v. Jardine	2336
v. Dowdican	660, 1978	v. Hall		v. Jeffries	12, 38, 95, 302, 762, 763, 1073
v. Downey	280	4 All.	278, 318	v. Jenkins	1126, 1128, 1129
v. Downing	2060, 2164	164 Mass.	561, 696, 1385	v. Jennings	951, 952
v. Drake		v. Haney	1441, 1450	v. Jongrass	1819
15 Mass.	840, 2394	v. Hanley	2272	v. Julius	581
124 Mass.	2059, 2060	v. Hardy	56, 58, 194	v. Kane	2535
v. Dunan	1005	v. Harman	26, 832, 852, 2081	v. Keenan	2183
v. Eagan	851	v. Harris	62, 200	v. Keller	792, 2079
v. Easland	609	v. Harrold	1671	v. Kelley	950, 1263
v. Eastman	321, 1073, 1876, 1890, 2016, 2019, 2020	v. Hart		v. Kendrick	415, 439
v. Edds	367	98 Ky.	2044	v. Kennedy	
v. Edgerly	318, 1073	21 Pa.	1036, 1899	97 Mass.	153
v. Elliot	2056, 2059, 2060	v. Harvey	1072	170 Mass.	363, 457, 655, 728, 1878, 1977, 2166
v. Emery		v. Haskell	290, 2079	v. Kenney	1071, 1072, 2089
2 Gray	1224, 1225, 1318	v. Hawkins	1026, 1042, 2511	v. Kent	1732
107 Mass.	2252, 2282	v. Hayden	1633, 1644, 1680, 2088, 2245	v. Keyes	2094, 2113, 2115
v. Epps	861	v. Hayes		v. Kimball	
v. Fairbanks	1938	140 Mass.	2059	7 Gray	78
v. Fairfield	580, 1254, 1514, 1672	145 Mass.	2336	24 Pick.	2260, 2270
v. Farrar	1022	v. Heffron	1640	v. King	
v. Farrell	107, 569, 901, 1977	v. Henderson	2183	8 Gray	852
v. Felch	143, 1503, 1726	v. Hersey	238, 293, 1840	150 Mass.	2580
v. Fenno	1719	v. Hershell	664	v. Kinison	2079
v. Ferrigan	63, 216, 246, 390	v. Higgins	2203	v. Knapp	824, 834, 861, 1163, 1850
v. Ferry	367	v. Hill		v. Kneeland	2582
v. Finnerty	153, 382, 2529	11 Cush.	2363	v. Lahey	398
v. Fitzgerald	933, 1003	14 Mass.	811	v. Lanman	762, 852, 2276
v. Flaherty	2514	145 Mass.	2514	v. Larrabee	2056, 2059
v. Flood	839, 841	v. Hilliard	246	v. Lawler	692, 1614, 1985
v. Flynn	568, 1976	v. Hills	987, 1821	v. Lenousky	21, 1393
v. Follansbee	1839	v. Hobbs	2463	v. Lenox	246, 247
v. Ford		v. Hollis	222, 667, 1154	v. Little	1750
14 Gray	1677	v. Hollister	2060	v. Littlejohn	1645, 2085, 2088
130 Mass.	748, 749, 760, 763	v. Holliston	791	v. Locke	
v. Foster	987	v. Holmes		145 Mass.	280
v. Fox	762, 763	127 Mass.	2059	14 Pick.	1850
v. Funai	1072	157 Mass.	108, 396, 897	v. Lubinsky	321
v. Galavan	784	v. Holt	2085, 2086	v. Lynes	1821
v. Gallagher	950, 1116	v. Homer	1432	v. McBean	1021
v. Gannett	73, 204	v. Hopkins	203, 1620	v. McCabe	285, 287, 290, 1072
v. Gearhardt	1938	v. Horner	2273	v. McCann	2071
v. Gillon	280	v. Hoskins	63, 247	v. McCarthy	354
v. Goodman	439	v. Horton	398	v. McCaul	2354
v. Goodwin		v. Hourigan	1003, 1021, 1618	v. McCue	272
14 Gray	108, 281, 1133	v. Howe		v. McDermott	1072
122 Mass.	2447	9 Gray	235, 499, 933, 2071	v. McDonald	200, 987
186 Pa.	841	13 Gray	2270	v. McGuire	524
v. Gorham	987, 1270, 2277	v. Hudson	905, 913, 1890	v. McHugh	280
		v. Hunt	1005		
		v. Hunton	852, 1079		

TABLE OF CASES.

COM

	Section		Section		Section
Commonwealth v. McKenna	1406	Commonwealth v. Phelps	761, 1860	Commonwealth v. Sego	839, 860
v. McMurray	2592	v. Phillips		v. Selfridge	1671
v. McNamee	203	162 Mass.	667	v. Shaw	987, 2270
v. M'Pike	218, 1756	170 Mass.	1646	v. Sheehan	826
v. Madan	105, 106, 390	10 Pick.	1681, 2164	v. Sheets	855
v. Magee	2495	v. Pierce	398, 2276	v. Shepard	216, 331
v. Major	363	v. Piper	416, 451, 1976	v. Shepherd	2063
v. Maloney	153	v. Pitsinger	2100	v. Sherman	1352
v. Manson	609	v. Place	406	v. Shew	851
v. Marsh	580	v. Pollard	2042	v. Silcox	1442
v. Martin	1350	v. Pomeroy	233	v. Smith	
v. Marzynski	1696, 2567	v. Pope	1181, 1977	2 Gray	1820, 2214
v. Mason	987	v. Porter	2559	119 Mass.	832, 851,
v. Matthews	1442, 1447	v. Powers	437		2071
v. Mead	246, 2360,	v. Pratt	2276	163 Mass.	1042, 2273,
	2362, 2363	v. Preece	851		2276
v. Meaney	1873	v. Price	318, 2056	166 Mass.	1354, 2183
v. Merriam	398	v. Quin	987, 1270	12 Metc.	580
v. Meserve	2354	v. Quinn	106, 108	6 S. & R.	701, 1991,
v. Messinger	1177, 1202,	v. Ramage	507, 1832		1993
	1205	v. Randall	2513	v. Snelling	66, 73
v. Mika	1442, 2512	v. Regan	200, 963, 987	v. Snow	2059
v. Millard	153	v. Reyburg	457	v. Sparks	2235
v. Miller		v. Reynolds	852	v. Starkweather	905, 907,
3 Cush.	318, 415, 2591	v. Rich	569		1017, 1018,
139 Pa.	1164	v. Richards	1395, 1398,		1362
v. Minor	524		2098	v. Stearns	318
v. Mitchell	832, 851	v. Richardson	1674, 1677,	v. Stevenson	667, 1335
v. Moffat	2085, 2086		2159	v. Stewart	1609, 1620, 1362
v. Montgomery	152, 154	v. Ricketson	1373	v. Stone	
v. Mooney	1041	v. Roark	1267, 2107	4 Metc.	321
v. Moore		v. Robbins	280	Thacher Cr. C.	1331,
2 Dana	203	v. Roberts	1438, 1440,		1383
3 Pick.	987		1441, 1442	v. Storti	396, 837, 1810
v. Morey	822, 830, 832	v. Robertson	792	v. Straesser	246, 248
v. Morgan		v. Robinson		v. Stricker	2063, 2064
107 Mass.	1890, 2276	1 Gray	609	v. Stump	2083
159 Mass.	225, 792	146 Mass.	216, 304,	v. Sturtivant	413, 414, 559,
v. Morrell	861, 1385		363, 2550		568, 1696,
v. Morris	268, 1645	165 Mass.	506, 507,		1924, 1977
v. Morrissey	2071		851, 1770,	v. Sullivan	
v. Mosler	851		1821, 1832	123 Mass.	416
v. Moulton	1873		Thacher Cr. C.	150 Mass.	2276
v. Mudgett	363		195	156 Mass.	278
v. Mullen	2276	v. Roddy	218, 1435,	161 Mass.	1270
v. Mullins	506, 507, 680,		1445	v. Switzer	791
	1821, 1825	v. Rogers		v. Talbot	153
v. Mulrey	154	136 Mass.	691, 1613	v. Tarr	2071
v. Murphy		181 Mass.	1079	v. Tate	1978
4 All.	612	7 Metc.	1918	v. Taylor	
14 Mass	923	v. Rowe		6 Cush.	836
v. Murtagh	2086	14 Gray	1354	14 Gray	153
v. Myers	822, 855	105 Mass.	1781	132 Mass	2183
v. Nefus	561, 2529	v. Russell	2100	v. Thompson	
v. Nichols	398, 2276	v. Ryan		3 Dana	1959
v. Norcross	1644, 2088	134 Mass.	85, 280, 376,	159 Mass.	1432, 1839
v. Nott	832, 838		1667, 1908	v. Thrasher	398, 770
v. O'Brien		157 Mass.	2183, 2215	v. Thyng	1028
12 All.	2059	v. Sacket	280, 962,	v. Tibbetts	2183
119 Mass.	194, 988,		1618	v. Tolliver	276, 821, 2276,
	1983	v. Salyards	1803		2529
134 Mass.	1974	v. Sanders	1076	v. Trefethen	13, 143, 266,
179 Mass.	104, 1072	v. Sapp	2239, 2337, 2341		278, 1072,
v. O'Connor	133	v. Saulsbury	352		1362, 1714, 1715,
v. Parker	2042	v. Savory	987, 2056, 2059		1725, 1726, 2100
v. Payne	923	v. Schaffner	216, 218,	v. Trider	950, 2276
v. Pease	660		439, 987	v. Tuckerman	331, 824,
v. Peckham	2570, 2582	v. Scott	216, 351, 1156, 1824,		826, 832, 838
			2056, 2059, 2272	v. Turner	349, 967, 987

	Section		Section		Section
Commonwealth v. Twitchell	1862, 2221	Compton v. Arnold	1267	Conner v. State	
v. Van Horn	1750, 1803	v. Fleming	1081	34 Tex.	2100
v. Vaughan	396	v. Randolph	1705	v. Winton	2356
v. Vincent	367	v. State	2239	Connorsville v. Wadleigh	1378
v. Vosburg	2113	Constock v. Carnley	1213	Connolly v. Murrell	2340
v. Vose	668, 1810	v. Hadlyme	1738	Connop v. Hayward	2122
v. Waite	585	v. Kerwin	1681	Connor v. Corson	1890
v. Wallace	278	v. Smith		Connors v. Morton	199, 208
v. Walker		23 Me.	18	v. People	987, 2276
13 All.	1072	20 Mich.	34, 344, 463, 565, 719	v. State	851, 862
163 Mass.	1335	26 Mich.	2525	Conoly v. Gayle	1736
v. Wallace	1354	Conant v. Bank	2434	Conover v. Bell	2222
v. Walton	1850	v. Conant	2067	Conrad v. Ellington	438
v. Weber	290, 1867, 2243	v. Leslie	406	v. Griffey	
v. Webster	26, 56, 57, 136, 138, 149, 266, 273, 278, 413, 460, 703, 993, 1163, 1983, 2026, 2027, 2072, 2081, 2273, 2497	Concha v. Murieta	1953	11 How.	1126, 1132
v. Welch		Concord L. & W. P. Co.		16 How.	1028, 1031
134 Mass.	1181	v. Clough	290, 1807	v. State	1802
163 Mass.	278, 2183	Concord R. Co. v.		Conran v. Lowe	2083, 2084, 2086
v. Welsh		Greely	451, 463, 1943	Conroe v. Conroe	72, 73
4 Gray	905	Condit v. Blackwell	1633, 2573	Consaul v. Sheldon	940, 950, 1022, 1867
110 Mass.	2183	Conely v. McDonald	657	Consequa v. Willings	1271
v. Wentz	2063	Cones v. Binford	1871	Considine v. Ins. Co.	2452
v. Wesley		Confederation L. Ass'n v.		v. U. S.	792, 2513
140 Mass.	852	O'Donnell		Consolidated Coal Co.	
166 Mass.	1256	10 Can. Sup.	2408	v. Peers	2169
v. Wheeler	2575	13 Can. Sup.	1464	v. Seniger	208, 901, 1674
v. White		2 Russ. & C.	2065	Consolidated I. M. Co.	
145 Mass.	318	Congar v. R. Co.	1890	v. Trenton H. I. Co.	2354
147 Mass.	2354	Congdon v. Morgan	1194, 1314	Consolidated Ins. Co. v.	
162 Mass.	21	v. Scale Co.	461	Cashow	690
v. Whitney	203	Conger v. Converse	2450	Consolidated S. & W. Co.	
v. Willard	2222, 2223	Congregation v. Miles	1309	v. Burnham	2593
v. Williams		Congregational H. M. Soc.		Consolidated Tank L. Co.	
2 Cush.	238, 351	v. Van Arsdale	2477	v. Pien	1085
6 Gray	1354	Conkey v. Carpenter	1614	Consolidated Traction Co.	
105 Mass.	413, 561, 680	v. People	357	v. Lambertson	688
171 Mass.	382, 851, 2081	v. Post	1042, 1195	Constance v. Brain	1841
v. Wilson		Conklin v. Stamler	1554, 1560	Constitutional Prohibitory Amendment	1350
2 Cush.	238	Conley v. Finn	2520	Consumers' Ice Co. v. Jennings	2525
1 Gray	111, 228, 1129, 1131, 1700, 1938	v. Meeker	987, 1005, 1117	Continental Ins. Co. v. Delpeuch	238, 391, 1976
Ky., 32 S. W.	923, 987	v. State	834, 836	v. Horton	716
152 Mass.	2056, 2059	Conn v. Penn	1587	v. Ins. Co.	341
186 Pa.	363, 830, 1821	Connecticut v. Bradish	2153	v. Pruitt	1195
v. Wirebach	1938	Connecticut M. L. Ins. Co.		Continental Nat'l Bank	
v. Wood		v. Akens	2500	v. First Nat'l Bank	64, 1074, 1530
11 Gray	1010, 2060	v. Ellis	1700	Converse v. Allen	112
111 Mass.	1041	v. Hillmon	1075, 1079, 1081, 1725	v. Meyer	1389, 2103
v. Worcester	65	v. Lathrop	568, 1919, 1938	v. Wead	1273, 1705
v. Wright	2535	v. Schaefer	6	Conway v. Clinton	581, 987
v. Wyman	1820	v. Schwenk	1487, 1503, 1530	v. Fitzgerald	571
v. Yerkes	321, 392	v. Union Trust Co.	6, 2380	v. John	1269
v. York		Connell v. Connell	2098	v. State	580, 682, 905, 1018, 1072
7 L. Rep. Mass.	246	v. McLoughlin	291	v. Vizzard	229
9 Metc.	2511	v. McNett	289, 681	Conyers v. P. F. C. Co.	1236
v. Zorambo	1072	v. O'Neil	1669	Coogler v. Rhodes	769
Commonwealth's Ins. Co.		v. Smith	15	Cook v. Bank	1352
v. Monninger	1205	v. State	243, 851	v. Barr	1066
Comparet v. Jernegan	1271	Connolly v. Bowie	1651	v. Bartlett	2558
		v. Edgerton	571	v. Blair	1414
		v. Woolen Co.	1978	v. Brown	953, 996, 1026, 1028, 2408
		Conner v. Carpenter	2406		
		v. Groh	2498		
		v. R. Co.	1954		
		v. State			
		25 Ga.	811		
		23 Tex. App.	1404		

	Section		Section		Section
Cook v. Castner	1976, 2354	Cooper v. Ord	613	Cornell v. State	
v. Com'rs	463	v. Phipps	76	Tex. Cr., 75	
v. Corn	2222	v. Potts	2054, 2465	S. W.	1003
v. Field	406	v. R. Co.	792, 1722	104 Wis.	681
v. Fuson	677	v. Randall	451, 717, 1943	v. Vanartsdalen	610, 2237,
v. Grange	2336, 2337, 2341	v. Smith	1388	2336, 2341	
v. Guirkin	2540	v. State		v. Woolley	1304
v. Hearn	1204	63 Ala.	1774, 1781	Cornet v. Bertelsmann	1256,
v. Henry	2237, 2336, 2341	86 Ala.	2265, 2272		2047, 2097
v. Hunt	923, 1195, 1985	90 Ala.	2062	Cornett v. Williams	1268, 1275
v. Hunter	1225	59 Miss.	736	Corning v. Corning	75, 987
v. Ins. Co.	1974	23 Tex.	412, 1918,	Cornish v. Abington	2413
v. Knowles	1082, 1257		1938, 1977	v. Ins. Co.	1947
v. Mason	253, 392	Cooper's Case	1354	v. Pugh	607
v. Moore	102, 334	Cooper-King v. Cooper-		Cornville v. Brighton	1784
v. Nethercote	1842	King	1645	Cornwall v. Richardson	66
v. Parkham	13, 249	Cope v. Cope	1646, 2063	v. State	822, 841,
v. Perry	321	v. Pearce	2083		2354, 2513
v. R. Co.	462	Copeland v. Collins	1684	Cornwell v. State	1079
v. State		v. R. Co.	392	Corps v. Robinson	1073, 2286
11 Ga.	21, 2085, 2086	v. State		Corrigan v. Rockefeller	2358
110 Ala.	1699	41 Fla.	63, 2277	v. Trenton D. F. Co.	2456
111 La.	194, 988	7 Humph.	63, 111	Corse v. Patterson	607
81 Miss.	1205	v. Watts	2211, 2307	v. Sanford	1188
24 N. J. L.	1976	Copenhaver v. State		Corsten v. Dubois	2211, 2307
v. Stout	1408, 1415	Ind., 67 N. E.	21	Corser v. Paul	1056, 1058,
v. Swan	1082	Copes v. Pearce	1492, 1495		1072
v. Sypher	2349, 2354	Copland v. Toulmin	1856	Cortland Co. v. Herkimer	
v. Totton	2141	Copp v. Henniker	1354	Co.	581
v. Wood	2450	v. Upham	1085, 2223	Cory v. Bretton	1062
Cooke v. Booth	2465	Copperman v. People	326	v. Silcox	1700
v. Curtis	1127, 1131	Coppin v. State	18, 288,	Cosgrove v. Pitman	96, 1621
v. Lalance G. M. Co.	1862		2273	Cosselmon v. Dunfee	282
v. Lloyd	1644	Coppock v. Lampkin	2016	Cossens, ex p.	2260, 2276
v. Maxwell	521, 2375	Corbett v. Clough	1067	Cossey v. R. Co.	2319
v. Tanswell	1295, 1298,	v. Corbett	1406, 2111	Costello v. Costello	2218
	1858	v. Gibson	1219, 2373	v. Crowell	
v. Wilson	803, 2575	v. Gilbert	2312	133 Mass.	392, 736, 747,
v. Woodrow	1312	v. Kilminster	2016, 2018		754, 2020
Cookes v. Hellier	291	v. Nutt	1196, 1275	139 Mass.	83, 221,
Cookson v. R. Co.	1951	v. State	2100		238, 1548,
Cool v. Roche	1890	Corbin v. Jackson	1257, 1300		2020
Cooley v. Cooley	2240	Corbishley's Trusts	2531	v. State	1254
v. Foltz	2383, 2384, 2386	Corbleys v. Ripley	1566	Coster v. Merest	2354
v. Norton	960, 1078	Corcoran v. Detroit	252, 458	v. Symons	1084
Coolidge v. Ins. Co.	1647, 1680	v. Peakskill	283	Costigan v. Lunt	2098
Coombs v. Coether	157, 1592	Cordray v. Mordecai	2104	Costill v. Costill	2046
Coon v. People	770, 778	Corey v. Jones	2098	Costley v. State	63
v. State	2100	Corfield v. Parsons	2529	Cotterill v. Hobby	1246, 2447
v. Swan	2294, 2302,	Corinna v. Exeter	581	Cottrell v. State	1350
	2303	Cormier v. Richard	2313	Cottrill v. Myrick	
Cooney v. Packing Co.	2145,	Cornneil v. Buckley	1320	3 Fairf.	2168
	2166	Cornelieson v. Foushee	2578	12 Me.	1976
Coonrod v. Madden	1245, 1254	Cornelison v. Browning	1304,	Cotton v. Jones	1878
Coons v. Renick	1218, 1219		1678	v. Luttrell	607
Cooper v. Brockett	2525	Cornelissen v. Ort	1066	v. State	
v. Central R. Co.	1951,	Cornelius v. Com.		87 Ala.	2273, 2276,
	1976	15 B. Monr.	111, 247,		2326
v. Cooper	2046		1022	31 Miss.	246
v. Dawson	1872, 2020	3 Metc. Ky.	609	Couch v. Couch	1738
v. Gibbons	291	v. Cornelius	2067	v. Gentry	229
v. Granberry	1199	v. Kessel	1678	v. R. Co.	1951
v. Hayward	1036	v. State	952, 1362, 1420,	v. Steele	770
v. Hopkins	1002, 1003,		1714, 1728, 1732,	Coughlin v. Hanessler	1388
	1005		1963	v. People	664
v. Marsden	1312, 1521	Cornell v. Barnes	18	Couillard v. Duncan	1021
v. Morrel	1558	v. Dean	715	Coulam v. Doull	2475
v. Nelson	2169	v. Green	736, 1918,	Coulson v. Disborough	784,
v. O'Brien	1304		1924, 2098		910, 2484

	Section		Section		Section
Coulter v. Express Co.	905, 907	Coyle v. Gozzler	95	Crane v. Thayer	923, 987
v. Stewart	2042	Coyne v. Souther	2450	v. Waldron	1354
Coulter Mfg. Co. v. Grocery		v. Weaver	1086	Crane Co. v. Columbus	
Co.	2463	Cozzens v. Higgins	792	C. Co.	658, 1951,
Counselman, re	2282	v. Holt	382		1984
v. Hitchcock	2252, 2281,	Crabb v. Orth	1240	v. Tierney	1275
	2282	Crabtree v. Dunn	613	Crank v. Frith	1316
v. Reichart	581	v. Hagenbaugh	691, 1011,	Crary v. Sprague	913, 1083,
Countryman v. Bunker	1548		1013, 1014,		1086, 1404,
County Com'rs v. Wise	791		1612, 1985		1405
Courcamp v. Weber	2525	v. Kile	691, 923, 1612,	Crauford v. Blackburn	1481
Courser v. Kirkbride	1951		1985	Crauford v. State	1651, 2450
Courteen v. Touse	777, 779	Craddock v. Craddock	18	Craven v. Russell	1078
Courvoisier v. Raymond	682	v. Merrill	1651	v. Walker	406
Cousins v. Partridge	1873	Crafton v. Metropolitan		Cravens v. Carter-Crume	
Covanhovan v. Hart	392	R. Co.	2	Co.	377
Coveney v. Tannahill	2298,	Craft v. Com.		Craw v. Abrams	2158
	2306, 2307,	80 Ky.	2059	Crawford v. Branch Bank	1223
	2308, 2309, 2311	81 Ky.	959, 1028, 1032	v. Christian	987,
Coventry Case	2287	v. State	923, 967, 2056		1938
Covert v. Hertzog	1481	Crafts v. Clark	1271	v. Crawford	1778
v. Sebern	2477	Cragin v. Lamkin	1703	v. Duckworth	2579
Covey v. Campbell	1944	Craig v. Brown	1684	v. Hodge	1204, 1206
Covington v. Geyler	615	v. Burris	1064	v. McKissack	2308
v. State	821	v. Craig	905, 1124,	v. People	1079
Cowan v. Abrahams	1249		1126, 1129	v. State	
v. Musgrave	1877	v. Dimock	2184	44 Ala.	1781
v. State	321	v. Miller	608	112 Ala.	4, 142, 288,
Coward v. Clanton	1066, 1067	v. R. Co.	681		923, 987, 1002,
Cowden v. Reynolds	905	v. Rohrer	1017		1003, 1157,
Cowdery v. McChesney	715	v. Sauce	1651		1898, 1985
Cowen v. Truefitt	2477	v. Southard	233	113 Ala.	2497
Cowles v. Merchants	1938	v. State	923, 1985	12 Ga.	141
v. R. Co.	2349	Craig, dem. Annesley		155 Ind.	2578
Cowley v. People	223, 225, 682,	v. Anglesea; see		98 Wis.	2239
	790, 792, 811	Annesley v. Angle-		2 Yerg.	2349, 2353,
Cox v. Allingham	1238	sea.			2354
v. Beaufort C. L. Co.	1273	Crake v. Crake	1684	v. Williams	1693, 1694
v. Brower	2517	Cram v. Cram	619	v. Wolf	1978
v. Com.	2056, 2059	v. Ingalls	1300, 1320, 1321,	v. Word	1387
v. Couveless	2447		1513, 1651	Crawford and Lindsay	
v. Davis	1316, 1320	v. Spear	1537, 1549	Peerage Cases	570, 1279
v. Eayres	905	Cramer v. Burlington	283, 1871	Crayton v. Munger	1225
v. Hill	2223	v. Cullinane	1890	Creamer v. McIlvain	2494
v. Jones	1681, 2184	v. Hurt	612, 2385,	v. State	2242, 2243
v. McDonald	1225		2389	Crease v. Barrett	21, 1458,
v. Montague	2286	v. Reford	619		1591
v. Pearce	1373	v. Shriner	1245	Credit v. Brown	2117
v. People	851	v. Truitt	1186, 2594	Creery v. Carr	1893
v. Prater	905	Crandall v. Lynch	2529	Creighton v. Hoppis	1774, 1779
v. Pruitt	64	v. R. Co.	2578	v. Johnson	1312
v. R. Co.		Crandall's Appeal	229	Crenshaw v. Gardner	1842
170 Mass.	250	Crandell v. White	581	v. Johnson	770
126 N. C.	460	Crane v. Ayre	1313	Crescent C. I. Co. v.	
v. Robinson	1684	v. Barkdoll	2297	Ermann	291
v. Royal Tribe	1073, 1671	v. Buchanan	613	Cresswell v. Jackson	
v. State		v. Crane		2 F. & F.	2016
64 Ga.	1745, 2115	81 Ill.	612	4 F. & F.	905, 2016,
41 Tex.	1586	33 Vt.	1938		2024
v. Strickland	66, 74	v. Dameron	1267	v. State	1840
v. Troy	2409	v. Ellis	1867, 1873	Creswick's Case	575
v. Whalley	2218, 2222	v. Horton	797	Crete v. Hendricks	1158
v. Williams	529, 1911	v. Marshall	1082, 2138	Crew v. Saunders	1858
Coxe v. Deringer	377	v. Morris	1257, 1511,	Crewe v. Crewe	2067
v. England	1278, 2105		1573, 2494	Crick v. McClintic	1389
v. Milbrath	738	v. Northfield	1943, 1951	Criddle v. Criddle	1133, 1779
Coxwell v. State	247	v. People	398, 2540	Crippen v. Des Moines	1719
Coyle v. Baum	1943	v. Reeder	1502	v. People	950
v. Coyle	1856	v. State	415	Crisler v. Garland	2304

TABLE OF CASES.

CRI

	Section		Section		Section
Crispen v. Hannavan		Cross v. Wilkins	463	Cummings v. McCullough	334
50 Mo.	1225, 1651, 2141	v. Williams	1189, 1205	v. McKinney	1208
72 Mo.	1225, 1226, 1275, 2143	Cross L. L. Co. v. Joyce	1750	v. Nichols	85, 1541, 1556
Crispin v. Doglioni	1492	Crossgrove v. Himmelrich	1391	v. Stone	2575
Crisson v. State	2058	Crossman v. Crossman	2525	Cummins v. Ins. Co.	1770
Crist v. State	2016	Crouch v. Drury	1518	v. People	276
Criswell v. Altemus	1257	v. Eveleth	1481	v. R. Co.	463
Critchlow v. Parry	1056	v. Hooper	1495	Cundell v. Pratt	986
Crittenden v. Com.	1021, 1963	Croughton v. Blake	2139	Cuney v. Dupree	2054
v. Rogers	736, 747, 754	Crouse v. Duffield	1312	Cunliffe v. Sefton	1313, 1316
Croasdale v. Tantum	2354	v. Holman	720, 1943	Cunneen v. State	1960
Crocker v. Agenbroad	905, 907, 916	v. Miller	1508, 1514, 1567	Cunning v. State	1349, 1667
v. Clements	2124	v. R. Co.	1698	Cunningham v. Bank	693, 699, 701, 702, 2529
v. Chase's Estate	1738	Crow v. Jordon	166, 1154	v. Com.	2071
v. Lowenthal	1195	Crowder v. Garber	617	v. Cunningham	
v. McGregor	461	v. State	2071	Conn., 52 Atl.	1225
v. State	2363	Crowe v. Capwell	1195	2 Dow	1603, 2083
v. Turnstall	2207	v. Peters	1393, 1938	121 N. C.	1404
Crockett v. Crockett	1304, 1312, 1313	Crowell v. Bank	18, 728, 1969	v. Davis	1311, 1460, 2141
v. Davis	689, 1922	v. Kirk	917, 1302, 1312, 1316, 1505, 1511	v. Fonblanque	1954
v. State	987	Crowley v. Crowley	1303, 2049	v. Freeborn	581
Croff v. Ballinger	1777	v. Page	1037	v. Fuller	1082
Croft v. Arthur	529	Crowninshield v. Crown-		v. R. Co.	
v. Pawlet	1511	inshield	2500	72 Conn.	437, 438, 492, 1807
Crofter v. R. Co.	458	Crowson v. Crowson	1738	61 Mo.	2107
Crofton v. Crofton	1380	Crowther v. Hopwood	520	88 Tex.	199, 208, 250, 995, 1896
Cromack v. Heathcote	2294	Crozier v. Gano	2083	v. Smithson	1710
Cromer v. Penston	2250	v. People	205	v. State	
Crompton v. Butler	2045	Crum v. State	321	73 Ala.	2062
Cromwell v. Grunsden	2456	v. Thornley	229	97 Ga.	1842
v. Tate's Ex'r	2555	Crumley v. Adkins	2354	65 Ind.	987
Cronin v. R. Co.	1720, 1722	Crummen v. Cavenah	2124	v. Stein	462
Cronk v. Frith	1316	Crummey v. Bentley	1651	v. Tracy	1225, 1651
Cronkrite v. Trexler	1028	Crumpton v. State	1022	v. Underwood	207, 1613
Crook v. Rindskopf	581	Crusen v. State	2042	Curby v. Terr.	2061
Crookham v. State	140, 142, 1432, 1750	Crusoe v. Butler	1304	Curlew v. Corfield	291
Crooks v. Bunn	1124, 1126, 1131, 1133	v. Clark	463	Curling v. Perring	2319
Croom v. State		Cubbison v. M'Creary	1817, 1820	Curme v. Rauh	1195
v. Sugg	87, 2008	Cuddy v. Foreman	1779, 1890	Curran v. Stange Co.	1719, 2498
Cropsey v. Averill	1263	Cudney v. Cudney	1738	v. Witter	1560
Crosbie v. Macdonal	2452	Culbertson v. Coleman	1678	Curren v. Connery	1896, 1898
Crosby v. Berger	2317	v. Hill	106	v. Crawford	1550
v. Percy	1313	v. R. Co.	65	Currey v. State	1215, 2576
Crose v. Rutledge	64, 75	Culbertson & B.		Currie v. Child	1316
Cross v. Bell	291, 1199	P. Co. v. Chicago	463, 1168	v. Donald	528
v. Cross		Cull v. Herwig	2240	v. Southern P. Co.	1850
Ky., 41 S. W.	1379	Cullen v. Com.	2252, 2260, 2276, 2282	v. Stairs	1501, 2083
55 Mich.	2085	v. Hanisch	1270	Currier v. Gale	
108 N. Y.	905	Culmer v. Clift	18	9 All.	2515
3 Paige Ch.	2063	Culp v. Wilson	2526	4 Gray	1456, 1458, 1469, 1778
v. Garrett	1067	Culver v. Caldwell	1672	v. R. Co.	2268, 2282
v. Haskins	1244	v. Lumber Co.	759, 1560	v. Silloway	1063, 1066
v. Johnson	1273	v. Marks	1521	Curry v. Charles Warner	
v. Kaye	2535	v. R. Co.	1525, 1951	Co.	1230
v. Martin	2529	v. State	1561	v. Colburn	2408
v. People		Culverwell v. Birney	1841	v. Raymond	1225
47 Ill.	2056	Cumberland T. & T. Co.		v. State	860, 1976
192 Ill.	1197, 1852	v. Dooley	1976	Curtin v. R. Co.	463
v. Pinckneyville		Cumming v. French	1062	Curtis v. Aaronson	1567, 1587
M. Co.	1678	Cummings v. Armstrong	1669	v. Belknap	1291
v. R. Co.	1951	v. Brown	1684	v. Bradley	748, 754, 763
v. Higgins	2304	v. Com.	2570	v. Cochran	523, 980
v. State	1806, 1807	v. Fullam	1538	v. Gano	1951
		v. Furnace Co.	2509		

	Section		Section		Section
Curtis v. Hunting	1239	Dale v. R. Co.	283	Dannenberg v. Berkner	63, 246
v. Parker	1389	v. State	1841	Danser v. Boyle	1541
v. R. Co.	1976, 1977	Da Lee v. Blackburn	1890,	Danville Bank v. Waddill	20,
v. State			1969		2349
118 Ala.	2008	Dalison v. Stark	2429	Dantzler v. D. C. & I. Co.	1699
36 Ark.	1164	Dairymple v. Dal-		Darby v. Huffman	1225
v. Wilcox	1335	rymple	1697, 2406	v. Ouseley	935, 1048,
Curtiss v. Strong	1816, 1818,	v. Williams	2355		1244, 1256,
	1820	Dalrymple's Estate	233		1696, 1699, 2214
Curzon v. De la Zouch	2268	Dalston v. Coatsworth	291, 1267	Darcy's Infants	2063
Cushing v. Billings	1873, 1908	Dalton v. All Souls'		Dare Valley R. Co., re	1912,
v. Cushing	1876	College	1163		2358
v. Friendship	581	v. Bethlehem	2083	Darland v. Rosencrans	1878
v. Hederman	406	v. Dregge	13, 1730, 2232	Darling v. Banks	2498
v. R. Co.	1634, 1684	v. Driggs	2232	v. Bryant	1779
Cushman v. Coleman	2125	v. Poplar Bluff	2495	v. Thompson	907
v. Loker	521	v. R. Co.	199	v. Westmoreland	39, 57,
v. Wooster	803	Dalton's Appeal	1195		216, 444,
Cushman P. B. M. Co. v.		Daly v. Byrne	404, 405, 406		445, 458, 461
Goddard	2580	v. Kimball Co.	717	Darrak v. Watson	1681
Cusick v. Whitcomb	2115	v. Maguire	797	Darrett v. Donnelly	1779
Cussons v. Skinner	1292	v. Milwaukee	1951	Darrier v. Darrier	2245, 2336
Cutbush v. Gilbert	1456	v. Multnomah Co.	2203	Darrigan v. R. Co.	1721
Cutcher v. Crawford	1350	v. Webster	1633, 1639	Dartmouth v. Holdsworth	2319
Cutler v. Carpenter	1969	Dalzell v. Davenport	1943	v. Roberts	1065, 1080,
v. Cutler	2593	v. State	2081		1082, 1215,
v. Skeels	21, 1807	Dambmann v. Schulting	2417		1216, 2529
v. State	2205	Dame v. Kenney	74, 76,	Dartnell v. Howard	1185, 2158
v. Thomas	1249		1611	Dasher v. Ellis	1188
Cuts v. Pickering	2304	Damon's Case	1644, 2085	Dashiell v. Griffith	569
Cutter v. Terr.	1398	Dampman v. R. Co.	1018	Daspit v. Ehringer	2239
v. Waddingham	1678	Damport v. Sympton	2040	Daubney v. Cooper	1834
Cuyler v. McCartney	1083, 1086	Dan v. Brown	1076, 1081,	Daugherty v. Heckard	770
Cyr v. Sanfacon	2164		1195, 1304,	Dauvillier v. Myers	1859
Czarecki v. R. & N. Co.	492, 561		1736, 1782	Dave v. State	692, 1614,
Czewezwka v. R. Co.	1951	Dana v. Boyd	1204		1985
		v. Fiedler	463	Davenbagh v. M'Kinnie	1858
		v. Kemble	95, 1201, 1280	Davenport v. Cummings	2349
		v. Tucker	2354	v. Freeman	529
		v. Underwood	1389	v. McKee	762, 1131
Dabney v. Mitchell	1058, 1909	Dandridge v. Corden	2276	v. Ogg	1842
v. State	357	Dane Co. v. Reindahl	2577	v. Russell	62, 75
Daburgaveny's Case	2371	Danforth v. Reynolds	1684	v. Ryan	614
Dacey v. R. Co.	283	v. State	1271	v. State	248, 923
Dacosta v. Jones	2180	Daniel v. Braswell	1678	Davey v. Janesville	2572
v. Pym	698, 1994	v. Daniel	1958, 2306,	v. Prendergass	2455
Dade v. Ins. Co.	95, 1205,		2314	David Adler & S. C. Co. v.	
	1208	v. Guy	167, 1154	Hellman	2312
Dagg v. Penkevov	1211, 1252	v. Johnson	1245	Davidson v. Arsenean	905
Daggett v. Shaw	1567	v. Pitt	1070	v. Cornell	688, 1719
v. Tolman	950, 1031	v. State		v. Davidson	
v. Willey	1582, 1587	63 Ga.	2071	10 B. Monr.	1215
Daggs v. Ins. Co.	7, 1354	65 Ga.	1476	Nebr., 96 N. W.	1738
D'Aglie v. Fryer	1644	103 Ga.	246, 396, 950	v. Kahn	334
Daigneault v. Woonsocket	463	114 Ga.	1186	v. Kimpton	2528
Dailey v. Coons	1062	v. Wilkin	1591, 1634,	v. King	1871
v. Frey	1645		1665	v. Murphy	1267
v. Linnehan	1779	Daniels v. Conrad	1021, 1040	v. Peck	1245
v. State		v. Hamilton	382	v. People	111, 246
28 Ind.	968, 1126	v. Ins. Co.	1947	v. Peticolas	2579
Tex. Cr., 55 S. W.	78	v. McGinnis	1086	v. R. Co.	456, 571, 1976
Daily v. R. Co.	1432	v. Mosher	1951	v. Shuler's Heirs	2477
v. Warren	1085	v. Stone	1225	v. Slcomb	1273, 2450
Daines v. Hartley	1971	v. Woonsocket	1062	v. State	
Dainese v. Hale	2573	Danielson v. Dyckman	1873	33 Ala.	2060
Daintrey, re	1062	Danks v. Rodeheaver	20	104 Ga.	2513
Dakota v. O'Hare	697, 2016,	Danley v. Danley	2242	135 Ind.	852, 1157,
	2132	v. State	1503		1976
Dale v. Johnson	2237	Dann v. Cudney	1890	39 Tex.	1821

TABLE OF CASES.

DAV

	Section		Section		Section
Davidson v. Wallingford	1651	Davis v. Improvement		Davis v. Supreme Lodge	2390
Davidson L. Co. v. Jones	1195	Co.	1651, 2520	v. Tarver	1530
Dayie v. Briggs	2531	v. Ins. Co.		v. Taylor	2355
v. Jones	291, 760	59 Kan.	682	v. Teachout	1198
v. Terrill	736, 747	39 U. C. Q. B.	1911	v. U. S.	
Davies, re	2195	v. Jenny	1168, 2525	160 U. S.	2501
v. Davies	1261	v. Jones	2410	165 U. S.	1696
v. Flewellen	2111	v. Keyes	1021	v. Vories	321
v. Humphreys	1465	v. Kimball	1031	v. Walter	2155
v. Lowndes	1489	v. Kneale	377	v. Watkins	2166
v. Morgan	1468	v. Lees	1164	v. Weaver	2337
v. Pettit	1267	v. Lloyd	1476, 1644	Davis' Sons v. Sweeney	451
v. Pierce	1476, 1778	v. Lyon	376	Davis' Trusts, re	2165
v. Ridge	1081	v. McEnaney	2578	Davison v. Bloomer	1309, 1316
v. Salter	2581	v. Marvine	581	v. Cruse	928
v. Waters	2308	v. Mason	1963	D'Avry v. World News-	
D'Avignon v. Jones	963	v. Melson	1082	paper Co.	2270
Davis v. Allen	759	v. Mills	571	Dawbeny v. Davie	2250
v. Alston	291, 1290, 1301	v. Monroe	580	Dawby's Case	1364
v. American T. &		v. Morgan		Dawkins v. Rokeby	2375
T. Co.	1164	1 C. & J.	1584	v. Smithwick	2581
v. Bank of Fulton	2572	19 Mont.	2303	Dawley v. State	2056
v. Barr	586	v. Neligh	1890	Dawson v. Barham	1219
v. Batty	1373	v. Paducah R. & L. Co.	2509	v. Callaway	728, 1890
v. Brown		v. People	246	v. Dawson	
98 Ky.	1807	v. Power Co.	791	18 Mich.	2067
94 U. S.	529, 531	v. Printing Co.	2508	Rice Eq.	1321, 1511
v. Buchanan	905, 1085	v. R. Co.		v. Graves	1249
v. Byrd	1842	11 Cush.	463	v. Parham	1239
v. Cal. Powder Works	987, 995, 1003	75 Ga.	285, 288	v. Peterson	1684
v. Calvert	40, 229, 233, 1871	20 Mich.	249, 250	v. Pittsburgh	1040
v. Campbell	1778	70 Minn.	2307	v. Smith	1388
v. Clements	1672	v. Randall	2444	v. State	351
v. Coblens		v. Reid	2279	Day v. Backus	1268
12 D. C. App.	944	v. Reynolds	1247	v. Caton	2414
174 U. S.	944	v. Rhodes	1225, 1226	v. Cooley	905
v. Com.		v. Richardson	6	v. Crawford	1009
95 Ky.	1476	v. Robinson	2163	v. Day	
99 Va.	2239	v. Roby	1021, 1022	Eng.	166
v. Cook	771	v. Rogers	112	56 N. H.	1821
v. Cotey	463	v. Ruggles	1651	v. Donohue	969
v. Council	1131	v. Salisbury	1141	v. Lumber Co.	283
v. Curry	25, 2491	v. Sanford	1549	v. Moore	1186
v. Dale	1894, 2200	v. Sigourney	1267, 2106	v. Ross	64, 1614, 1983
v. Davis		v. Simma	1890	v. State	
2 Add. Eccl.	1267	v. Smith	2099	63 Ga.	2265
90 Fed.	2207, 2211	v. Spooner	1082	13 Mo.	923, 1111, 1985
123 Mass.	233	v. Spurling	2122	v. Stickney	950, 1022, 1026, 1714, 1730, 2098
v. Dinwoody	603, 2228	v. State		v. U. S.	1385
v. Emmons	2591	17 Ala.	1387, 2098	Day Land & C. Co. v.	
v. Field	735, 745, 747, 748, 749, 753, 754	131 Ala.	1072, 2265	State	1350
v. Franke	953, 964, 988, 1028, 1614	63 Ark.	1136	Dayrell v. Glascock	528, 1302, 1512
v. Fredericks	2008	Fla., 32 So.	561	Dazcy v. Mills	1076
v. Freeland	1680	105 Ga.	56, 2071	Deacon v. Shreve	1166, 2354
v. Fuller	1456	114 Ill.	246	Deadman v. Ewen	2211
v. Gaines	1350	35 Ind.	569, 682, 684	Deal v. State	38, 660
v. Gray	1678	38 Md.	580, 662, 682, 1108, 1109, 1700, 1976	Dean v. Blackwell	1010
v. Hamilton	284, 1971	31 Nebr.	496, 1821	v. Border	1205
v. Hardy	1018	51 Nebr.	21, 86, 460, 736, 944, 953, 969, 1013, 1873, 2497	v. Carnahan	1190
v. Hare	1245	54 Nebr.	347, 2514	v. Chapin	1681
v. Herndon	1651	58 Nebr.	318	v. Com.	273, 279, 413
v. Hopkins	18	2 Tex. App.	2056, 2060	v. Dean	1304, 1512
v. Howard	1347, 2066	6 Tex. App.	1840	v. Fuller	1938
v. Huber Mfg. Co.	2349	v. Strohm	1267	v. McLean	1951
				v. Sharon	437, 1951
				v. State	
				89 Ala.	2591

	Section		Section		Section
Dean v. State		Delaware Co. Com'rs v.		Denning v. Butcher	229, 232,
105 Ala.	1072, 1966	Diebold S. & L. Co.	1066	1938, 2315,	
43 Ga.	1851	Delaware L. & W. R. Co.		2391	
v. Swoop	1954	v. Ashley	1750	v. Roome	1661
Deane v. Packwood	1911	v. Burson	1943	Dennis v. Barber	2105
Dear v. Knight	905	v. Converse	2495, 2552	v. Brewster	167
De Arman v. State	246, 988	v. Roalefs	680, 688, 1721	v. Codrington	2290
Dearmond v. Dearmond	1890	Delaware Surety Co. v.		v. Crittenden	605
De Armond v. Neasmith	415,	Layton	2373	v. Holsapple	2473
	1523	Delaware & C. Towboat		v. Mfg. Co.	2451
Deathridge v. State	824, 833,	Co. v. Starrs	561, 1951	v. Pawling	73, 209
	858	Delegall v. Highley	406	v. Slyfield	2463
Deaver v. Rice	1213	De Lisle Peerage Case	1670		
De Baker v. R. Co.	2575	Delk v. State	1476	118 Ala.	2497
De Bode's Case	609, 1271,	Dell v. Oppenheimer	1009	Ala., 35 So.	1807
1458, 1697,	1953	v. Taylor	1862	v. Weeks	1738
De Bow v. People	1350	Delmare v. Robello	2474	Dennison v. Page	2063
De Cair v. Manistee & G.		Delogny v. Rentoul	1062	Denny, re	2577
R. R. Co.	461	v. Smith	1676	v. Dana	253
De Cambra v. Rogers	1347	Delony v. Delony	1312, 1320	v. Pinney	1312
De Camp v. Archibald	2195,	Delphi v. Lowery	252, 458	v. Sayward	1416
	2210	De Lucenay v. State	987, 1839,	v. Williams	2494
v. Vandagriff	1536		2535	Densler v. Edwards	584
Décary v. Poirier	1028	Deluglio v. Barney	2155	Denslow v. Fowler	1858
Decatur v. Fisher	682	Delventhal v. Jones	18	Denson v. Denson	2098
Decatur C. W. & M. Co.		De Manneville v. De		Dent v. Hertford	2352
v. Mehaffey	451	Manneville	2239	v. Portwood	334
Deck v. Johnson	2232	Demars v. Mfg. Co.	969	v. R. Co.	1943
Decker v. Decker	2474, 2477	Demartini v. Anderson	78,	v. State	1966, 2512
De Cordova v. Korte	2463		1620	Denton v. Foute	1219, 1680
Dederichs v. Salt Lake	792	De May v. Roberts	461, 1263	v. Jackson	1898
Dedric v. Hopson	2214	De Medina v. Owen	2104	v. Perry	1086
Deedes v. Giles	1486	De Meli v. De Meli	905, 907,	v. Peters	2445
Deep River Nat'l Bank, re	2149		2239	v. Smith	463
Deerfield Tp. v. Harper	1219	Demelman v. Burton	1067, 2124	v. State	1750
Deering v. Cunningham	907	Dement, ex p.	2203	Denver S. P. & P. R. Co.	
v. Metcalf	527,	Dement v. State	1841	v. Moynahan	1807
	1010, 1013	Demeritt v. Miles	89	v. Wilson	1951
v. Sawtel	529	v. Randall	782, 2008	Denver T. Co. v. Owens	2304,
v. Shumpik	2155	Deming v. Carrington	1082, 1257	2326	
Deery v. Cray	1573	Deminger v. McConnell	1189	Denver T. & F. W. R. Co.	
Defarges v. Ryland	613	Democrat P. Co. v. Lewis	1384	v. Ditch Co.	1168
De Ford v. Painter	784	Demombreun v. Walker	1291	v. Smock	571
De Forest v. State	247	Den v. Allen	1304	Denver & R. G. R. Co.	
De Forge v. R. Co.	795	v. Clark	1671	v. Glasscott	379
De France v. Stricker	1239	v. Downam	98	v. Roller	682, 792,
De Freese v. Lake	2471	v. M'Allister	1212, 1203,		1976
v. State	321		2354	v. Spencer	1725
Defries v. Davis	406	v. Mayfield	1312	Depew v. Wheelan	1195
Degraffenreid v. Thomas	1779	v. Pickett	1779	De Phue v. State	1621
De Graw v. Emory	1969	v. Vancleve	496, 505,	Depue v. Place	2016, 2020
De Gray v. N. Y. &			1738, 1820	De Pusey v. Du Pont	1248
N. J. Tel. Co.	1168, 2570	v. Vreelandt	2169	Derby v. Derby	2067
De Haas v. Galbreath	1373	v. Wright	1943	De Remer v. Parker	1873
De Haven v. De Haven	778,	Denbo v. Wright	2336	Derham v. Derham	2340
1483, 1605		Dench v. Dench	112	De Rosaz' Goods	2473, 2474
Deininger v. McConnel	1225,	Denins v. State	1404	Derr v. Greenwalt	2048
	2105	Denison's Appeal	1738	Derrick v. Sams	2465
De Kalb Co. v. Smith	923, 1626	Deniston v. Hoagland	610	v. Whitman A. Co.	1657
Delafield v. Hand	2164	Denmead v. Maack	2165	Derry Bank v. Webster	2408
v. Parish	1938, 2500,	Denn v. Fulford	1681	De Rutzen v. Farr	1472
	2503	v. Pond	1665	De Saily v. Morgan	1040
Delancy v. Little	661	v. White	2232	Desborough v. Rawlins	2312
v. Erickson	1225, 1234	Dennehy v. O'Connell	952	Desbrack v. State	199
v. Philadelphia	2373	Dennett v. Crocker	1245	Deshon v. Ins. Co.	1124
Delano v. Goodwin	581, 1971	v. Dow	905, 917	Des Moines v. Casady	1248
Delaplaine v. Cook	1354	v. Kneeland	1141	Des Moines S. Bank v.	
Delaware, The	2432	Denney v. Stout	1013	Colfax H. Co.	1877
		Dennie v. Williams	1066	Desnoyer v. McDonald	1201

TABLE OF CASES.

DES

	Section		Section		Section
Desnoyers Shoe Co. v.		Dickerson v. State	278, 852	Dimmick P. Co. v. Wood	1966
First Nat'l Bank	2165	v. Talbot	1195, 1212,	Dinan v. Supreme Council	1487
De Sobry v. De Laistre	905,		1225, 1226, 1651,	Dinges v. Branson	233
	1018, 2164		2141, 2196	Dingle v. Bowman	1225, 1318
De Sonora v. Bankers'		Dickey v. Grice	2446	Dinsmore v. State	770
M. C. Co.	690, 1697	v. Malechi	2052, 2106	Dishazer v. Maitland	2141
Despan v. Swindler	2578	v. State	987, 2277	Dismukes v. Musgrove	
Destrehan v. Lumber Co.	2140	Dickie v. Carter	1737, 1738	7 Mart.	1513
De Thoren v. Attorney-		Dickinson v. Barber	1938	8 Mart.	1085, 1313,
General	1602, 2505	v. Breeden	1189, 1225		2108
Detroit v. Brennan	1960	c. Clarke	1212	v. State	1745, 1747
Detroit C. R. Co. v. Mills	1908	c. Coward	1060	v. Tolson	1560
Detroit Post Co. v. Mc-		c. Dickinson		Di Sora v. Philipps	1271, 1953
Arthur	406	9 Metc.	529, 1061, 1062	Disque v. State	1890
Detroit & M. R. Co. v.		61 Pa.	1938	D'Israeli v. Jowett	1641
Van Steinburg	199, 571,	v. Dustin	987, 1270	Distad v. Shanklin	1236, 2154
	655, 1888,	v. M'Craw	1215, 1681	Distin v. Rose	406
	1890	v. Shee	911, 915	District of Columbia	
Detweiler v. Groff	571, 1976	Dickson v. Bamberger	655	v. Armes	458, 492,
Detzur v. Brewing Co.	681, 1951	r. Lodge	1525		493, 494, 495,
Deupree v. Deupree	1512	r. M'Farlane	1188		496, 497
Devenbagh v. Deven-		r. Mfg. Co.	2442	v. Bakersmith	2219
bagh	1697, 1700,	c. Pinch	1890	v. Haller	568, 1951
	2067, 2220	v. State	1842	v. Woodbury	18
Dever v. State	1079	v. Waldron	500	Dittman v. Distilling Co.	2536
Devereux's Estate	2517	v. Wilton	2375	Dittrich v. Detroit	2384
Devine v. Rand	364	v. Zizania	2430	Divers v. Fulton	1208
Devlin v. Crocker	1873	Diebold S. & L. Co. v. Holt	716	Dix v. Atkins	1201, 1203
Devling v. Williamson	661,	Diehl v. Rogers	523	Dixon v. Barclay	1248
	2158, 2373	v. State	1969, 2115	v. Doe	1225, 1651
Devonshire v. Neill	1588, 1594	Diener v. Diener	1810	c. Ins. Co.	2437
v. Peters	1874	v. Schley	1213	v. Monroe	1573
Devoll v. Brownell	2222, 2223	Diers v. Mallon	2554	v. Nicolls	2581
Devoto v. Com.	326	Dietrich v. Dietrich	64	v. Orr	1351, 2215
Devries v. Phillips	289, 1779	Diffenderfer v. Scott	917	v. Parmelee	2294
De Wald v. Ingle	1944	Diffin v. Dow	681	v. People	2203
De Warren v. State	2595	Digby v. People	1362	c. Pluns	2354, 2509
Dewdney v. Palmer	586	v. Stedman	735, 748, 1518	v. R. Co.	1576
Dewees v. Colorado Co.	2576	Diggins v. Hartshorne	2575	v. State	
v. Ins. Co.	2434	Diggins' Estate, re	694, 695,	13 Fla.	106, 1440
Dewey v. Algire	1671		1548	86 Ga.	905
v. Dewey	1302	Diggs v. Downing	1082	113 Ga.	838, 2059
v. Hotchkiss	2118	v. Kurtz	2465	46 Nebr.	390
c. Williams	437, 463,	Dighton v. Holt	2250	v. Thatcher	1651, 1684
	1021, 1168	Dike v. Polhill	1658	v. Vale	2276
De Whelpdale v. Mil-		Dikes v. Miller	1219	Dixon-Woods Co. v. Glass	
burn	1082	Dill v. State		Co.	2442
Dewit v. Greenfield	66, 73,	106 Ga.	1157, 1750	Doak v. Johnson	1086
	74, 209	1 Tex. App.	2059, 2236	Doan v. State	2273, 2513
Dewitt v. Barley		Dillard v. Samuels	1890	Doane v. Farrow	1257
13 Barb.	1934	c. Scruggs	1777	v. Glenn	18
9 N. Y.	568, 689,	c. State	457, 568, 1160,	Dobbin v. Cordiner	2419
	1934, 1938		1896, 1977	Dobbs v. Justices	1186, 2167
v. Berry	2434	Dilleber v. Ins. Co.	266	Dobson v. Crew	2190
De Wolf v. Strader	2297	Dillin v. People	280, 293	v. Finley	1582
Deybel's Case	2575	Dillon, re	2191, 2372	v. Graham	2212
Dexter v. Booth	1554, 2237,	c. Anderson	581	v. Laval	1675
	2336, 2341	v. Bell	1020	v. Southern R. Co.	18
v. Hall	681	v. Crawly	1300	v. Whisenant	791, 1665
Diamant v. Colloty	1555	v. Dillon	2239	Dock v. Com.	246
Dibble v. Morris	1681	v. Harris	2452	Doctor Jack v. Terr.	1913
v. Nash	341	v. Mattox	1678	Dodd v. Norris	75, 76, 210,
Dick v. Balch	1225	c. Pinch	905		986, 1106, 2257
v. State	2056	Dillon's Case	2372	v. State	367
Dicken v. Johnson	1938	Diman v. R. Co.	2415, 2417	Dodge v. Bache	728
Dickens v. Winter	1523	Dimenstein v. Richardson	2220	v. Carroll	2354
Dickerman v. Graves	610, 2237	Dimmick v. Collins	392	v. Freedman's S. & T.	
Dickenson v. Fitchburg	655, 672	v. Downs	62, 200, 571,	Co.	1082,
Dickerson v. Burke	1807		923, 987		1084, 1257

	Section		Section		Section
Dodge v. Haskell	318	Doe v. Galloway	2477	Doe v. Phelps	2141, 2144
v. Hollinshead	1347	v. Gatacre	1644	v. Phillips	2139
v. State		v. Gilbert	21, 1958, 2500	v. Pitt	2465
24 N. J. L.	2043	v. Green	1778	v. Pulman	157, 1232, 2139
100 Wis.	667	v. Grey	1204, 1208	v. Randall	1484, 1486, 1489
Doe v. Adams	1415	v. Griffin	1495, 1501, 2531	v. Reagan	1028, 1938
v. Allen	2472	v. Gwillim	2459	v. Reynolds	1244
v. Andrews	2315	v. Harris		v. Richards	1063
v. Arkwright		5 C. & P.	2294, 2297, 2298	v. Rickarby	1456, 1458
2 A. & E.	1634, 1640	7 C. & P.	1106, 1514	v. Rideout	1651
5 C. & P.	1778	v. Harvey		v. Ridgway	1033, 1362
v. Askew	157	1 Moo. & Sc.	1246	v. Ries	1207
v. Auldjo	1487	1 Ry. & Moo.	1489	v. Roberts	
v. Austin	1082	v. Henning	1297	2 Chitty	20
v. Barnes	2535	v. Henry	2141	13 M. & W.	378, 1218, 1223, 1224, 1653, 1665
v. Barton	1492	v. Hertford	2311, 2329	v. Robson	1471, 1476
v. Benjamin	2465	v. Hindson	582, 1304	v. Roe	
v. Benson	2470	v. Hiscocks	2474	2 Camp.	783
v. Benyon	2145	v. Hodgson	1210	1 E. & B.	1858, 1859
v. Beviss	17, 1465, 1472	v. Holmes	1225	13 Fla.	1684
v. Biggers	1194, 1195, 1213, 1257, 1268	v. Holtom	2470	16 Ga.	2016
v. Biggs	1072	v. Hubbard	2467, 2471	31 Ga.	2141
v. Bird	2593	v. Huthwaite	2477	1 John.	2067
v. Blanche	1256	v. Jack	2105	v. Ross	
v. Bray	1633, 1646	v. Jersey	2463	5 All.	1065
v. Brown	1378	v. Jesson	2531	7 M. & W.	1180, 1268, 2307
v. Burdett	1292, 1311, 2145	v. Johnson		v. Samples	2139
v. Burt	2465	3 Ill.	1318	v. Savoy	1681, 2500
v. Burton	1471	18 N. J. L.	2234, 2235	v. Seaton	1082, 1640, 2211, 2307
v. Calvert	1072	v. Joinville	2473	v. Servos	1481, 1490
v. Campbell	2144	v. Jones	1080, 1458, 1476	v. Sisson	380
v. Cartwright		v. Keeling	2139	v. Spitty	1208
3 B. & Ald.	2429	v. Kelly	2200	v. Stacey	1472
Ry. & M.	1465, 1640	v. Kemp	378	v. Stevens	136, 287, 1651, 1676
v. Catomore	2525	v. Keunedy	1225	v. Stiles	2105, 2143
v. Chichester	2463, 2470	v. Kilner	1224	v. Strong	2531
v. Clifford	1194, 1212, 1650, 2211	v. King	1677, 1678	v. Suckermore	694, 695, 702, 704, 709, 1993, 1994, 1997, 1998, 1999, 2000, 2002, 2006, 2007, 2012, 2017, 2026
v. Cockell	1210	v. Knight	2408	v. Sybourn	1065
v. Cole	1082, 1214, 1268	v. Langdon	2211, 2307	v. Tarver	704, 1993, 2006
v. Connoly	1878	v. Langfield	21, 1458, 1471	v. Taylor	2463
v. Cooke	2522	v. Lyford	2462	v. Thomas	
v. Cox	1842	v. McCaleb	1195, 1239	9 B. & C.	2307
v. Daniel	2525	v. McLean	1651	14 East	1587
v. Date	2211, 2222	v. McWilliams	1645	v. Thynne	1472, 2144
v. Davies	704, 1484, 2006, 2550	v. Martin	2470	v. Todd	1257
v. Deakin		v. Mason	379	v. Turford	1518, 1523, 1526
4 B. & Ald.	2531	v. Mew	1238	v. Turnbull	1311, 2143, 2145
3 C. & P.	1297, 1311, 2138, 2145	v. Minge	1354	v. Twigg	1292, 1306, 1309, 1313, 1316
v. Derby	1388	v. Moore	1085	v. Tyler	
v. Dring	2462	v. Morris		6 Bing.	21
v. Durnford	1248	3 A. & E.	1202, 1203	4 Moo. & P.	1465
v. Egremont	2196	12 East	1246, 2447	v. Vowles	1464
v. Eslava	157, 1219, 2139, 2141	v. Murray		v. Wainwright	
v. Evans		1 All.	1666	1 Nev. & P.	1233, 1273, 1297
1 Blackf.	1458	3 Kerr	1567, 1802	3 Nev. & P.	1076
3 C. & P.	1062, 1406	v. Needs	2472	v. Walker	1514
v. Fleming	2083	v. Nevers	1801	v. Wallaston	1644
v. Ford		v. Newton	1994, 2001, 2015, 2017		
3 A. & E.	2456	v. Palmer	112, 1736, 2525		
3 U. C. Q. B.	667, 1493	v. Passingham	1311, 1388, 2141, 2145		
v. Forster	1072	v. Pearce	2139		
v. Foster	1387	v. Pearson	1246, 2447		
v. France	1632, 1646	v. Pembroke	1073		
v. Fraser	1082	v. Perkes	1737		
		v. Perkins	735, 749, 760		
		v. Pettett	1080, 1778		

TABLE OF CASES.

DOE

	Section		Section		Section
Doe v. Watkins	2296, 2308, 2312	Donley v. Dougherty	949	Doty v. Wilson	586
v. Webster	2465	Donnell v. Jones	770	Doud v. Guthrie	1164
v. Westlake	2472	Donnelley v. Terr.	1821	Dougan v. Champlain Co.	283, 458
v. Whitefoot	232	Donnelly v. Donnelley's Heirs	2083	Douge v. Pearce	2097
v. Wilkins	1297	v. Fitch	1951	Dougherty v. Milliken	1951
v. Wilkinson	1081, 1035	v. R. Co.	1976, 1921	v. Posegate	2119
v. Williams	1778	v. Smith	607	v. Swett	1271
v. Wilson	1994, 2018	v. State	1072, 1431, 1435, 1439, 1442, 1443, 1445, 1890	Doughton v. Tillay	2158, 2164
v. Winn	1196, 1224, 1225, 1239	Donner v. Palmer		Douglas v. Bank	1350
v. Wittcomb	1465	23 Cal.	2354	v. Douglas	1044
v. Wollaston	1646	31 Cal.	1289	v. Leighton	1672
v. Wolley	1311, 2138	v. State	657	Douglas Peerage Case	166, 1431
v. Wombwell	1072	Donoho v. Petit	803	Douglass v. Eyre	1641
v. Wood	1514	Donohoo v. Brannon	2168	v. Hart	1554, 1561
v. Young	2535	Donohue v. McNulty	1604	v. K. & M. R. Co.	2566
Doe d. Latham v. Wright	228, 1304	Donovan v. Driscoll	581	v. Mitchell	41
Doggett v. Simms	987, 1270, 2110	v. R. Co.		v. Sanderson	1709
Doheny v. Lacy	2312, 2503	65 Conn.	2509	v. Tousey	73, 692
Doherty v. Gilmore	1738	158 Mass.	1530	Douston v. State	1800, 1802
v. Hill	2465	v. Richmond	1807	Douthitt v. Terr.	2513
v. O'Callaghan	2314	v. Terr.	2578	Dove v. State	
v. Thayer	1680	Donovan's Estate	1738	37 Ark.	347
Dohmen Co. v. Ins. Co.	1012, 1530, 2498	Don Yook v. Milling Co.	2433	3 Heisk.	1938, 2085
Doker v. Hasle	2341	Dooley v. Baynes	1460	Dover v. Harrell	2307
Dolan v. M. R. F. L. Ass'n	792, 2529	v. Van Hohenstein	1351	v. Maestaer	523, 1245
v. State		Doolittle v. State	397, 2338	v. Winchester	68, 142, 201
81 Ala.	925	v. Stone	1557, 2118	Dow v. Beidelman	1350
40 Ark.	1404	Doon v. Donaher	1210	v. Julien	1951
Dolder v. Lord Huntingfield	2574	v. Ravey	1062	v. Sawyer	1523, 1525
Dole v. Allen	1674	Door v. Geary	2477	v. Tuttle	2444
v. Johnson	561, 687, 1691, 1696	Doran v. McConlogue	1938	v. Weare	458
v. Wooldredge	1896, 2115	v. Mullen	770, 778	Dowagiac M. Co. v. Watson	95
Dollarhide v. Parks	1225	v. Shaw	2349, 2354	Dowden v. Wilson	
Dollner v. Lintz	1618	Dore v. Babcock	987	71 Ill.	1225
Dominges v. State	1398	Dorff v. Schmunk	1573	108 Ill.	1195
Dominici v. U. S.	2572	Dorin v. Dorin	2463	Dowdy v. Watson	585, 587
Dominick v. Randolph	563, 689, 1938, 1958	Dormady v. State Bank	1195	Dowie v. Driscoll	21, 1738
Domschke v. R. Co.	1339	Dorman v. Ames	451, 1678	Dowie's Estate	2321
Domville v. Ferguson	1066, 1388	v. State	2579	Dowley v. Winfield	2531
Don v. Lippman	5	Dormer v. Thurland	1302	Dowling v. Dowling	
Donahue v. Coleman	382	Dormoy's Goods	1674	10 Ir. C. L.	89
v. Donahue	2526	Dorough v. Equitable M. Co.	2581	116 Mich.	2240
v. Johnston	2319	Dorr v. Fenno	2349, 2354, 2356	v. Feeley	2111
Donald v. Mitchell	2308	v. School District	1257, 1676	v. State	194, 363
Donaldson v. Boston	252	Dorset v. Girdler	1395, 1417	Down v. Ellis	2065
v. Com.	2079	Dorsey v. Clapp	258	v. Murphey	1985
v. Jude	2051	v. Dorsey	1082	Downer v. Baxter	2354
v. R. Co.	1698, 1873, 1874	v. Habersack	792	v. Button	1062
Doncaster v. Day	735, 1330	v. State		v. Dana	1026, 1027, 1028, 1031
Donegan v. Wade	1195, 1219	107 Ala.	1157	v. Morrison	1558
v. Wood	1633, 2165	110 Ala.	293	v. Rowell	736, 2098
Donahoo v. Johnson	2477	108 Ga.	59	Downes v. Mooreman	1177, 1223
Donellan v. Donellan	2046	34 Tex.	246, 247	v. Society	581
v. Hardy	1273, 1684	v. U. S.	331	Downey v. Dillon	66, 406
Donelson v. Taylor	586	v. Warfield	1938	v. Murphy	987, 1985, 2421
Don Francisco, The	2212	Dosch v. Diem	1867	v. Sawyer	283
Donk Bros. C. & C. Co. v. Stroff	1951	Dossett v. Miller	1126, 1128	v. State	57
Donkle v. Kohn	1820	Dost Aly Khan, Goods of	690	Downing v. Butcher	258
Donlan v. Clark	2508	Doster v. Brown	715	v. Gallagher	1257
		Dotson v. Moss	1225, 2143	v. Pickering	157, 1267
		Dotton v. Albion		v. Plate	291
		50 Mich.	252	Downing's Will	2314
		57 Mich.	252, 2390	Downs v. Belden	1083
				v. Downs	1312, 1320
				v. Lyman	1082, 1778
				v. R. Co.	736, 749, 750

	Section		Section		Section
Dow's Ex'r v. Spenny's Ex'r	87	Dukes v. State		Dunn v. Choate	1196
Dowzelot v. Rawlings	1066	11 Ind.	63, 246	v. Dunn	1038, 1415
Doxon v. Haigh	2223	80 Miss.	1387, 1398	v. Dunnaker	905
Doyle v. Bradford	2572	Duling v. Johnson	1432	v. Eaton	1778, 2522
v. Doyle	1354	Dumangue v. Daniels	233, 382	v. Hall	2354
v. Mizner	1680	Dumas v. Hunter	1206	v. People	
v. R. Co.		v. State		40 Ill.	367
42 Minn.	458, 461	62 Ga.	1442, 1451	172 Ill.	784, 1033, 1450
128 N. Y.	451, 462	63 Ga.	821	29 N. Y.	527, 1010,
v. Sleeper	1086	14 Tex. App.	2086,		1015, 2056,
v. State	969, 2061		2241		2060
v. Wiley	1195, 1387	Dumbach v. Bishop	2336	v. Pipes	1898
Dozier v. Joyce	1007	Dummer v. Chippenham	2257	v. Price	2446
v. McWhorter	1779	Dunafon v. Barber	1051	v. State	
v. State	2264	Dunaway v. School Directors	1085	2 Ark.	390, 1329, 1442
Drumm v. Cessnum	1681	Dunbar v. McGill	1777	99 Ga.	2269
Du Barré v. Livette	2290, 2294,	v. Madden	1308, 1312	Ind., 67 N. E.	20
	2317	v. Meek	905, 916	58 Nebr.	2061
Dubé v. R.	2509	v. Parks	1910	45 Oh. St.	1135, 1138
Dublin Election Case	2287	v. U. S.	1203, 1236	118 Wis.	2272
Dublin, etc. R. Co. v. Slattery	2495, 2552		1256, 2132	v. Welsh	5
Dubois v. Baker	93, 570,	Dunbarton v. Franklin	7	v. Whitney	1537, 1538,
	2012, 2016,	Duncan, re	1350, 2577		1541
	2024, 2027	Duncan v. Beard	1311, 2141,	v. Wolf	1879
v. Ferrand	2232		2522	Dunnaway v. State	2349
v. People	321	v. Blair	1239, 1275	Dunne v. Park Com'rs	855
Dubois' Case	1407, 2372	v. Duncan		Dunning v. R. Co.	455, 2591
Dubose v. State		1 Watts	1676	v. Rankin	1229
120 Ala.	1442	23 Ill.	1303	v. West	7
13 Tex. App.	1840	v. Gibbs	1297, 2121	Dunraven v. Llewellyn	1587
Du Bost v. Beresford	266, 1715	v. Landis	2232	Duntley v. Inman	571
Duckham v. Wallis	1080, 1083,	v. McCullough	1878	Dunwoody v. State	579
	1084	v. Scott	1677	Dupays v. Shepherd	1684
Ducoign v. Schreppel	1539, 1549	v. Seeley	762	Dupeé v. Chicago H. S. Co.	1195
Ducommun v. Hysinger	1681	v. State		Dupey v. Ashby	1248
Dudley v. Beck	2298	97 Ga.	1011	Duplessis v. Attorney-General	2256
v. Bolles	1126, 1127	40 Tex. Cr.	398	v. Kennedy	1335
v. Chilton Co.	1640	Dunck v. Milwaukee Co.	1373	v. Miller	1651
v. Grayson	1680	Duncombe v. Daniell	15, 1807	Du Pont v. Davis	1502, 1503
v. McCluer	64	v. Prindle	1350, 1662	Dupont v. Downing	1215
v. State	2376	Dundas v. Lansing	252, 458,	Dupré v. Desmaret	663
v. Sumner	1312, 1316		1722	v. Prescott	663
v. Wardner	1267, 2106	Dunham v. Averill	2463	Dupree v. State	194, 247,
Dudleys v. Dudleys	2049	v. Chicago	2373		692, 1404
Dudly's Case	1644	v. Rackliff	65, 249	Durden v. Cleveland	1065
Duer v. Allen	1951	v. Simmons	1943	Duren v. Kee	1335
Duff v. Duff	1066	v. State	1836	v. Sinclair	1186
Dufferin and Claneyboye		Dunham's Appeal	394, 679,	Durfee v. Abbott	1644, 1646,
Peerage	1644		1938, 1951		2529
Duffey v. Presbyterian Congregation	1777	Dunklee v. Goodnough	2441	v. State	2512
Duffield v. Brindley	1651	Dunlap v. Berry	1275	Durgin v. Danville	290, 1194,
v. Morris' Ex'r	228, 1738,	v. Griffith	1779		2220
	1938, 2500	v. Hearn	619, 1960	v. Somers	1062
Duffin v. People	797, 1229	v. Hopkins	747, 754	Durham v. Beaumont	1033,
v. Smith	2294, 2297	v. Richardson	905		1109
Duffy v. People	859	v. State	1387, 1398	v. Shannon	1777, 1779
Dufresne v. Weise	692, 1046,	v. Waldo	1674, 2164	v. Smith	2500
	1983	Dunlavy v. Watson	2354	v. State	951
Dugan v. Com.	569, 833, 801,	Dunlop v. Berry	758, 759,	Duringer v. Moschino	1207,
	2071		760		1234
v. Mahoney	736, 747, 754	v. Higgins	95	Durkee v. Leland	2219, 2294,
Duggan v. State	1878	v. Patterson	527, 1010, 1015		2307, 2308,
Dugger v. Collins	1651	v. Servas	1491		2309
v. Oglesby	1195	v. U. S.	95, 2511	v. R. Co.	
Duke v. Taylor	2573	Dunmore v. State	1807	69 Cal.	1750
Dukehart v. Caughman	2498	Dunn v. Adams	2165	29 Vt.	1236
		v. Amos	2303	Durkin v. Cobleigh	2442
		v. Aslett	901, 905		

TABLE OF CASES.

DUR

	Section		Section		Section
Durnell v. Sowden	2008, 2016	Driver v. Lanier	2529	Earl v. Lefler	791
Durnford v. Clark	1888, 1890	Drohn v. Brewer	1890	v. Lewis	2139
Durning v. Hastings	2505	Droop v. Ridenhour	1681, 2433	v. State	222
D'Urphy v. Nelson	1664	Drosdowski v. Chosen		v. Tupper	1722, 2098
Durrell v. Bederley	1917, 1920, 1947	Friends	1382, 2110	v. Vass	2375
Durrence v. Northern Nat'l Bank	601, 1676	Drowne v. Stimpson	1141	Earle v. Earle	416
Durst v. Masters	792	Druce v. Denison	2463	v. Grout	2294, 2303
Dusenberry v. Abbott	1681	Drucker v. R. Co.	462	v. Picken	1256, 2094
Dushane v. Benedict	568, 1944	Drum v. Harrison	1867	v. Rice	2406
Dutch Flat W. Co. v. Mooney	2580	Drumm v. Cessnun	1275	Earl v. People	2056
Dutcher v. Howard	15	Drummond v. Henderson	75	Earls' Trial	1700, 1842
Dutchess Co. Bank v. Ibbotson	2427	v. Leslie	2354	Earls' Trust, re	2165
Dutillet v. Blanchard	1684	Drumright v. State	1071	Early's Case	830, 855
Duttenhofer v. State	2327	Drury v. Hervey	1072	Earnshaw v. Tomlinson	1779
Dutton v. Woodman	1073	v. Midland R. Co.	1573, 1587, 1592	v. U. S.	2553
Duval v. Davey	2336	v. Terr.	905, 1051	Earp v. Edgington	1736
Du Vall v. Augusta	2582	Druse v. Wheeler	396, 2535	Easler v. R. Co.	
Duval v. Ellis	1681	Dwelly v. Dwelly	2239	59 S. C.	675, 1951
v. Griffith	406	Dwight v. Brown	1456, 1472	60 S. C.	2220
Duval's Ex'r v. Darby	658, 728	v. Co. Com'rs	1943	Easley v. Com.	1141
Du Vivier v. Phillips	1044	v. Macklam	2287	v. R. Co.	2354
Drabble v. Donner	1208	Dwinell v. Larrabee	1207	Eason v. Chapman	1985, 1986
Drach v. Kamberg	1911	Dwyer v. Collins	1202, 1204, 2309	East v. Chapman	2276
Draggoo v. Graham	1681	v. Dunbar	1213	v. Pace	1254
Drake v. Drake		Dyas v. Southern P. Co.	283, 458, 1951	East Dubuque v. Burhyte	1003
4 Dev. L.	1662	Dye v. Young	1738	East India Co. v. Atkins	2256, 2275
8 H. L. C.	2474	Dyer v. Dyer	233, 1757, 1963	v. Campbell	2257, 2258, 2260
r. Henly	529	v. Flint	2165	v. Kynaston	1862, 2221
v. Kinsell	1267, 1278	v. Fredericks	1233	v. Neave	2257
v. Ramey	1195	v. Hudson	1275	East Kingston v. Towle	68, 201
v. State		v. Lowell	1216	East Line & R. R. Co. v. Scott	250
74 Ga.	2264	v. Morris	1842	East Omaha St. R. Co. v. Godola	2536
110 Ala.	106, 2115	v. Rosenthal	720	East Pa. R. Co. v. Hiester	463, 1943
Drakeford v. Adams	2498	v. Smith	1249, 1271, 2573	v. Hottenstine	1943
Draper v. Clemens	1269	v. State	1878, 1879	East Tenn. V. & G. R. Co.	
v. Crofts	1073	v. Union R. Co.	21, 199	v. Culler	285
v. Draper	505, 1821	Dymoke's Case	575	v. Daniel	1005
v. Hatfield	1062, 1225	Dysart v. Furrow	1554	v. Hall	2509
v. Horton	1062	Dysart Peerage Case	268, 1362, 1424, 1483	v. Hesters	456, 2509
v. Vanhorn	2442	Dyson v. R. Co.	437, 792	v. Kane	97, 290
Draughn v. State	836	v. Wood	2450	v. Maloy	1432
Dravo v. Fabel	6, 908, 916			v. Smith	1719
Draycott v. Talbot	2529			v. Watson	791
Drayton v. Wells	1362, 1408			v. Wright	1951
Dreher v. Fitchburg	20			East Tenn. & Tel. Co. v. Simms' Adm'r	1078
Drennen v. Lindsey	916, 1028			East & W. I. R. Co. v. Miller	1168
Dresbrack v. State	221			Eastabrooks v. Prentiss	616
Dresch v. State	2089			Eastham v. Riedell	461
Dresden v. Bridge	2427			Eastis v. Montgomery	230
Dresler v. Hard	2025			Eastland v. Caldwell	73
Drew v. New River Co.	1949			v. Jordan	1649, 1651
v. Sutton	1722			Eastman v. Amoskeag Mfg. Co.	1062
v. Tarbell	2336			v. Bennett	1777
v. Wadleigh	1291			v. Martin	1496
v. Wood	950			v. Moulton	1544, 1549, 1551
Dreyspring v. Loeb	787			v. R. Co.	1750
Drinkwater v. Porter	1584, 1588, 1595			Eastwood v. People	1163, 1166
Driscoll v. Fall River v. People	249, 987, 1005, 1021, 1117, 1142, 1270			Eaton v. Campbell	1224, 1225, 1318, 1651
Drish v. Davenport	75, 210, 1362			v. Farmer	1856, 2271
Driver v. Driver	1730, 2340				

	Section		Section		Section
Eaton v. Freeman	1651	Edmonston v. Hughes	1311,	Elam v. Commercial Bank	2354
v. Gladwell	2464		1511, 1513,	v. State	257, 692
v. Hall	1267, 2110		1676, 2141	Elberfeldt v. Waite	1666
v. Knowles	2240	Edmunds v. State	1684	Elbin v. Wilson	728, 2368
v. New England T.		Edrington v. Harper	2437	Elcessor v. Elcessor	1931
Co.	1072	Education, etc., of the Royal		Eld v. Gorham	1350
v. Rice	2097	Family	1598	Elden v. Keddell	1238
v. Tallmadge	1490	Edwards v. Currier	581, 661	Elder v. Coal Co.	1951
v. Tel. Co.	377	v. Evans	21	v. State	
Eaves v. Henderson	2436, 2441	v. Foote	1750	123 Ala.	1605
Eberhart v. State		v. Gimbel	749, 1667, 1668	124 Ala.	1490
40 Ga.	860	v. Hanna	1651	69 Ark.	1750
47 Ga.	21, 1867, 1878	v. Hener	1669	Elderton's Case	2576, 2578
Eberle v. Board	1665	v. James	1651	Eldred v. Eldred	2083
Eborn v. Zimpelmann	797, 2016	v. Logan	1351, 1671, 1712	Eldridge v. Hargreaves	1062
Ebos v. State	689	v. Mattingly	2111	v. Knott	2522
Eby v. Winters	1225, 1415	v. Noyes	1278, 2105	v. State	1644
Eccles v. Shackelford	406	v. Pitts	2235	Eleanor, The	1641
Echols v. Staunton	1389	v. Publishing Soc.	2582	Electric Light Co. v. Grant	1021
Eck v. Hatcher	2218	v. Rives	1267, 1957, 2105	Electric Lighting Co. v.	
Eckert v. State	821	v. State		Rust	1391
v. Triplett	1081	39 Fla.	568	Electric R. Co. v. Carson	1750
Eckford v. Berry	2437	2 Wash.	580, 2056	Elfelt v. Smith	717
v. Eckford	2477	v. Sullivan	953, 1028,	Elias v. Lancaster	283
Eckles v. Bates	688, 1722		1312, 2098	Eliot v. Eliot	1512
Eckstein's Petition	2268	v. Three Rivers		v. Skyppe	2355
Economy L. & P. Co. v.		96 Mich.	1158	Elkins v. Hamilton	1777
Sheridan	682	102 Mich.	252, 438, 664	v. McKean	1750
Eddings v. Boner	1051	v. Tipton	1664	v. State	1244
Eddy v. Gray	62, 133, 166,	v. Tracy	1257	Elkinton v. Brick	1511
	1141, 1977	v. Vasey	1684	Elledge v. Todd	2354
v. Wilson	1176	v. Williams	1072	Ellen v. Ellen	
Ede v. Johnson	2164	v. Worcester	96, 1951, 1974	16 S. C.	1778
Edelen v. Gough	694	Edwards' Case	2250	18 S. C.	1133
Edelhoff v. State	331	Edwin I. Morrison, The	2533	Eller v. Church	2495
Edelstein v. Schuler	2580	Eelbank v. Burt	1779	v. Roberts	2205
Eden v. Blake	2425, 2442	Eel River D. Ass'n v. Topp		Ellershaw v. Robinson	73
v. Chalkill	1650		2572	Ellerson v. State	1290, 1291
Edgar v. Brown	1290	Egan v. Bowker	278	Ellicott v. Pearl	
v. Richardson	1256	v. Gordan	204, 1620	1 McLean	1126, 1138
Edgell v. Bennett	1086, 2237	v. Horrigan	1225, 1651,	10 Pet.	1124, 1126, 1129,
v. Francis	1730		2520		1363, 1481, 1585,
Edger v. Board	1350	Egbers v. Egbers	1081, 2500		1587, 1665
Edgeworth v. Wood	2515	Egbert v. Greenwalt	617, 2063	Ellingboe v. Brakken	1651
Edgington v. Fitzmaurice	661	Egg v. Barnett	156	Ellingwood v. Bragg	561, 1923
v. Nixon	1858	Eggart v. State	1700	Elliot v. Shultz	913
Edie v. East India Co.	1954,	Eggers v. Eggers	680	Elliott v. Boyles	406, 781
	2580	v. Fox	1712, 2215, 2276		983, 987
Edinburgh A. L. M. Co. v.		Eggett v. Allen	1666	v. Dycke	1521
Peoples	1347	Eggler v. People	248, 1976	v. Hayden	1065, 1066
Edington v. Ætna L.		Eggleston v. Boardman	463	v. McClelland	1681
Ins. Co.	2381, 2382,	Eggspiller v. Nockles	1879	v. Mills	2349
	2383, 2384	Ehrensperger v. Anderson	1258	v. Moreland	2445
v. M. L. Ins. Co.	266, 2380,	Ehrman v. Hoskins	2474	v. Peirsol	18, 1347,
	2383, 2384,	Ehrmann v. Ehrmann	2210		1483
	2386, 2387,	Ehrsam v. Brown	2434	v. R. Co.	2494
	2388	Eichenlaub v. St. Joseph	1680	v. Russell	681
Edison EL. L. Co. v. N. S.		Eicke v. Nokes	2301, 2311	v. Stocks	1213
EL. L. Co.	2219,	Edit v. Cutter	33, 451, 660,	v. Van Buren	656, 1268,
	2125, 2374		1160		1286, 1339
Edisto Phos. Co. v.		Eifert v. Lytle	2529	Ellis v. Abell	2434
Stanford	1278	Eighmie v. Taylor	2434	v. Alford	620
Edmister v. Garrison	2354	Eiland v. State	63, 246, 2100	v. Baldwin	1248
Edmiston v. Schwartz	1677	Eisenhart v. Slaymaker	1186,	v. Buzzell	2498
Edmonds v. Rowe	1818		1206, 1234, 2158	v. Ellis	
v. State	390	Eisenlord v. Clum	1481, 1482,	11 Mass.	1645, 2085,
v. Walter	779		1503		2088
Edmondson v. Lovell	1318, 1651	Eisfield v. Dill	2012	55 Minn.	1681
Edmonson v. R. Co.	1415	Ela v. Edwards	1312, 1512	v. Houstoun	2463

TABLE OF CASES.

ELL

	Section		Section		Section
Ellis v. Howard	1083, 1086	Emerson v. Lebanon	438	Equitable Acc. Ins. Co. v. Stout	1230
v. Huff	1195	v. Lowell Gaslight Co.	442,	Equitable L. A. Soc. v. Clark	1859
v. Leonard	2570	v. Stevens	1041	Equitable Secur. Co. v. Talbert	2432
v. Lindley	406	v. White	1481, 1484, 1490	Erb v. Popritz	65, 687, 1976
v. Mills	1186	Emerson Co. v. Nimocks	787	Erd v. R. Co.	728
v. Newell	1777	Emery v. Atlanta R. E. Exchange	1062	Erhart v. Dietrich	2518
v. Reddin	2577	v. Berry	1271, 1684	Erickson v. R. Co.	1898
v. Saltan	2372	v. Fowler	2098	v. Schmill	133, 2580
v. Short	21, 84, 220	v. Haven	2471	v. Sophy	1960
v. Smith	1195, 1300, 1301	v. State		Erie Preserving Co. v. Miller	760
v. State		92 Wis.	581, 1045, 2098, 2497	Erie R. Co. v. Decker	456
105 Ala.	1966	101 Wis.	460, 968, 987, 2269, 2276, 2497, 2511	v. Kane	288
120 Ala.	364	v. Twombly	1312	Erie & Pac. Despatch v. Stanley	1890
152 Ind.	111, 987, 1117	Emig v. Diehl	1406, 1408	Ernest v. Napier	1215
v. Thayer	1871	Emmert v. Hayes	2477	Errissman v. Errissman	1839
v. Thompson		Emmett v. Penoyer	2442	Errskine v. Davis	382, 2505
3 M. & W.	2442	Emmons v. Barton	1086, 2237, 2341	v. State	2089
37 N. Y. Supp.	1770	v. Emmons	2046, 2067	Erwin v. Bailey	269, 1605
v. Watkins' Estate	1085	v. R. Co.	1943	v. Bulla	1802
Ellis' Appeal	1681	Emory v. Smith	289	v. English	1644, 1645
Ellison v. Bennabia	770	Empire Mfg. Co. v. Stuart	702	v. Porter	1212, 1233
v. Branstrator	1873, 2169	Emporia v. Schmidling	283	v. State	905
v. Cookson	2475	Emrich v. Union Stockyard Co.	18	Eschbach v. Hurtt	17, 18
v. Gray	2435	Emrie v. Gilbert	1244	Esckridge v. State	499, 2100
Ellmaker v. Buckley	915, 1885	Endaily v. State	216, 347	Eslow v. Mitchell	1268, 1293
1890, 1893		Enders v. Sternbergh, 2 Abb. App.	2141	Esquimalt & N. R. Co. v. New Vancouver Coal Co.	1862
Ellmore v. Mills	1680, 1681	40 N. Y.	1198, 2141	Essex' Case	2220
2529		Endick v. Endick	2067, 2069	Essex' Murder	1837, 1838
Ellsworth v. Fairbury	2220	Endowment Rank v. Allen	658	Este v. Wilshire	2276
v. Potter	951, 953	Enfield v. Ellington	1640, 1678, 2145	Estell v. State	1362, 1750
1007, 1022		Engelthaler v. Engelthaler	2473	Estep v. State	1842
Elmer v. Fessenden	1714, 1729	England v. Hatch	1651, 2143	Esterbrooks v. Towse	157
Elmore v. Overton	763, 2104	Engles v. Bruington	693, 1312	Estes v. Bridgforth	1909
Elmendorff v. Carmichael	1188, 1304, 1658, 1662	English v. Cropper	2337	v. Farnham	1269
Elms v. Chevis	1521	v. Oliver	1350	v. Jackson	1549
Elrod v. Ashton	1013	v. Sprague	1678	Estey v. Birmbaum	1078
v. Cochran	1194, 1254	v. State	2060	v. Fuller I. Co.	2242
Elsam v. Faucett	211	Engner v. R. Co.	2507	Estofte v. Vaughan	1211
Elsner v. Supreme Lodge	222, 1974	Enloe v. Hall	1242, 1249	Etheridge v. Hobbs	1842
Elster v. Seattle	252, 458	Enlow v. State	233, 247, 248	Ethier v. Homier	2298
Elston v. Kennicott	736	Ennis v. Little	561, 1951	Etna v. Brewer	1784
Elswick v. Com.	2337	v. Smith	1271, 1684	Etting v. Bank	64
Elting v. Scott	1066	Ennor v. Barwell	1862	Eubanks v. Harris	2141,
Elton v. Larkins		Eno v. Allen	1018		2145, 2447
5 C. & P.	1041, 1946, 1947	Enos v. Enos	406	Eure v. Pittman	1192, 1202, 1207
1 Mo. & Rob.	2593	v. Tuttle	1774, 1775	Eureka F. Co. v. Baltimore	
Eltzroth v. Ryan	1239	Enright v. R. Co.	1951	C. S. & R. Co.	2556
Elvins v. Delaware & A. T. & T. Co.	714	Ensley v. R. Co.	1750	Eureka Ins. Co. v. Robinson	98
Elwell v. Mersick	1194, 1196	Enthoven v. Cobb	2325	Evans, re	2498
v. Russell	321	Entick v. Carrington	2264	v. Arnold	1304
v. Walker	2105	Entwistle v. Meikle	1417, 2500	v. Birch	93
Elwood v. Deifendorf	586	Ephraims v. Murdock	2098	v. Blood	1933
v. Saterlie	1779	Epperson v. State	1215, 1450	v. Browne	1350
Ely v. Ely	2525	Eppinger v. Scott	95	v. Chamberlain	2494
v. James	1684	Evans		v. Eaton	585,
v. R. Co.	283	19 Ga.	784		586, 1040
v. Stewart	1885, 2138	102 Ind.	439, 457, 680, 1166, 1696	v. Evans	
Elyton Land Co. v. Denny	2105			41 Cal.	2046
Embry v. Millar	1188			1 Hagg. Cons.	2081
Emerson v. Bigler	716			155 Pa.	620, 2232
v. Blonden	2232				
v. Boynton	1062				
v. Fisk	291, 1208				
v. Gaslight Co.	569				

	Section		Section		Section
Evans v. Evans		Ewer v. Ambrose		Fairly v. Fairly	901, 907,
1 Rob. Eccl.	2046	3 B. & C.	897, 905		2138, 2141
10 Sm. & M.	1304		906, 907	v. State	457
v. Gas Co.	451	4 B. & C.	1215, 1216	v. Wappoo Mills	2440
v. Gerry	1960	Ewers Adm'r v. National		Faivre v. Manderscheid	1158
v. Getting	1598	I. Co.	2349	Falconer v. Hanson	1404
v. Gray	585	Ewing v. Bailey	1828	Falk v. Witham	604
v. Hettich	492, 493	v. Duncan	1350	Falkland v. Bertie	2426
v. Ins. Co.	565, 571	v. Goode	2494	Falkner v. Beers	1206
v. Lee	2166	v. Keith	1128	v. Earle	379
v. Lipscomb	946	v. Moses	770	Fall v. Overseers	68, 133, 202,
v. Merthyr Tydfil	1075,	v. Osbaldiston	2276		211, 987,
	1586, 1665	v. Savary	1665		1003, 2180
v. Morgan	1603, 2083	Excelsior Co. v. Sweet	2509	Fall Brook C. Co. v.	
v. Murphy		Excelsior M. A. Ass'n v.		Hewson	1893
v. O'Connor	2276	Riddle	2384	Fallon v. Dougherty	1225
v. People	568, 656,	Excelsior Mfg. Co. v.		Falls v. Building Co.	1684
	1918, 1924	Owens	2518	Falls City v. Sperry	1800, 2554
v. Reed	1409	Exchange & B. Co. v.		Falls Land & C. Co. v.	
v. Rees	1594	Boyce	1678	Chisholm	1651
v. Rothschild	1379	Exon v. State	987	Falmouth v. Moss	2380
v. Smith	1062	Exton v. R. Co.	252, 461	v. Roberts	1313
v. Sprague	1651	Eyerman v. Sheehan	1918, 1978	Fancher v. De Montegre	2167,
v. Staalle	2235	Eyler v. State	398		2477
v. State		Eyman v. People	2534	Fane v. Fane	2426
109 Ala.	457, 988	Eyre v. Palsgrave	1219	Fanning v. State	276
120 Ala.	1974	Eyster v. Gaff	1186	Fant v. McDaniel	1215
58 Ark.	1442	v. Young	2048	v. Miller	5, 18, 763,
78 Ga.	2059				788, 1379,
106 Ga.	2264				1898, 2123
44 Miss.	247			Farbing v. Webster	2052
61 Miss.	580			Faribault v. Ely	1206
35 Tex.	521			Farkas v. State	852
Tex. Cr., 76				v. Stewart	770
S. W.	281			Farleigh v. Kelley	17, 1124,
v. Trenton	1807				1505, 1514
v. Turnpike Co.	1223			Farley v. C. B. & V.	
v. Watt	2063			Co.	283
Evans' Estate	2341			v. Farley	1511
Evansich v. R. Co.	987, 1890			v. Graham	1212, 2447
Evanston v. Gunn	1633,			v. Peebles	1079, 2304
	1634, 1639			v. Rodocanachi	2115
Evansville R. Co. v.				v. State	923, 987, 1270
Fitzpatrick	1943			v. Tillar	613
Evansville T. & C. G. R.				Farmer v. Brown	2250
Co. v. Cochran	1168			v. State	1066
Evansville & T. H. R. Co.				Farmers' Bank v. Cole	2341
v. Crist	1977			v. Gilson	1267
v. Tothill	250			v. Saling	658, 1624
Evarts v. Middlebury	1951			v. Whitehill	
v. Young	1566			10 S. & R.	728, 2016
Evening Journal Ass'n v.				16 S. & R.	1362
McDermott	406			Farmers' Mut. F. Ins.	
Everage v. State	1079			Co. v. Bair	769, 779
Everett v. Deal	2451			Farmers' & M. Bank v.	
v. Lowdham	1841			Boraef	736, 754
v. R. Co.	1908			v. Bronson	1651
v. State				v. Israel	2125
33 Fla.	2245			v. Lonergan	1207
62 Ga.	107, 1976			v. Woods	803
v. Tidball	1415			v. Young	1873
Everingham v. Roundell	1274,			Farmers' & T. N. Bank	
	1275			v. Woodell	561, 571
Evers v. Life Ass'n	613			Farnsworth v. Briggs	1238,
v. State	246				1288, 1320
Everson v. Carpenter	1028			v. Sharp	1202
Ewbanks v. Ashley	1684			Farnsworth Co. v. Rand	1352
Ewell v. State	1420,			Farnum v. Farnum	377
	1605, 2085			v. R. Co.	2463

TABLE OF CASES.

FAR

	Section		Section		Section
Farr v. Bell	616	Fellowes v. Williamson	1729	Fidelity M. L. Ass'n	
v. Rouillard	1066	Fellows v. Fellows		v. Mettler	1503, 2531
v. Swan	1680, 1956, 2109	37 N. H.	1082, 1257	v. Miller	1133
		69 N. H.	112	v. Winn	1081
v. Thompson	1108, 1109	v. Smith	1779	Fidler v. McKinley	815
Farrand v. R. Co.	1678, 1943	Felska v. R. Co.	1755, 1974	Fiedler v. Darrin	581
Farrar v. Fessenden	1225,	Felt v. Amidon	1750	Field v. Cain	1677
	1651, 1655	Feltner v. Com.	905	v. Clark	1350
Farrell v. Boston	779	Felton v. Pitman	1314	v. Harrison	2054
v. Ledwell	613, 619	Feltz v. Walker	2433	v. Malster	2572
v. Leighton	1710	Fengar v. Brown	2034	v. R. Co.	455, 456
v. People	2272	Fenn v. Granger	2218	v. Tenney	654
v. U. S.	1960	Fenner v. Lewis	2117, 2232	v. Thompson	754, 1540,
v. Weitz	166, 792, 794, 1461, 1476	v. R. Co.	2319		1560
Farrell's Adm'r v. Bren-		Fennerstein's Champagne	1521,	Field's Appeal	1304
nan's Adm'x	689, 1213,		1522,	Fielder v. Collier	1530
	1938, 1958		1528, 1704	v. Ray	2447, 2456
Farrer v. State	313, 363, 2354	Fenno v. Weston	1073	Fields v. Copeland	1969
Farrington v. Sinclair	338	Fenstermaker v. Pub. Co.	949,	v. Statc	
Farris v. Com.	2511		1005, 1021	47 Ala.	63
v. People	216	Fenton v. Hughes	901	121 Ala.	2277
v. State	390	v. Reed	2083	Fla., 35 So.	111, 950,
Farrow v. Blomfield	1256, 1263	Fenton's Will	689		1732, 1890,
v. R. Co.	1225	Fenwick v. Bell	1921, 1949		1974, 2115
Farwell v. Cramer	2515	v. Reed	2327		63, 246
Fash v. Blake	728, 1320	v. State	581	39 Tex. Cr.	987
Fasset v. Brown	1292	Ferguson v. Brown	1842	Fife v. Com.	824, 841,
Fassin v. Hubbard	654	v. Clifford	463, 1219		861, 862
Fatheree v. Lawrence	1511		1632, 1677	Fifth Mut. B. Soc. v.	
Faucett v. Nichols	354	v. Davis Co.	2159, 2167	Holt	1549, 1978
Faulder v. Silk	1671	v. Hemingway	1719, 1975	Figg v. Wedderburne	1503
Faulk v. Iowa Co.	252, 438	v. Hirsch	1203	Fightmaster v. Fight-	
Faulkner v. Brine	905	v. Hubbell	784	master	2239
v. Faulkner	1675	v. Miles	1923, 1951	File v. Springel	1244
v. Gilbert	928	v. Moore	1204	Filer v. R. Co.	663
v. Hendy	2203	v. Peden	2061	v. Smith	2554
v. Terr.	851, 2501	v. Rutherford	2167	Filipowski v. Merry	
Faunce v. Gray	842, 843, 852, 1540, 2183	v. Stafford	1890	weather	1349
		v. State	714, 720, 1943, 1944	Filley v. Angell	666
Faust v. R. Co.	2509			v. Register	344
v. U. S.	1898	49 Ind.	1807	Filson v. Terr.	2089
Fawcus' Goods	5	71 Miss.	581, 2062	Finch, re	2065
Faxon v. Hollis	1537, 1558	31 Tex. App.	821	v. Barclay	760
v. Jones	581	Fernandez, ex p.	2192, 2271, 2371	v. Finch	2250, 2260
Fay v. Davidson	1246			v. Garrett	2475, 2526
v. Guynon	2336	Ferner v. State	376	v. Kent	2504
v. Harlan	1719	Fero v. Roscoe	406	v. State	238
Fayerweather v. Ritch	2314	Ferrand v. Milligan	18	Finch's Case	2463, 2477
Fayette v. Chesterville	561, 689, 1938	Ferrell v. State	852, 1186, 1877, 2505	Fincher v. People	862
			2165	v. State	93
Fazakerley v. Wiltshire	2575	Ferrers v. Bosel	699, 1065, 1991	Findlay v. Pruitt	63
Fearing v. Clark	2420	v. Shirley	1086	Findlay Brewing Co.	
v. Kimball	1073			v. Bauer	451
Fearn v. Taylor	1300	Ferriday v. Selser	2349	Findley v. Means	2410
Feary v. O'Neill	905	Ferrill v. Simpson	2573, 2578	Fink v. Denny	603
v. R. Co.	2594	Ferris v. Bank	1456	Finley v. Widner	66, 73, 2498
Featherstone v. People	784, 1821	v. Boxell		v. Woodruff	1239
Fee v. Taylor	2008, 2016, 2027	v. Commercial Nat'l Bank	2165	Finn v. Cassidy	1951
		v. Saxton	529	v. Com.	318, 1398, 1404
Feemster v. Ringo	2580	v. Thaw	728	Finnegan v. Dugan	166, 1154
Feeney v. R. Co.	2383	Ferry v. Legras	2054	v. Gas Works Co.	687
Feeter v. Heath	736	v. Taylor	1062	Finnerty v. Tipper	209, 406
Feibelman v. Assur. Co.	905, 987, 1062	Fertig v. State	2097	Finney v. College	1195
		Fetherly v. Waggoner	2141	v. State	2231
Feilder v. Studley	2426	Fetkenhauer v. State	2089	Fiott v. Com.	1651
Fell v. R. Co.	2098	Ficken v. Atlanta	1890	First Congreg. Church	
v. Young	1442	v. State	1018	v. Ins. Co.	1947

	Section		Section		Section
First Meth. Ep. Church		Fisher v. Fisher	2276	Fitzwalter Peerage Case	704,
v. Fadden	7	v. Greene	1213		1993
First Nat'l Bank v.		v. Hall	2408	Fitzwater's Case	2352
Allen	2015	v. Hart	905	Flack v. Green	95, 736, 747
v. Bews	2442	v. Hood	1003, 1021	v. Neill	2296
v. Booth	1971	v. Kaufman	2534	Fladong v. Winter	89
v. Briggs	1675	v. Kyle	2098	Flagg v. Mann	586
v. Broadway Bank	2536	v. Lane	2450	v. Mason	1567
v. Carson	2016	v. Mayor	1521, 1523	v. People	838
v. Chaffin	1558	v. Owen	2268	v. Wellington	334
v. Cody	1651	v. Patterson	73, 74,	Flaherty v. Powers	451, 458,
v. Com. Assur.			209, 406		676
Co.	953, 1107,	v. People	1010	Flam v. Lee	581
	1108, 2498	v. Price	2257	Flamingham v. Boucher	406
v. Fire Ass'n	1974	v. Porter	1890	Flanigin v. State	276, 506,
v. Foote	2444	v. Ronalds	2271		605, 1072,
v. Harris	2518	v. Samuda	1268, 1281		1821, 2056
v. Holland	617, 1458	v. True	1082, 1086	Flanders v. Davis	1511
v. Kidd	1658, 1680	v. Willard	586	Flandreau v. Ellsworth	1978
v. Linn Co. Bank	1078	Fishmongers' Mistery v.		Flanigan v. Guggenheim	
v. Lippman	1678	Robertson	1300	S. Co.	283
v. Lowrey	2504	Fisk, ex p.	6, 1381, 1856	Flannagan v. State	675, 688
v. Marshall	1078	v. Chester	581	Flannery v. Com.	1391
v. Minneapolis &		v. Hopping	2167	Flattery v. Flattery	2046
N. E. Co.	1014, 1389,	v. Kissane	1189	Fleet v. Murton	379, 2438
	2103	Fiske v. Gowing	1969	Fleischman v. Topplitz	2115
v. Priest	1243	v. Ins. Co.	1947	Fleming v. Clark	2450
v. Robert	2016, 2018	Fitch v. Bogue	1189, 1192	v. Fleming	2083
v. Smith	1890	v. Chapman	1082, 1456	v. Parry	1352
v. Wirebach's Ex'r	233,	v. Hill	2235	v. R. Co.	2509
	561, 682,	v. Hyde	1373	v. Springfield	1719
	1392, 1938	v. Mason C. & C. L.		v. St. John	2268
v. Wisdom's Ex'rs	318,	T. Co.	1951	v. State	
	2019	v. Murray	258, 1416	5 Humph.	235, 933
v. Wolff	1874	v. R. Co.	456	11 Ind.	1163
First Nat'l Bank of B.		v. Smalbrook	521	v. Thomas	2131
v. First Nat'l Bank		Fitchburg R. Co. v.		Flemister v. State	1614, 1985
of N.	1249, 2508	Eastern R. Co.	1168	Flemming v. Lawless	1210
First Nat'l Bank of D.		Fitler v. Morris	1675	Fletcher v. Bradyll	2152
v. First Nat'l Bank		v. Shotwell	1651	v. Crosbie	1891
of W.	736, 762	Fitts v. R. Co.	1951	v. Fletcher	1035
First Nat'l Bank of		v. State	396	v. Fuller	1640
Hoopeston v. R. Co.	456	Fitz v. Rabbits	1195	v. Henley	1031
First Nat'l Bank of		Fitzcox v. State	527, 2056	v. Horne	1318
Nashville v. R. Co.	2463	Fitzgerald v. Clark	2349	v. Jackson	1195
First Nat'l Bank of		v. E. E. Illum. Co.	252	v. Peck	1350
Omaha v. Goodman	2498	v. Elsee	1303	v. Perry	1299
Fire Ass'n v. Flem-		v. English	2596	v. R. Co.	1021
ming	1911, 2917	v. F. & M. C. Co.	2536	v. State	
Firebrass's Case	2250	v. Hayward	1944	90 Ga.	821
Fireman's Ins. Co. v.		v. McCarty	1558	49 Ind.	59, 290,
Mohlmann	1921, 1978	v. R. Co.	2494		890, 923,
Firkin v. Edwards	1208	v. Williams			2477
Firkins v. R. Co.	1719, 1750	24 Ga.	1268	v. Wakefield	1779
Firmeis v. State	2888	148 Mass.	1003	Fleury v. Campbell	2218
Fischer v. Bergson	1779	Fitzgibbon's Adm'r v.		Flick v. Gold Hill &	
v. State	581	Kinney	736	S. M. M. Co.	1225
Fish, re	2463	Fitzherbert v. Fitzher-		Flight v. Robinson	2291, 2294
v. Dodge	663	bert	1304, 1312	Flindt v. Atkins	1256, 1681
v. Hubbard	2465	Fitzhugh v. Croghan	1306	Flinn v. M'Gonigle	1188, 1194
v. Smith	1074, 1633	v. Love	1213	v. Prairie Co.	2203
Fishburne v. Fergu-		Fitzjames v. Moys	1910	v. R. Co.	456
son's Heirs	1938	Fitzpatrick v. Brigman	1966	Flint v. Clark	406
Fishel v. Ireland	1014	v. Fitzpatrick	2477	v. Flint	1640
Fisher v. Betts	1244, 1272	v. Hoffman	2433	Flint's Estate	754, 2391
v. Clark	1938	v. U. S.	2276	Flood v. McClure	2354
v. Conway	616, 938,	v. Williams	1681	v. Mitchell	736, 738,
	1618, 1908	Fitzsimons & Connell			754, 2099
v. Donovan	2536	Co. v. Brann	451	v. Russell	1461, 1736

TABLE OF CASES.

FLO

	Section		Section		Section
Flora v. Anderson		Folsom v. Manchester	2354	Foresman v. Marsh	1225, 1651
67 Fed.	2463	v. R. Co.	461, 1976	Forester v. Guard	2354
75 Fed.	1487, 1492,	v. Scott	1195	Forgey v. Bank	2008, 2012
	1605, 1671	Foltz v. State	93, 667	Formby v. Wood	497
Florence L. M. & M. Co.		Folwell v. Journal Co.	209	Fornes v. Wright	2494
v. Warren	1225, 1246	Fonda v. R. Co.		Fornette v. Carmichael	1335
Floreys' Ex'rs v. Florey	689,	71 Minn.	65, 287	Forney v. Hallacher	2086
	1938	77 Minn.	1976	v. Hallagher	1373, 1404
Florida C. & P. R. Co. v.		Fong Yue Ting v. U. S.	516,	Fornhill v. Murray	2083
Seymour	1680		1354	Forrest v. Kissam	1390, 1438
Flournoy v. Newton	1256	Fong Yuk, re	1620	v. State	1750
v. State	521	Fonnereau v. Poyntz	2470	v. Trammell	2132
v. Warden	2135, 2529	Fonseca v. Cunard S. Co.	2415	Forrester v. Pigon	583
Flower v. Brumbach	1963	Fonsick v. Agar	1404	Forsaith v. Clark	1195, 1219,
v. MacGinniss	1856	Fontaine v. Beers	1779		1225, 1267, 1651
v. R. Co.	1168	Fonts v. State	832	Forshaw v. Lewis	2313
v. Young	1647	Foot v. Bentley	1234	Forshee v. Abrams	2354
Flowers v. Fletcher	702	v. Buchanan	2282	Forsyth v. Charlebois	2327
v. Haralson	1605	v. Hunkins	1021	v. Clark	1010
Floyd v. Bovard	913, 915,	v. Silliman	1225	v. Cothran	1807
	1887, 1890	v. Tracy	70, 73, 209	v. Doolittle	672, 680,
v. Miller	2336	Foot v. Beecher	1083		682
v. Mintsey	1195, 1664	v. Cobb	1312, 1779	v. Kreakbaum	1082, 1083
v. R. Co.	1750	v. Hayne	2313	v. Vehmeyer	1273
v. Rice	803	v. Richmond	1877	Forsyth Boulevard v.	
v. Ricks	2167	v. Woodworth	437	Forsyth	463
v. State		Foot v. D. Co. v. Malony	1944	Forsythe v. Norcross	1558
82 Ala.	1263	Forbes v. Caruthers	1917, 1956	Fort v. Clarke	1573
7 Tex.	2260, 2281	v. Howard	716	v. State	2059
v. Wallace	950	v. Morse	266	Fort Smith Oil Co. v.	
Flynn v. B. E. L. Co.	1978	v. Myers	406	Slover	1078, 1750
v. State	1750, 1755	v. Snyder	1389	Fort Wayne v. Coombs	438
v. Sullivan	1651, 2520	v. Wale	1309, 2138		561, 571
Flynt v. Bodenhamer	561	v. Wall	2141	Fort Worth & D. C. R. Co.	
Flynt B. & C. Co. v. Brown	1951	v. Waller	581	v. Thompson	1976
Fockler v. Simpson	1709	Force v. Martin	133, 905	Fortescue & Coake's Case	803,
Foerst v. Kelso	2509	Forcheimer v. Stewart	1976		1364
Foerster v. U. S.	1614	Ford v. Beech	2435	Fosdahl v. State	194, 367
Foertsch v. Germuller	619	v. Cunningham	1234, 1280	Foskett & B. Co. v.	
Fogarty v. Finley	1635	v. Ford		Swayne	2495
Fogel v. R. Co.	1951	4 Ala.	2086	Foss v. Haynes	2257
Fogg v. Dennis	693, 2015	7 Humph.	1503, 1605,	Fossett v. State	1618
v. Hill	463		1611, 1985	Fossler v. Schriber	2329
Fogleman v. State	1021, 1022	11 Humph.	1415, 1893	Fossum v. R. Co.	714
Fok Yung Yo v. U. S.	1354	v. Grey	1080, 1082,	Foster v. Beals	1083
Folck v. Williams	2466		1257, 1573	v. Bowman	1195
Folger v. Boyinton	1067	v. Hale	1321	v. Brooks	1621, 1938
Folk v. Schaeffer	1053	v. Haskell	1776	v. Collner	2008, 2016
Folkes v. Chadd	442, 451,	v. Nesmith	2164	v. Crawford	2540
	728, 1917	v. R. Co.	1561	v. F. & C. Co.	675, 1770
Foley v. Platt	715	v. Savage	2433	v. Foster	2106
v. Royal Arcanum	2388	v. State		v. Globe Venture	
v. State		71 Ala.	15, 106,	Synd.	2566, 2569
59 N. J. L.	205		689, 1938	v. Gray	7
Wyo., 72 Pac.	1434,	34 Ark.	351	v. Hall	
	1445, 2098	92 Ga.	987	12 Pick.	334, 1082,
Foley-Wadsworth Co. v.		73 Miss.	2501		2291, 2294, 2295
Solomon	2525	75 Miss.	832, 852	7 S. & R.	2169
Follain v. Dupré	530	101 Tenn.	136, 279	v. Jolly	2444
v. Lefevre	2168, 2578	v. Teal	1347	v. McDonald	2205
Follansbee v. Walker	1911,	v. Tennant	2317, 2319	v. Mackay	1195, 1196,
	2351	v. Tirrell	2464		2550
Follett v. Jefferyes	2298	v. Whitaker	1249	v. Mackinnon	2415, 2416,
Folly v. Smith	1911	v. Wiley	461		2419
Folsom v. Brown	1022, 2349,	Forde's Case	1020, 1037	v. Magill	1249
	2356	Fordham v. Gouverneur	458	v. Mansfield	2408
v. Cressey	2450	v. Smith	1006	v. Montgomery	1674
v. Log-driving Co.	759,	Fordyce v. Godman	1350	v. Newbrough	1985
	760, 761	v. Lowman	1951	v. Nowlin	1133, 1779

	Section		Section		Section
Foster v. People		Fox v. Stevens	282	Fraser v. James	1352
18 Mich.	348,	v. Vanderbeck	2097	v. Jennison	1304, 1502,
	2270, 2276	v. Whitney	529		1503, 1908,
63 N. Y.	1157	v. Wunderlich	2349		1938, 2384,
v. Pierce	2276	Foxley's Case	276		2391
v. Pointer	1208	Foxworth v. Brown	1254, 1318,	v. Pigott	2463
v. Shaw	1126, 1666, 1676		1651	v. Sutherland	2311
v. Sinkler	1554, 1561	Fraim v. Ins. Co.	571	v. Tupper	1951
v. State		Fraim v. State	1062	Fratini v. Caslani	1730, 2159,
88 Ala.	1195	Fralick v. Presley	1083, 1884,		2233
45 Ark.	580		1890	Frazee v. State	1182, 2281
70 Miss.	1803	Framingham Mfg. Co. v.		Frazier v. Linton	1124
63 N. Y.	414	Barnard	1469	Frazier v. Basset	1651
39 Tex. Cr.	521	France v. Lucy	1208	v. Drayton	1542
v. Trull	1269	Francis v. Edwards	1072	v. Laughlin	1680, 2218
v. Wallace	1250, 1293,	v. Francis	2531	v. McCloskey	406
	1779	v. Hazelrig	1065	v. Moore	1312
v. Ward	716	v. Ins. Co.	1195	v. R. Co.	250, 1984
v. Woodfin	1779	v. Mayor	1678	v. State	
v. Worthing	1040, 1042	v. Roades	615	42 Ark.	1029, 2100
Foster's Appeal	1267, 1736	v. Rosa	770, 1018	135 Ind.	351, 2273
Foster's Will	797, 2016	v. Wilkinson	1085, 1738	Frear v. Drinker	1911
Fouché v. Bank	2109	Franco v. Bolton	986	v. Evertson	1085
Fouke v. Douglass	1350	Frank v. Bank	795	Fred v. Fred	2408
v. Ray	1215	v. Lilienfeld	604	Fred M. Laurence, The	285
Foulk v. Colburn	1267	v. Longstreet	1206, 1213	Fredericks v. Judah	1388
v. Eckert	1985	v. Morley's Estate	2317	Frederickson v. Johnson	406
Foulkes v. Sellway	77, 206,	v. Pennie	1543	Frederickton Boom Co.	
	692	v. Reuter	1225	v. McPherson	1890
Foulke's Case	1339	v. State		Fredin v. Richards	1770
Fountain v. Boodle	1984	39 Miss.	824, 833	Frederick v. State	857
v. Brown	229, 568,	94 Wis.	2497	Free v. Buckingham	932, 935,
	1938, 1974	Frank Waterhouse Co. v.			944, 1817,
v. Lynn	1652	Rock Island A. M. Co.	288		1820, 2214
v. Young	2302	Frankenthal v. Solomonson	2235	v. Hawkins	2444
Fourth Nat'l Bank v.		Frankford & B. T. Co.		Freel v. R. Co.	2382
Albough	1076, 1083,	v. R. Co.	461	Freeland v. Heron	1073
	1890	Frankfort & K. R. R. Co.		Freeman v. Arkell	1194, 1195,
Foute v. State	318	v. Windsor	1943		2363
Fowkes v. Ins. Co.	1021	Frankhouser v. Neally	1415	v. Brewster	
v. Pascoe	2065	Frankland v. Johnson	2444	93 Ga.	1076, 1464,
Fowler v. Fowler		Franklin v. Com.	949, 1041,		2148, 2296,
111 Mich.	770, 1944		1072, 1124,		2317
113 Mich.	73	v. Creyon	1215, 1658	94 Ga.	830
v. Hoffman	1275	v. Franklin	85, 318,	v. Brittin	529
v. Ins. Co.	64		934, 1021,	v. Fogg	285
v. Lewis	1690		2016	v. Freeman	612
v. Middlesex	714	v. Mayor	726	v. Ins. Co.	1951
v. More	1267	v. State		v. Philipps	1483, 1588
v. Pierce	1350	28 Ala.	851	v. Price	74
v. Sergeant	285	29 Ala.	194, 246	v. State	
v. Simpson	1484	69 Ga.	792, 2264	112 Ga.	1445
v. State	804	Franklin Bank v. Navig.		40 Tex. Cr.	1750
v. Strawberry Hill	1899	Co.	905, 907,	v. Walker	1058
Fox v. B. & O. R. Co.	1168		1028, 1078	Freeny v. Freeny	507
v. Barrett	1062	Franklin Fire Ins. Co.		Freleigh v. State	1878
v. Lambson	167, 1195,	v. Gruver	1946, 1947	Fremont B. & E. Co. v.	
	1225, 1239,	v. Martin	2425, 2434	Peters	1037, 1044
	1651, 2454	Franklin Syndicate, re	2282	Fremont E. & M. V.	
v. Lead Works	949	Franklin's Adm'r's Appeal	2514	R. Co. v. Marley	1225,
v. Mining Co.	439, 2524,	Franks v. Gress Lumber Co.	771		1943
	2580	Frary v. Gusha	1938	v. Whalen	1943
v. Pedigo	1188	Fraser v. Berkeley	1768, 1789	Fremoult v. Dedire	2573
v. Peninsular Works	1700	v. Black	2098	French v. Day	2498
v. People	318, 1249,	v. Charleston	1661, 2451	v. Fitch	463
	1256	v. Drew	2349	v. Hall	1911
v. R. Co.	2413	v. Fraser	745	v. Merrill	1126, 1129
v. Reil	1287, 1300	v. Hopkins	1647, 1650	v. Millard	923, 1612, 1985
v. State	2569			v. Piper	463

TABLE OF CASES.

FRE

	Section		Section		Section
French v. Sale	691, 923, 1111, 1612, 1614, 1615, 1985	Fuller v. Rice	1390	Gage v. Caraher	1354
v. Spinning	461	v. State		v. Eddy	
v. State	233	117 Ala.	794, 851, 1442, 1974	167 Ill.	1267, 1270
v. Ware	2237, 2337	109 Ga.	821, 826, 2236	179 Ill.	1082, 2522
v. Wilkinson	437, 1154	v. Valiquette	15	v. Meyers	451, 1201
Freyman v. Knecht	437	v. Weaver	2471	v. Parmelee	291
Fretwell v. State	682	Fullerton v. Fordyce	682, 1873, 2220, 2484	v. Smith	1165, 1802
Frick v. Barbour	291	Fullington v. Williams	1350	Gagg v. Vetter	456, 1168
v. Reynolds	1084	Fulmer v. Com.	392	Gagnon v. Dana	2495
Fricker v. Moore	803	Fulmore v. R. Co.	199	Gahagan v. People	2086
Friedberg v. People	2056	Fulsome v. Concord	1977	v. R. Co.	65, 249, 376, 1984, 2507
Friedlander v. Assur. Co.	907	Fulton v. Bayne	1225	Gainer v. Cotton	1239, 1513, 1651, 2141
Friel v. Wood	2231	v. Central Bank	1890	Gaines v. Catron	1651
Friend v. Burleigh	1749, 1750	v. Hood	2027	v. Com.	950, 1022, 1028, 1873
v. Hanrill	259, 367, 1789	v. Hughes	1034	v. Green P. I. M. Co.	1645
v. Ingersoll	1698	v. McCracken	728	v. Horrigan	1350
v. R. Co.	2319	v. Northern Ill. College	2538	v. Relf	894, 923, 987, 1112, 1612, 1632, 1644, 1645, 1730, 1985, 2008, 2086
Friendly v. Lee	736, 738, 763	v. State	105	v. State	
Fries v. Brugler	987, 1021, 1026, 1028, 2268, 2270	Fulton Bank v. Benedict	1985	99 Ga.	505, 507
Frink v. Frink	2450	v. Stafford	901, 913, 1885, 1890	108 Ga.	1750
v. Phelps	1757	Fulton Co. v. Phillips	2349	v. White	2354
v. Potter	571, 1415	Fulton Works v. Kimball	283	Gainesville J. & S. R. Co.	
Frith v. Frith	792	Fulton's Estate	1542, 1548	v. Edmondson	2509
v. Sprague	1271	Fulwood's Case	2239	v. Wall	285
Fritz v. Tel. Co.	461, 1951, 1974	Fund Com'rs v. Glass	2165	Gainsford v. Grammar	2294
Frizell v. Cole	664	Funderberg v. State	59, 1109	Galbraith v. Galbraith	585
Froman v. Com.	1877, 2016	Funderburk v. State	1072	v. Green	1133
Frome v. Dennis	1777	Funk v. Davis	2477	v. McLain	612, 2334
Frontino v. Frost	2089	v. Eggleston	614	v. Zimmerman	1388, 1409
Frost v. Brown	1267, 1573	v. Ely	1551, 1557	Galbreath v. Eichelberger	9, 987
v. Rosecrans	15, 581	v. Mohr	2312	v. Knoxville	1230
v. Shapleigh	2450	v. U. S.	276	Gale v. Ins. Co.	581
v. Wolf	1213	Funkhouser v. Pogue	2232	v. Lincoln	1072
Fruit Dispatch Co. v.		Funston v. R. Co.	1951	v. People	987, 1808, 2268, 2276
Murray	1976	Fuqua v. Bogard	1085	v. R. Co.	950
Fry v. Bennett	406	v. Com.	1435, 1445	v. Salas	50
v. State		Furber v. Hilliard	705, 2024	v. Shillock	18
27 Ind.	1674	Furbush v. Maryland		Galena & C. U. R.	
96 Tenn.	928	C. Co.	1976	Co. v. Fay	461, 1029, 1748, 1750, 1757
v. Stowers	1072, 1082, 1568	Furlong v. Carraher		Galena & S. W. R. Co. v.	
v. Wood	1404, 1406	102 Ia.	1938	Haslam	1943
Frye v. Bank	923, 1985	108 Ia.	1938, 1958	Gallagher v. Assur. Co.	1246, 1313
Fudge v. Payne	2465	Furman v. Peay	1558	v. Delargy	1513
Fugate v. Pierce	613	Furneaux v. Hutchins	380	v. McBride	2593
Fulbright v. Perry Co.	2500	Furrow v. Chapin	2235	v. Land Co.	1247
Fulcher v. State	821, 2272	Fursdon v. Clogg	1469	v. People	571
Fulham v. Howe	1671, 1684	Furst v. R. Co.	1020, 1040	v. R. Co.	1597, 1690, 1693, 1698, 1699
Fulkerson v. Holmes	1481, 1490, 1573	Fussell v. State	284, 660	v. Williamson	2311
Fullam v. Rose	728	Fyson v. Kemp	1279	Gallaher v. State	851
Fuller v. Dean	1072			Gallick v. Bordeaux	1779
v. Fletcher	2349, 2354	G.		Gallivan v. O'Donnell	2529
v. Fox	2016	Gable v. Rauch	87, 1302, 1913	Gallup v. Armstrong	2166
v. Fuller		Gadbois v. R. Co.	1951	Galveston v. Barbour	1749
17 Cal.	1828, 2086	Gaddis v. Lord	2115	Galveston H. & S. A. R.	
108 Ga.	280	Gadsby v. Dyer	907	Co. v. Davis	208, 250, 1984
177 Mass.	2336	Gaetano and Maria, The	5	v. Matula	1908
v. Hampton	1062	Gaffney v. People	1028, 1263	Galvin v. Palmer	1680, 2168
v. Hollander	1858	Gafford v. Invest. Co.	1199		
v. Ins. Co.	1955	v. State			
v. Jackson	252, 437	122 Ala.	390		
v. Knights of Pythias	2388	125 Ala.	1034		
v. Prentice	2202	Gage v. Bulkeley	1271, 1703		
		v. Campbell	1210		

	Section		Section		Section
Galvin v. R. Co.	2433	Gardner v. R. Co.	21, 987	Gartside v. Outram	2212
v. State	2349	v. State		Garvey v. Hibbert	
Gamble v. Mfg. Co.	2466	81 Ga.	950	1 Jac. & W.	2166
Gambrill v. Schooley	406, 460,	90 Ga.	1963	19 Ves. Jr.	2477
	581, 1270,	4 Ind.	1908	Garvin v. Carroll	1215, 1216,
	2018	Tex. Cr. 34			2529
Ganahl v. Shore	1539, 1547	S. W.	1072	v. State	1154, 2016
Ganaway v. Dramatic		v. Vidal	2016	v. Wells	2572
Ass'n	1755	v. Way	341, 987	Garwood v. Dennis	1133, 1311,
Gandolfo v. Palmer	1614	Gardner Peerage Case	688, 760,		1420, 1573,
v. State	63, 246,		1230, 1490,		1680, 1778,
	1983, 1986		1662, 1700,		2141
Ganer v. Lady Lanes-			1722, 2380	v. Hastings	1225, 1651
borough	564, 1271	Gardom v. Woodward	581	v. R. Co.	1698
Gannon v. Gaslight Co.	2495	Garey v. Nicholson	2113, 2115	Gary v. Terrill	1779
v. State	2339	Garfield M. & M. Co.		Gaskill v. King	2237, 2336
v. Stevens	770, 775, 2098	v. Hammer	1225	v. Skene	1073
Ganong v. Green	334	Garland, ex p.	7	Gass v. Stinson	586, 986, 1377,
Gant v. Carmichael	1230	v. Foster Co. S. Bank	1188		1391, 1985
Ganther v. Jenks	1074	v. Gaines	2184	Gassenheimer v. State	275, 326,
Gantling v. State		v. Scott	2294		770, 1974
40 Fla.	568, 826,	Garnan v. Fox	2426	Gassert v. Noyes	581
	1012, 2497	Garneau v. Mill Co.	1654	Gassett v. Glazier	2556
41 Fla.	2073, 2081	Garner v. Graves	1085	Gaston v. Merriam	392, 1225,
Ganton v. Size	1464	v. State			1352
Gantt v. Cox	916	28 Fla.	111, 246,	v. State	364
Garber v. Blatchley	285		247, 248	Gate City Abstract Co. v.	
v. State	1732	31 Fla.	246, 247, 248	Post	93
Garbutt L. Co. v. Gress		5 Lea	18, 2110	Gates v. Bennett	1267
L. Co.	1189, 1651	76 Miss.	1021	v. Fleischer	681, 683, 1951
v. People	1700	v. Taylor	1777	v. People	154, 841, 1125,
Garcia v. State	1802	Garnet v. Ball	1070		1128, 1852
Garcin v. Garcin	2046	Garnett, re	2065	v. R. Co.	2552
Garden City v. Heller	754	v. Ferrand	1834	v. Winslow	1678
Garden City S. Co. v.		Garnett's Goods	2452	Gathercole v. Miall	1194, 1195,
Miller	1681	Garnett-Botfield v. Garnett-			2150
Gardenhire v. Parks	1514,	Botfield	2421	Gattis v. Kilgo	1064
	1985	Garnier v. Berry	1651	Gatzmeyer v. Peterson	133, 282,
Gardere v. Fisk	1212	Garney v. Rhodes	950		2060
v. Ins. Co.	2164	Garr v. Craney	561	Gaudy v. R. Co.	456
Gardiner v. Gray	2434	Garrard v. Frankel	2418	Gaunt v. Harkness	2015
v. People	1157	v. State	822, 836,	v. State	166, 1150,
Gardner v. Barney	1350		858, 861		1154
v. Bartholomew	987, 1116	Garrells v. Alexander	694, 728,	Gauntlett v. Whitworth	1940
v. Brookline	463		1993, 2005	Gavan v. Ellsworth	1387
v. Connelly	907	Garrett v. Ferguson	2444	Gavisk v. R. Co.	1951
v. Eberhart	2575	v. Hanshue	1288, 1299,	Gavit v. Snowhill	1681
v. Frieze	1738		1300	Gay v. Lloyd	1256, 1681
v. Gardner		v. Heflin	2503	v. Rogers	1186
23 Nev.	397	v. Mannheimer	581	v. State	2081
177 Pa.	112	v. Southern R. Co.	2509	Gayle v. Bishop	1877
104 Tenn.	2239	v. Sparks	905, 907,	Gazett, re	1280
v. Grannis	1311, 1651,		916	Gearhart v. Dixon	1661
	2138, 2140, 2141	v. State	1028	Geary v. People	1022
v. Heyer	2463	v. Tel. Co.	1969	v. Stevenson	64, 258, 1078
v. Irvin	2311	v. Weinberg		Gebhart v. Burket	64, 66
v. Kellogg	1135	54 S. C.	1330	v. Shindle	499
v. Ladue	1658	59 S. C.	1623	Gee v. Ward	1483, 1484
v. Lewis	1271, 1703	Garretty v. Brazell	2355	Geer v. Durham W. Co.	561
v. Madeira	398	Garrigues v. Harris	1186, 1205,	v. Goudy	2341
v. M. C. R. Co.	2552		1871, 2105,	v. M. L. & M. Co.	797, 2016
v. Meeker	377, 1066,		2158	Geery v. Hopkins	1177, 1223,
	1404	Garrison v. Blanton	689, 1935,		2211
v. Minea	2354		1938, 1975	Gehrke v. State	1938
v. Moulton	1075	v. Owens	1312, 2406	Geiger v. State	2339
v. People	1750, 1852	v. People	2061	Geisendorff v. Eagles	684
v. Port Blakely M.		Garrott v. Johnson	2098	Geist v. Rapp	791
Co.	1676	Gartlett v. Stafford	2153	Gelott v. Goodspeed	1304, 1312,
v. Preston	321	Gartside v. Ins. Co.	2384		1320

TABLE OF CASES.

GEL

	Section		Section		Section
Gelpcke v. Dubuque	6	Gertz v. Fitchburg R. Co.	987,	Gilbert v. Nat'l C. R. Co.	2575,
Gelston v. Hoyt	2566		1000, 1017,		2578
Geneva v. Burnett	795		1106, 1109, 1116	v. Odum	657, 1960
Gentry v. McGinnis	167, 1151,	Gervais v. Baird	1290, 1320	v. Palmer	1073
	1154, 1960, 1977	Getchell v. Hill		v. Porter	1058
Genz v. State	1938, 2501	19 Minn.	681	v. R. Co.	
Geohegan v. Eckles	2164	21 Minn.	1951	160 Mass.	225, 792
George v. Pilcher	1106, 1108,	Gethin v. Walker	1206, 1225	116 Mich.	905
	1109	Gettelman v. Assur. Co.	2437	v. State	2511
v. R. Co.	461	Getto v. Binkert	2444	Gilbraith v. State	347
v. Radford	1877	Getty v. Hamlin	283	Gilbreath v. State	1398, 1404
v. State		Getzlaff v. Seliger	613, 2297	Gilchrist v. Ass'n	736, 747
39 Miss.	2056	Geyman v. District Court	1862	v. Bale	1714, 1730,
16 Nebr.	1021	Gholson v. Lefevre	1225		2239
61 Nebr.	276, 851, 1896	Giannone v. Fleetwood	1290,	v. M'Kee	923
v. Stubbs	585		1291	v. Martin	1464
v. Surrey	693	Giblehouse v. Stong	1049, 1080,	Gildersleeve v. Caraway	2098
v. Thompson	1208		1082, 1257,	Giles v. Hodge	233
v. Triplett	904, 905		1457	v. Powell	1876
Georgia v. Bond	73, 2276, 2277	Giberson v. Mills Co.		v. Vandiver	1072
v. Kepford	2071	174 Pa.	1078	Gill v. Caldwell	1818
Georgia H. Ins. Co. v.		187 Pa.	1404	v. Ferrin	2465
Campbell	946	Gibbon v. Featherston-		v. Shurtleff	2215
v. Warten	1078	haugh	2518	v. Staylor	
Georgia Med. Co. v. Hyman		Gibbons v. Proprietors of		93 Md.	1127
& Co.	2415	Waterloo Bridge	2259	Md., 55 Atl.	377
Georgia P. R. Co. v. Strick-		v. Powell	1208	v. Strozier	1651, 1676,
land	1195	v. R. Co.	455, 456		1779
Georgia R. Co. v. Homer	987	Gibbs v. Cook	1312	v. Watson	986
Georgia R. & B. Co.		v. Linabury	1051	Gillam v. Sigman	2115
v. Fitzgerald	1081, 1461	v. Linsley	1125, 1126	Gillard v. Bates	2310
v. Hicks	1976	v. Pike	20	Gillebrand, ex p.	1346, 1666
v. Lybrend	280, 959, 2276	Gibney v. Marchay	1257		2450
v. Smith	1035	Gibson v. Com.	1215, 1681	Gilleland v. Martin	2531
Georgia S. & F. R. Co. v.		v. Gibson		v. Schuyler	1712
Cartledge	283	24 Mo.	1738	Gillespie v. Burleson	1777, 1778
Gerald v. State	1447	9 Yerg.	689, 1938, 1958	v. Gillespie	2341
Geralopulo v. Wieler	1240, 1288,	v. Goldthwaite	1391	v. People	609, 1398
	1456	v. Hatchett	461, 1951, 1976	Gillet v. Phelps	1082
Gerdes v. Iron & F. Co.	2553	v. Hunter	38, 318, 377,	Gillett v. Abbott	1295
Gere v. Ins. Co.	716		2495	Gilliam v. Perkinson	1320
Gerhauser v. Ins. Co.	1415	v. Ins. Co.	2558	v. State	923, 1985
Germain v. Lumber Co.	2437,	v. Peebles	1466	Gillian v. State	270, 2059
	2440	v. Poor	2139, 2143	Gillies v. Smithers	1314
German v. German	2336	v. Robinson	2110	Gillis v. Gillis	1302, 1511
German Bank v. Citizens'		v. State	1442	Gillmor's Will	1511
Bank	669	v. Sutton	1081	Gillmore v. Fitzgerald	2105
German Ins. Co. v. Bartlett	1460	v. Thornton	1189	Gillooley v. State	2395
v. Gibe	2437	v. Trowbridge	696, 2008	Gillrie v. Lockport	458
German N. Bank v.		v. Winter	1076	Gilman v. Gross	2410
Leonard	1073, 1330	Giddings v. Smith	2145	v. R. Co.	249
German Sav. Bank v.		Gidney v. Logan	1779	v. Riopelle	380, 661, 1680
Kerlin	1877	Giffen v. Lewiston	283	v. Sheets	2529
German Theol. School v.		Gifford v. Ford	2016	v. Strafford	681, 683
Dubuque	792	v. People	1852, 1985	Gilmanton v. Ham	166, 1154
German-American Bank v.		Gihon v. Albert	2210	Gilmer v. Atlanta	458
Stickler	393	Gilbert v. Boyd	1207, 2535	v. Higley	1890
German-Amer. Ins. Co.		v. Campbell		Gilmore v. Paper Co.	1078
v. Paul	714, 2337	1 Hann. N. Br.	1073	v. State	149
v. Steige	1947	13 N. Br.	1890	v. Swisher	2008, 2504
Germania L. Ins. Co. v.		v. Com.		Gilpins v. Consequa	1873
Ross-Lewin	569, 1671	Ky., 51 S. W.	580	Gilruth v. Gilruth	1951
Germinder v. Machinery		111 Ky.	1842, 2071	Gilson v. Gilson	1456
M. I. Ass'n	987	v. Duncan	1244, 1254	Gimbel v. Hufford	1200, 1212
Geron v. Felder	1680, 1684	v. Gilbert	664, 1738	v. Salomon	1195
Gerrish v. Gerrish	770	v. Gooderham	1023, 1041	Gindrat v. People	2183, 2264
v. Pike	1003	v. Guild	1951	Ginger v. Ginger	2066
v. Sweetser	1062	v. Kennedy	463, 1246, 1976	Gingrich v. Foltz	1257
v. Whitfield	455	v. McGinnis	2425, 2440	Ginn v. Com.	133, 2276

	Section		Section		Section
Ginn v. State	852	Godfrey v. Norris	1316	Goodman v. James	1681
Ginterman v. Steamship Co.	1951	v. Macauley	255	v. Kennedy	1969
Giordano v. Brandywine Granite Co.	208, 1616, 1908	v. State	1438, 1445	v. State	
Girard v. Kalamazoo	1722	Godkin v. Monahan	2442	141 Ind.	326
Girdner v. Walker	1195	Goelz v. Goelz	2341	Meigs	2595
Gist v. McJunkin	1254	Goens v. State	1781	Goodrich v. Conrad	1678
Gitt v. Watson	1856, 2529	Goersen v. Com.	363	v. Hanson	1388
Gittings v. Hall	1225, 1226, 1382, 1651, 1778, 2138, 2141	Goeschel v. Fisher	770	v. Senate	2427
Givens v. Bradley	76	Goessel v. Dairs	616	v. Stone	406
v. State	1079	Goins v. Moberly	987	v. Tracy	2232
Glasgow v. Ridgeley	18, 1299	v. State	1842, 1898	v. Weston	1234, 1268, 1275
Glaspell v. R. Co.	2349	Gold v. Eddy	1409	Goodright v. Moss	1377, 1386, 1484, 1492, 1495, 2063
Glass v. Beach	736	Golden v. State	1781, 1840, 1842	v. Saul	1492
v. Bennett	1126, 1127, 1128, 1129, 1730	19 Ark.	276	Goodrum v. State	2337
v. Gilbert	2529	25 Ga.	1777	Goodsell v. Leonard	1681
v. Hulbert	2417	v. Vyse		v. Taylor	1951
Glasscock v. Com'r	1651	Golden Reward M. Co.	439, 460, 1978	Goodson v. Brothers	1247, 1587
Glassell v. Mason	1192	v. Buxton M. Co.	1195, 1678, 2535	v. U. S.	2580
Glauber Mfg. Co. v. Voter	654, 785	Golder v. Bressler	246, 569, 1933	Goodtitle v. Braham	84, 1993, 2026
Glaze v. Whitley	1108, 1109	Goldie v. McDonald	2534	v. Clark	1802
Glazier v. Hebron	792	Goldsberry v. State	326	v. Clayton	528
Gleadow v. Atkins	1464, 1466, 1471	Goldsboro v. R. Co.	792, 2552	v. Milburn	2520
Gleason v. Kinney	1539, 1548	Goldsborough v. Pidduck	378, 791	v. Southern	2477
v. Knapp	617	Goldsby v. U. S.	389, 1854, 1873	Goodwin v. Assur. Soc.	95, 1684, 2536
Glenister v. Harding	1645, 1646	Goldschmidt v. Marryat	1858, 2219	v. Goodwin	2432
Glenn v. Carson	1029	Goldsmith v. Friedlander	2054	v. Harrison	1718
v. Gleason	1263, 1890	v. Picard	76	v. Nicklin	619
v. Hunt	1382, 1684	v. Sawyer	2580	v. Scott	561
v. Philadelphia & W. C. T. Co.	1890	v. State	246	v. Spray	1592, 1670
v. Rogers	1194, 1208, 1243	Goldstein v. Black	2012	102 Ala.	851
v. State	351	v. People	2514	95 Ind.	682, 689, 1671, 1938
v. Stewart	1873	Goldstone v. Davidson	2110	114 Wis.	770, 821, 987, 2194, 2239
Glidewell v. Martin	1350	Goldthorp v. Goldthorp	1938	v. West	2199, 2201
Globe Accident Ins. Co.		Goldthorp's Estate	1738	Goodwin G. S. & M. Co.'s Appeal	2297, 2312
v. Gerisch	41, 1719, 1750	Golson v. Ebert	1704	Goodwyn v. Goodwyn	
Globe Printing Co. v. Stahl	2155	Goltra v. Wolcott	2303	20 Ga.	728, 934, 1922
Globe Savings Bank v. Nat'l Bank	1557	Gonzales v. State	2061	25 Ga.	1213, 1681
Glos v. Cary	1225, 1859	Good v. Knox	905, 916	Goon Bow v. People	987, 1142, 1842
v. Hallowell	1705	v. Zook	2503	Goon Gan v. Richardson	2437
v. Huey	2515	Goodall v. Goodall	1291	Gorder v. Canning Co.	2169
Glossop v. Pole	1670	v. Little	2317, 2319	Gordon v. Bucknell	1672
Glover v. Hunnewell	736	v. State	1443	v. Burris	112, 1738, 2474, 2477, 2500
v. Patten	2329	Goodbar v. Lidikay	1738	v. Clapp	1777
v. People	216, 352	Goode v. Riley	2417, 2418, 2462, 2463	v. Com.	2361, 2363
v. Scotten	461	v. State	987, 1126, 1132	v. Funkhouser	905, 1029
v. State	851	Goodell v. Labadie	157	v. Gordon	
Gloystine v. Com.	1730	Goodell's Ex'rs v.	2485, 2538	Prob.	2527
Glubb v. Edwards	1312	Goodenough v. Alway	1388	1 Swanst.	803, 2111
Glyn v. Caulfield	2317, 2319	Goodfellow's Ex'rs v.	93	v. Irvine	784
Glynn v. Bank of England	1409, 1466, 1518	Meegan	17, 995, 1005	v. Kitrell	2477
v. Houston	2257, 2260	Goodhand v. Benton	1258	v. Little	1389, 1416
Goblet v. Beechy	2467	Goodhay v. Hendry	1177, 1189	v. Miller	1312
Goddard v. Gray	1864	Goodier v. Lake	2575	v. Montgomery	2572
Goddard v. Gardner	2311	Gooding v. Morgan	2462, 2470	v. Parmelee	1066
v. Groninger	704	Goodinge v. Goodinge	1388	v. Payne	1315
v. Parker	1275	Goodlett v. Kelly	1858	v. People	279
v. Pratt	1624	Goodliff v. Fuller	2083	v. Price	701
Godding v. Orcutt	1543	Goodman v. Goodman		v. R. Co.	461

TABLE OF CASES.

GOR

	Section		Section		Section
Gordon v. Searing	1213, 1225, 1867	Governor v. Jeffreys	1635, 1674	Granger v. George	2450
v. Secretan	1298	Gowen v. Bush	1072, 1750	v. Warrington	2296, 2363
v. State		v. Glaser	456	Grangers' Ins. Co. v. Brown	2221
68 Ga.	2265	Gower v. Emery	2313	Grannis v. Branden	67
3 Ia.	59, 988	Grabowsky v. Baumgart	392	Grant v. Coal Co.	2109
v. Trevarthan	2354	Grace v. Adams	2415	v. Cole	1536
v. Tweedy		v. Hanks	2054	v. Dreyfus	748
71 Ala.	2336	v. R. Co.	1951	v. Grant	
74 Ala.	1213	Gracie v. Morris	1267	34 Beav.	2065
v. Waterous	2434	Graddy v. Tel. Co.	1078	L. R. 5 C. P.	2463,
Gordon's Will	1736	Grady v. Sharron	1296		2467, 2472
Gore v. Bowser	2312	Graffam v. Pierce	2442	1 Sand. Ch.	1267, 1736,
v. Curtis	62, 75, 200, 212	Graft v. Lord Bertie	318, 1512		2106
v. Elwell	1267, 2450	Grafton v. Cummings	2454	v. Jackson	1056
v. People	1852, 2071	Grafton Bank v. Moore	1624	v. Lewis	1086
Goree v. Wadsworth	1675	v. Woodward	15	v. Maddox	2463
Gorgas v. Hertz	1194	Gragg v. Learned	1318, 1648,	v. Pendery	2103
Gorham v. Canton	1784		1651	v. State	1842
v. Carroll	529, 2222, 2223	Graham, matter of	2260	v. Thompson	233, 1938
v. Peyton	728	v. Anderson	2578	v. Varney	1951
Gorham Mfg. Co. v. Emery		v. British C. L. & I. Co.	2058	Grant's Succession	1651, 2109,
R. T. D. Co.	2212	v. Campbell	1194, 1651		2167
Gorkow's Estate	654, 2477	v. Chrystal	928, 2105	Grantham v. State	93
Gorman v. Montgomery	1540	v. Com.	2501	Grattan v. Life Ins. Co.	
v. Park	716	v. Dyster	1259, 1884	80 N. Y.	2382, 2384,
v. R. Co.	1698, 1877	v. Gordon	1254		2387
Gormley v. Uthe	1239	v. Henry	1225	92 N. Y.	2116, 2384, 2389
Gorton v. Dyson	1297	v. Larimer	1890	Gratz v. Land & R. L. Co.	2143, 2520
Gosa v. Southern R. Co.	1718,	v. Law	2083		2535
	1750, 1951	v. Lockhart	747, 1250	Gravely v. State	2512
Goshen v. England	283	v. McReynolds		Graves v. Alsap	1350
v. Richmond	7, 1354	88 Tenn.	996, 1384	v. Battle Creek	1158, 2220
Gosford v. Robb	1256, 1257,	90 Tenn.	784, 1126	v. Bruen	1239, 1651
	1300, 1311, 2141	v. Martin	1770	v. Colwell	2491, 2529
Goss v. Ellison	2432	v. Nowlin	251	v. Davenport	908
v. Lord Nugent	2441, 2455	v. O'Bryan	2538	v. Graves	
v. Turner	1867, 1873	v. O'Fallon		70 Ark.	2237
v. Watlington	1474	3 Mo.	1267, 1304	45 N. H.	581
Goss P. P. Co. v. Scott	2211	4 Mo.	1304, 2052, 2314	v. Harris	2235
Gosse v. Tracy	1409	v. Oldis	1208	v. Kennedy	1944
Gossett v. Tolen	1651	v. Pennsylvania Co.	1918,	v. Key	2432
Gossler v. Refinery	561		1926, 1951	v. People	390, 1440
Gotlieb v. Danvers	1206, 1234	v. State	1072	v. U. S.	274, 286, 2243
Gotloff v. Henry	1029	Gran v. Houston	1976, 2354	Gravett v. State	2275
Gottlieb v. Hartman	682, 1013	Granby v. Menard	2494	Gravlee v. Lamkin	2432
Gouge v. Roberts	463	Grand Gulf R. & B. Co.		Gray v. Brooklyn H. R. Co.	568
Gough v. McBride	2143	v. Barnes	1320		2071, 2073,
v. St. John	64, 2117	Grand Island Banking Co.			2081
Gould v. Crawford	499, 2098	v. Shoemaker	2016	v. Davis	1186
v. Excelsior Co.	2442	Grand Isle v. Kinney	2406	v. Fielder	1211
v. Gould	2067	Grand Land v. Bartes	1486	v. Fox	2308
v. Gould Co.	2169	v. Randolph	457	v. Gray	2069
v. Jones	702, 704	v. Wieting	682, 689, 1671,	v. Haig	291
v. Lakes	112, 1736, 2452		1938, 2500	v. Hardman	1862
v. Leavitt	2446	Grand Pass S. C. v. Crosby	1684	v. Harrison	1779
v. Norfolk Lead Co.	1018,	Grand Rapids v. Bennett	1960	v. Kaufman D. & I. C. Co.	1073
	1026, 2098	v. Hastings	1651		1820
v. Safford	2034, 2045,	v. R. Co.	1943	v. Macallum	1718, 1722
	2050	Grand Rapids & I. R. Co.		v. McLaughlin	1207, 1212,
v. Schermer	1978	v. Ellison	1951		2211, 2371, 2374
v. Trowbridge	1195	v. Huntley	438, 689, 1718,	v. People	2056, 2059
Goulson v. Wainwright	2250		1721, 1722	v. R. Co.	1896
Gourdin v. Staggers	1215	v. Martin	2388	v. Rollinsford	1062
Gourley v. Hankins	2535	Grand Trunk R. Co.		v. Runrill	2500
Gove v. Cather	1635	v. Richardson	455, 456, 461	v. Schneider	1859
Government v. Aloiau	987	Graney v. R. Co.	458		
v. Hering	1398, 1442	Granger, re	1350		
Governor v. Barkley	1196				

	Section		Section		Section
Gray v. St. John	335, 1908	Green v. State		Grenfell v. Girdlestone	89
v. State		154 Ind.	142, 1033,	Gresham v. Manning	1753
63 Ala.	396		1442, 1749,	Gresham Hotel Co. v.	
42 Fla.	664		1750, 1978	Manning	1362
Grays v. Turnpike Co.	1074	97 Tenn.	1072	Greswold v. Kemp	1684
Grayson v. Atkinson	1304,	v. Waller	2164	Grever v. Taylor	581
	1311, 1312	v. Water Co.	283, 675	Greville v. Chapman	1984
v. Bannon	787	v. Weaver	2260, 2275	Grey v. Hesketh	2256
v. Com.	247	v. Weller	1350, 2577	Gribble v. Pioneer Press Co.	
v. Lynch	568, 665	v. Wilkie	2415	34 Minn.	404, 406
Graystock v. Barnhart	2525	v. Woodbury	278, 280	37 Minn.	1971
Greasons v. Davis	1271, 1681,	Greenawalt v. McEnelley	2086,	Gridley v. Bingham	1086
	1684		2235	v. Boggs	1890
Great Western Colliery		Greenbaum v. Bornhofen	2008,	Grieve v. R. Co.	1669
Co. v. Tucker	2212		2016	Griffen v. Manice	2509
Great Western R. Co. v.		Greene v. Almand	1491	Griffeth v. Griffeth	2337, 2341,
Hanks	664	v. Chickering	1389		2505
Great Western Turn-		v. Durfee	1186, 1678	Griffin v. Auburn	458, 2349
pike Co. v. Loomis	2210, 2268	v. Greene	2245	v. Brown	607
Greaves v. Hunter	701	v. Harriman	1083	v. Griffin	2312
Grebbin v. Davis	2110	v. Ins. Co.	1908	v. Harriman	2354
Greeley v. Mansur	2349	Greene Co. v. Bledsoe	1378	v. Henderson	20
v. Quimby	1346, 2454	Greenfield v. Kennett	1062,	v. Ing	1938, 1958
v. Stilson	718		1807	v. Marquardt	581
Greeley Co. v. Gebhardt	714	v. People	273, 568	v. Sheffield	1205
Green v. Barker	2534	v. State	273, 1476	v. Smith	2336, 2341
v. Brown	2531	Greening v. Keel	787	v. State	
v. Caulk	719, 738, 745,	Greenlaw v. King	2286, 2303,	76 Ala.	1136, 1138,
	747, 748, 749,		2329, 2380,		1761
	753, 1362		2394	129 Ala.	1254
v. Cauthorn	751	Greenleaf v. R. Co.	18, 1481,	14 Oh. St.	318, 1615
v. Chelsea	1587, 2140,		1503	32 Tex.	2242, 2243
	2141	Greenlee v. McDowell	2594	v. Wall.	1605
v. Chicago	714, 720, 1943,	Greenman v. O'Connor	1392	v. Willow	1951
	2570	Greenough v. Eccles	900, 905,	v. Wise	1640, 1651
v. Com.	363		907	Griffin's Divorce	1666
v. Compagnia	1383	v. Gaskell	2290, 2291,	Griffith v. Davies	2312
v. Crapo	1576, 2328		2294, 2295, 2306,	v. Diffenderffer	1738, 1890
v. Fall River	463		2311, 2315, 2319	v. Huston	1225, 1256,
v. Ford	1898	v. Greenough	1511		1302
v. Gould	770, 1554	v. Sheldon	1208, 1212	v. Ketchum	2116
v. Graves	1350	Greenshields v. Crawford	1513,	v. Richmond	1676
v. Green	1225		2529	v. Rive	791
v. Hart	2123	Greenslade v. Dare	253, 959	v. State	
v. Heritage	2529	Greenville N. Bank v.		37 Ark.	1028, 1029,
v. Howard	2463	Evans S. B. Co.	2573		1031, 1349
v. Indianapolis	1186	Greenwell v. Crow	728, 1951	140 Ind.	194, 195,
v. Lancaster Co.	2451	Greenwood v. Spiller	1678		987, 988
v. McLeod	2065	v. State	1398	v. Williams	1993, 1994
v. Nebagamain	2389	Greer v. Ferguson	1678	Griffiths v. Montandon	2354
v. Pacific L. Co.	1719	v. Higgins	1031	v. R. Co.	2381
v. Pratt	1540	v. State	581, 968	Griffits v. Ivory	2015
v. Proude	2143	Gregg v. Forsyth	1225, 1684	v. Payne	88
v. R. Co.		v. Jamison	1003, 1037	Grigsby v. Water Co.	1976
122 Cal.	1029	v. Mallett	1131, 1877	Grim v. Murphy	1778
171 N. Y.	2381, 2383	v. State		Grimes v. Cannell	1890
v. Skogvist	142	106 Ala.	836, 857	v. Fall	1256
v. State		3 W. Va.	1839, 1842	v. Hilliary	1192, 2498, 2518
69 Ala.	111, 247	Gregory v. Baugh	167	v. Keene	1062
38 Ark.	1398	v. Cheatham	1031, 1263	v. Kimball	1212
59 Ark.	233	v. Dodge	18	v. Martin	1842
64 Ark.	232, 233,	v. Howard	1056, 1062	v. Simpson College	1195
	569, 1938	v. Loose	1078	v. State	
21 Fla.	2085	v. McPherson	1239, 1275	105 Ala.	1821
40 Fla.	851, 852	v. Parker	2232	68 Ind.	1732
43 Fla.	1440, 1667	v. Taverner	762, 763	v. Talbot	1247
88 Ga.	838	v. Thomas	258	Grimes D. G. Co. v.	
112 Ga.	1076	Grellier v. Neale	1303, 2520	Malcolm	1086
Ga., 45 S. E.	1873	Grenell v. R. Co.	655	Grimshaw v. Kent	1938, 2297

TABLE OF CASES.

GRI

	Section		Section		Section
Grimsinger v. State	832, 852, 1327	Gulf C. & S. F. R. Co.		Hackett v. Martin	1085
Grimston v. Cunningham	2442	v. Compton	283, 461, 682, 1951	Hackley v. Hastie	2354
Grindall v. Grindall	1861, 2315	v. Evansich	461	Hackney v. Raymond	
Grinnell v. Phillips	2352, 2355	v. Harriett	461	B. C. Co.	581, 770
v. R. Co.	1951	v. Johnson		v. State	579, 2276, 2277
Grisler v. McKennon	1676	83 Tex.	987	Haddon v. Mills	1084
Griswold v. Pitcairn	2161, 2163	92 Tex.	2509	Hadden v. Powell	1779
v. R. Co.	663	10 U. S. App.	455	Haddock v. R. Co.	1492, 1605, 2063
v. State	2100	v. McGowan	283	Haddow v. Parry	1471
Gritten v. Dickerson	2066, 2498	v. Norfleet	2220	Hadduck v. Wilmarth	529
Grob v. Cushman	2577	v. Rowland	250	Hadfield v. Jameson	1269, 1598, 1681
Groenvelt v. Burrell	1858	v. Shieder	2507, 2509	Hadjo v. Gooden	692, 1108, 1612, 1614, 1985
Groff v. Ramsey	1189, 1677	v. Smith	461	Hadley v. Bean	1225
Groh's Sons v. Groh	18	Gulick v. Gulick	2312	v. Carter	1714, 1729, 1749
Groll v. Tower	2388, 2391	Gullihier v. People	1013	Hadra v. Bank	1391
Grooms v. State	797	Gully v. Exeter	1194	v. Howe	1568
Gross v. Brodrecht	62, 75, 200, 986	Gumz v. Giegling	2406	Haerle v. Kreihn	613, 2240
v. Disney	2538	Gundlach v. Schott	1951	Hagaman v. Gillis	1213
v. Feehan	770	Gunn v. Peakes	1681	v. Moore	1943
v. Scheel	1557	v. R. Co.	1164	Hagan v. Carr	791
v. Smith	1779	v. Wades	1405	v. Ins. Co.	1248
Groundwater v. Washing-		Gunning v. People	2575	v. Merchants' Ins. Co.	2525
ton	2221	Gunter v. Earnest	616	v. State	232
Grove v. Elliot	2250	v. State		Hagedorn v. Reid	1518
v. Ware	1206	83 Ala.	1263	Hagenlocher v. R. Co.	1719
Grover v. Grover		111 Ala.	111, 1966	Hagenow v. People	1442
30 Mo.	1681	v. Watson	770, 779	Hager v. Cleveland	1074
63 N. J. Eq.	2046	Gupton v. Hawkins	1466	v. Shindler	2311
Groves v. Groves		Guptill v. Verback	2385	Hagerman v. Wigent	2336
9 L. T. R.	2528	Gurley v. MacLennan	738	re	1003
57 Miss.	803	v. Park	2314, 2384	Haggerty v. R. Co.	675, 1951
65 Oh. St.	2433	Gurney v. Howe	1639	Haggett v. —	1267
Grubb v. State	684, 689	v. Langlands	2026	Haggitt v. Iniff	2165
Grubbe v. Grubbe	1576	v. Morrison	2444	Hahn v. Bettingen	401, 1013
Grubbs v. Pickett	1339	Gurno v. Janis	1678	v. Penney	1623
Gruder v. Bowles	1779	Gutgesell v. State	2363	Haig v. Newton	
Grundy v. Janesville	1872	Gutherless v. Ripley	1551	1 McCord	529
Grusenmeyer v. Logans-		Guthrie v. Shaffer	492	1 Mills Const.	735, 754
port	1956	Gutridge v. R. Co.	1951	Haigh v. Belcher	1871
Guard v. Whitehouse	2435	Gutsch v. McIlhargey	782	Haight v. Kimbark	716
Guardhouse v. Blackburn	2408, 2421, 2452	Guttersen v. Morse	949, 987	v. Turner	2349
Gude v. Mankato	252	Gutzeil v. Pennie	2169	Haile v. Hill	1684
Gudgen v. Besset	2408, 2420	Guy v. Hall	529, 1049, 1080, 1082	v. Palmer	1213, 1658
Guelph C. Co. v. White-		v. Manuel	1072	Haines, re	2199
head	2319	v. Mead	736, 747	v. Cadwell	760
Guenther's Case	2372	v. State	238, 2276	v. Christie	1554
Guepratte v. Young	1953	Guyette v. Bolton	728, 2518	v. Dennett	529
Guerin v. Hunt	1195	Gwaltney v. Provident		v. Gibson	2580
Guertin v. Hudson	85	S. L. Assur. Co.	2415	v. Guthrie	1503
Guesdorf v. Gleason	1681	Gwin v. Gwin	1738	v. Hayden	233, 1738
Guetig v. State	682	Gwynn v. Frazier	1651	v. Ins. Co.	463, 781, 1261, 1263
Guggenheim v. R. Co.	571	Gyfford v. Woodgate		v. State	1329, 1667
Gugins v. Van Gorder	1198	2 Camp.	1347, 1664	v. Trust Co.	2494
Gugy v. Maguire	2375, 2376	11 East	1664	Hainsworth v. State	238, 1974
Guhl v. Whitcomb	1159	Gyles v. Hill	1279	Haish v. Payson	463
Guice v. Thornton	1312	Gynn v. Kirby	2313	Halaska v. Cötzhause	2569
Guidery v. Green	2433, 2441			Halbert v. Rosenbalm	1839
Guidry v. Guivot	1086			Halbrook v. State	2085
Guild v. Hull	1738			Halderman v. Terr.	968, 2079
Guilliams v. Hulie	1837			Hale v. Cushing	1352
Guinan's Appeal	1777			v. Danforth	616
Guinn v. State	68				
Guterman v. Steamship Co.	681				
Gulf C. & S. F. R. Co. v.					
Brown	2220				

	Section		Section		Section
Hale v. Darter	1196	Hall v. State		Hamilton v. Marsden	1316,
v. Gibbs	1389	40 Ala.	293	1510, 1513	
v. Glidden	1919	51 Ala.	952, 1036	v. Mendota C. & M.	
v. Life Ins. Co.	108, 143,	130 Ala.	1750	Co.	15, 461
	1725	134 Ala.	2071, 2364	v. Menor	1564
v. McGettigan	1350	137 Ala.	1841, 1842	v. Nickerson	660, 728, 1954
v. N. J. S. N. Co.	2567,	64 Ark.	1908	v. People	
	2573	48 Ga.	1750	29 Mich.	56, 785, 923,
v. Philbrick	15	43 Tex. Cr.	923		928, 987, 988,
v. Rawallie	1009, 1013,	v. Steele	1350		994, 1022, 1111,
	1014	v. Taylor	775		1390, 1890, 1985,
v. Rich	794	v. The Emily Banning	1048		1986, 2056, 2103
v. Ross	1684	v. Warren	1671	46 Mich.	987, 1005
v. Silloway	1778	v. Williams	2555		1021
v. State		v. Woolen Co.	1541, 1544	v. R. Co.	461, 1923, 1951
122 Ala.	2513	v. Young	2200	v. Rice	736, 762, 1205
72 Miss.	2079	Hall's Case	2070	v. Shoaff	2108
v. Taylor	581	Hallahan v. R. Co.	461	v. Smith	704, 1033, 1082,
Hale's Ex'rs v. Ard's Ex'rs	1542	Hallenbeck v. Garst	2355		1873, 2143
Haley v. Flaccus	571	Halleran v. Moon	2065	v. State	
v. State	1005, 1611	Hallett v. Cousins	779	36 Ind.	1732
Haliburton v. Fletcher	1256	v. Walker	907, 1075	77 Miss.	830, 832
Halifax Banking Co. v.		Halley v. Webster	957, 987	34 Oh. St.	928, 987
Smith	258, 1185,	Hallidy v. Hess	2472	41 Tex. Cr. App.	564
	1911, 2016,	v. Martinet	736, 1523		2164
	2115	v. McDougall	255, 1624,	Hamilton B. S. Co. v.	
Halifax Union v. Wright	2419		1635, 1675	Milliken	1389, 2103
Hall v. Acc. Ass'n	1719	v. Sweeting	1123	Hamilton Buggy Co. v.	
v. Acklen	1225	Hallock v. Ins. Co.	2410	Iowa B. Co.	1878
v. Aitkin	1225	v. Smith	1898	Hamilton W. Co. v. Good-	
v. Austin	290, 437, 1974	Halloway v. People	987, 2277	rich	1040
v. Benson	1954	Hallowell v. Dickerson	1951	Hamit v. Lawrence	1195
v. Bishop	1186, 1213, 1273,	Hallum v. Dickinson	1267, 2110	Hamlin v. State	861
	1640, 2535	Halsey v. Adams	2464	Hamlyn v. Nesbit	1085
v. Brown	93	v. Sinsebaugh	735, 736,	Hammack v. State	2059
v. Bynum	1316		745, 749, 754	Hammargren v. St. Paul	283
v. Cardell	1225, 1496	Halstead v. Mullen	1566	Hammatt v. Emerson	1677,
v. Cazenove	2410	Halsted v. Colvin	2516		2124
v. Cedar R. & M. C. R.		v. Rice	1681	Hammick v. Johnson	2083
Co.	1722	v. State	1967	Hammock v. McBride	1415
v. Collins	1664	Halvorsen v. Moon & K.		Hammon v. Sexton	1246
v. Com.	196	L. Co.	1461	Hammond v. Blue	1225, 1239
v. Costello	690, 1271	Halwerson v. Cole	2053	v. Bradstreet	1591
v. Goodson	461, 1951	Ham v. Ham	2575	v. Dike	229, 1035
v. Hall	1302	v. Salem	463	v. Freeman	1254
v. Harris	2408	v. State	1842	v. Inloes	2572
v. Houghton	907	Ham's Case	2086, 2088	v. Johnston	1225
v. Huse	2016	Hambel v. Davis	2575	v. Noble	1501, 1503
v. Ins. Co.	794	Hamberg v. Ins. Co.	1976	v. Plank	1206
v. Manchester	2159	Hamblett v. Hamblett	19, 1062	v. State	2061
v. Manson	905, 913, 2220	Hambrook v. Smith	2256	v. Varian	694, 700
v. Mayo	1586, 1587	Hamburg v. Wood	581, 1086	v. Woodman	571
v. Murdock	1700	Hamburg-Bremen F. Ins.		Hammond's Case	700
v. Taylor	321	Co. v. Pelzer Mfg. Co.	2355	Hamner v. Eddins	1680
v. Obder	1347	Hamburger v. Rinkel	233, 1021	Hampshire v. Pierce	2470, 2472
v. Pegram	1898	Hamby v. State	1725	Hampton v. Garland	1316
v. People		Hamelyn v. White	2294, 2311	v. M'Connel	1216
21 Mich.	2159	Hamer v. Bank	1963	v. M'Ginnis	1269
47 Mich.	398	v. McFarlin	73	v. R. Co.	437, 790, 792
v. Perry	689, 1958	Hamersly v. Lambert	1877	v. Ray	1204, 1254
v. Phelps	1288, 1300	Hamill v. Woods	2463	v. Speckenagle	1664, 2110
v. R. Co.	905	Hamilton v. Billingsley	93	v. Spencer	2122
v. Rankin	65	v. Crowe	2523	v. State	
v. Ray	736, 753, 762	v. Galloway	1676	45 Tex.	2242
v. Redson	1651	v. Gray	1073	5 Tex. App.	1781
v. Renfro	1911	v. Hastings	94	Hamrick v. Hamrick	1938, 1958
v. Rixey	2312	v. Holder	1021, 1082	Hamsher v. Kline	1511, 1513
v. Simmons	1040	v. L. L. & G. Ins. Co.	2556	Hanawalt v. State	166, 1154,
v. Sims	1304	v. Love	1316, 1511		1168

TABLE OF CASES.

HAN

	Section		Section		Section
Hancock v. Blackwell	987	Hanoverian Consul's		Hargett v. —	1267
v. Byrne	1293	Case	2372	Harkins v. Forsyth	530, 1347
v. Cook	1460, 1466	Hanrick v. Andrews	1684	Harkless v. Smith	1185, 2303
v. Hintrager	1556, 1558	Hans v. State	367	Harkness v. State	247
v. Kelly	747, 1248	Hansard v. Robinson	1197	Harkrader v. Carroll	2534
	1539, 1560	Hansberg v. People	2582	Harlan v. Howard	2139, 2140,
v. Parker	524, 2191	Hansbrough v. Neal	2440		2141
v. Supreme Council		v. Stinnett	406	v. Moore	2337
N. J. Eq., 55 Atl.	667	Hanscom v. Burmood	1028,	Harland v. Eastman	1481,
67 N. J. L.	1644, 1683		1029, 1035		1486, 1490
v. Tram Lumber Co.	1651	Hansel v. Hansel	2046	Harless v. Harless	2304
Hancock Co. v. Leggett	1719	Hanselman v. Dovel	2239	Harloe v. Lambie	1200
Hancock Nat'l Bank v.		v. Doyle	1204	Harlow v. Boswell	2444
Ellis	2558	Hansen v. Ins. Co.	1195	Harm v. Wilson	66
Hand v. Ballou	1354	v. Miller	1890	Harman v. Harman	
v. Brookline	682	Hansley v. Hansley	2067, 2069	16 Ill.	2085, 2086
v. Elvira	1018	Hanson v. Armstrong	1186, 1225	70 Fed.	576, 2442
v. Howell	1073	v. Bean	2311	v. McLeland	2067
v. Ryan Drug Co.	2442	v. Chiatovich	382	v. Stearns	1495, 2537
v. Soodeletti	780	v. Crawley	2115	v. Vanhatten	1062
Handleigh v. Leigh	2354	v. Eustace	291	Harmon v. Decker	1195, 1549
Handley v. Fitzhugh	1215	v. Parker	1076	v. Harmon	406
v. R. Co.	1974	v. Red Rock	966	v. James	1225, 1257
Handlong v. Barnes	619	v. South Scituate	1641,	v. State	246
Hands v. James	1512		1662, 1674,	v. Terr.	1135 1136
Handy v. Canning	1041		1678	Harness v. Harness	1085
v. Ins. Co.	2349	Hanye v. State	2497	v. State	1871
v. State	1620	Happel v. Brethauer	2592	Harnett, re	2065
Hanes v. State	907, 914	Haralson v. Campbell	1943	v. Garvey	682
Haney v. Clark	1938	Harbers v. Tribby	1674	Harnsberger v. Kinney	2349
Hank v. State	860, 928, 1012,	Harbison v. Shook	406	Harp v. Harp	1082
	1476, 2385	Hard v. Ashley	581	v. Parr	233, 1304, 1417,
Hankinson v. Lombard	1379	v. Brown	1623, 1959		1738, 2500
v. R. Co.	2110	v. Moring	5309	Harper v. Burrow	1384, 2223
v. Vantine	2446	Hardage v. Coffman	2535	v. Lamping	1890
Hanks v. Phillips	1651	Hardeman v. English	1669	v. R. Co.	1021
v. Rhoads	1890	Harden v. Hays	905, 1033,	v. Rowe	1664
v. Van Garder	2337		1505, 1514	v. Scott	1195, 1196
Hanley v. Banks	1406	Hardiman v. Brown	569, 687	v. State	
v. Donoghue	2573	Hardin v. Blackshear	1186	109 Ala.	1214
v. Gandy	2008, 2016	v. Cheek	1664	101 Ind.	1076
v. Huntington	2552	v. Forsythe	1225	79 Miss.	1439, 1440
Hanlon v. Doherty	2297, 2312	v. Ho-yo-po-nubby	1676,	Miss., 35 So.	278
v. R. Co.	2464		1680, 2025	v. Tapley	1651
Hanlon's Will	1511	v. Kretsinger	1205	v. Wilson	1304
Hann v. Wilson	76	v. State		Harraway v. Harraway	2503
Hanna v. His Creditors	1681	66 Ark.	832	Harrel v. State	1820
v. Palmer	2473	107 Ga.	1375	v. Ward	1304, 1312, 1313,
Hannahan v. State	2059	Harding v. American			1513
Hannan v. Greenfield	1290	Glucose Co.	289, 2210	Harrell v. Enterprise Sav.	
Hanners v. McClelland	66, 73, 74,	v. Brooks	66, 76	Bank	1195,
	406, 928,	v. Craigie	1293		1268, 2105
	987, 988,	v. Harding	1510	Harriman v. Brown	1564, 1566,
	1067, 1615	v. R. Co.	987		1568, 1582, 1587
Hannibal & St. J. R.		v. State	318, 851	v. Jones	2313
Co. v. Clark	1779	Hardisty v. Glenn	1778	v. Pullman P. C. Co.	65
Hannon v. Hannah	1257	Hardtke v. State	1911	v. R. Co.	288, 1018
v. State	1135, 1136	Hardwick S. B. & T. Co. v.		v. State	1852
Hannum v. Belcher-		Drenan	451	v. Stowe	613, 1747, 2383
town	2349, 2354	Hardy v. Alexander	73	Harrington v. Fry	2153
v. Hill	437	v. Merrill	1918, 1919,	v. Lincoln	957, 1022, 1061,
v. McRae	2286		1933, 1934		1062, 1106
Hanoff v. State	987, 2276,		1938, 1977	v. MacMorris	1064
	2277	v. Moore	334, 1779	v. Mining Co.	1890
Hanover F. I. Co. v. Stod-		v. U. S.		v. R. Co.	1166, 2349
dard	1062	3 D. C. App.	832; 861,	v. Sedalia	613
Hanover R. Co. v. Coyle	1750		862	Harris v. Aldrit	1858
Hanover Water Co. v.		186 U. S.	852	v. Anderson	1678, 2110
Iron Co.	714, 1640	Harford v. Morris	1271	v. Ansonia	792, 1661

	Section		Section		Section
Harris v. Brooks	2444	Harrison's Will	2500	Hartwig v. Schiefer	2477
v. Clinton	1951	Harrold v. Smith	1539, 1551	Harty v. Malloy	1141
v. Collins	1249	Harrop v. Fisher	2409	Hartz v. Com.	1377
v. Daugherty	2312	Hart v. Alexander	95, 255	Hartzog v. Hubbard	1564
v. Doe	1273, 2166	v. Atlas K. Co.	963	Harvard v. Stiles	770
v. Harris		v. Bridge Co.	1029, 1951	Harvester Co. v. Miller	2015
136 Cal.	2312	v. Coram	1308, 1312	Harvey v. Chouteau	1219, 1280
26 N. Y.	1267, 2052	v. Deamer	1671	v. Clayton	2297
v. Hill	2211, 2307	v. Gage	1651	v. Cummings	1273, 1680
v. Knight	1267, 1512,	v. Hicks	1079	v. Harvey	2426
	1736, 2106	v. Livingston	1541	v. Mitchell	1201
v. Leavitt	1389	v. McElroy	1350	v. Morgan	1208
v. Lumber Co.	18, 581	v. Newman	1072	v. Osborn	392
v. Miller	1391	v. Powell	1747, 1748	v. R. Co.	1873
v. Murphy	2441	v. Pratt	1051	v. Smith	2419
v. Patten	1513	v. R. Co.	283	v. State	
v. Powell	1564	v. Randolph	1082, 1085	40 Ind.	761, 1700
v. Quincy	793	v. Robinett	1205, 2535	Miss., 20 So.	835
v. R. Co.	568	v. Ross		v. Terr.	2062, 2528
v. Rickett	2425	57 Ala.	1676, 2165	v. Thomas	1186
v. Smith	1944	64 Ala.	1651	v. Thorpe	1268, 1352
v. State		v. State		Harvy v. Board	2581
34 Ala.	111	40 Ala.	7	Harwich Case	2215, 2287
73 Ala.	1375, 1404	38 Fla.	246	Harwood v. Lee	575
78 Ala.	2276	55 Ind.	2582	v. Mulry	751, 1555
34 Ark.	247	15 Tex. App.	1157, 1168	v. People	204
61 Ga.	784	v. Stickney	1493, 1503	v. Sims	1585, 1588
109 Ga.	106	v. Strode	1195	v. State	1405
30 Ind.	1108	v. Ten Eyck	2122, 2123	v. Wentworth	1350
46 Miss.	246, 247	v. U. S.	1877	Harwood's Adm'x v. R. Co.	460
24 Nebr.	2349, 2354	v. Vinsant	1246	Hasbrouck v. Baker	1257
v. Tippet	1005, 1022	v. Walker	438, 1523	v. Vandervoort	619
v. Tisereau	1311	v. W. S. R. Co.	2552	Haseltine v. R. Co.	454
v. Traction Co.	1669	v. Wilson	736, 747	Haskell v. Becket	2354
v. Wilson	587	v. Yunt	2105	v. Mitchell	1943
v. Zanone	406	Hart's Appeal	1066	Haskens v. Lumsden	74
Harris' Trial	1911	Harter v. Harter	2421	Haskins v. Com.	1842
Harrisburg Bank v. Forster	529	Hartford v. Palmer	494, 495,	v. Ins. Co.	716
Harrison v. Bevington	2097		499	v. Lumsden	73
v. Blades	1456	v. Power	2065	v. People	2059
v. Burgess	610	Hartford Bank v. Barry	529	v. Warren	321, 1954
v. Charlton	2098	v. Stedman	95	Haslam v. Campbell	1388
v. Com.	246	Hartford Bridge Co. v.		Hassard v. Municipality	2572
v. Courtauld	586	Granger	1061, 1062	Hassler v. King	1651
v. Doyle	1558	Hartford Deposit Co. v.		Hastings v. B. H. T. Co.	1352
v. Garrett	13, 1611	Sollitt	461	v. Devlin	1674
v. Glover	719, 1704	Hartford F. Ins. Co. v.		v. Hopkinson	1249
v. Gordon	1022	Reynolds	2311, 2550	v. Livermore	1043
v. Gordy	1350	Hartford I. M. Co. v.		v. Palmer	1873
v. Harrison	2067	Cambria M. Co.	2458, 2463	v. Rider	569, 1938
v. Howe	2442	Hartford L. Ins. Co. v.		v. Stetson	73, 280
v. Kiser	285	Gray	1313, 2415	Hastings' Trial; see R. v.	
v. Langston	1040	Hartley S. Bank v. Mc-		Hastings.	
v. Lincoln	2506	Corkell	1877	Hatch v. Dennis	1083, 1084
v. McCawley	2054	Hartman v. Diller	1086	v. Fowler	1247
v. McKim	2445	v. Evans	377	v. Fuller	1718, 1721
v. Middleton	736, 748, 749,	v. Ins. Co.	1726, 1946, 1947	v. Lewis	2349
	753, 754, 760	v. Rogers	950, 1963	v. Pryor	2447
v. Powers	2272	Hartman Steel Co. v. Hoag	2115	Hatcher v. Bowen	1062
v. R. Co.		Hartness v. Boyd	1891	v. Dunn	
116 Cal.	2382, 2391	v. Brown	2311, 2319	Ia., 66 N. W.	1698
36 Ia.	1943	Hartnett v. McMahan	1755	102 Ia.	656
v. Rowan	773, 915, 1045,	Hartney v. Ins. Co.	1062	v. Hatcher	1197
	1873, 1890, 1917,	Hartranft's Appeal	2369, 2371,	v. Rocheleau	1681, 2529
	1938		2375	Hatchett v. Connor	1651, 2167
v. Simons	1676, 2165	Hartrich v. Hawes	1873	v. Gibson	461
v. Southcote	2251, 2256	Hartsell v. Masterson	93	Hately v. Pike	2445
v. Tate	2463	Hartshorne v. Wilkins	2532	Hatfield v. R. Co.	1158, 2220
v. Williams	1858			Hathaway v. Addison	1352, 2158

TABLE OF CASES.

HAT

	Section		Section		Section
Hathaway v. Brown		Hay v. Hay	2237	Haywood v. Rogers	1947
18 Minn.	581, 1967	v. Miller	1938	Hazard v. Ins. Co.	2466
22 Minn.	1963, 1976	v. Peterson	1539, 1548,	v. R. Co.	1031, 1382
v. Clark	2534		2524	Hazell v. Dyas	1195
v. Crocker	944, 987, 1021,	Hay's Appeal	1379, 1390, 1409	Hazen v. Pierson	1195
	1037	Haycock v. Greup	2008, 2016	Hazer v. Streich	616, 748,
v. Hemingway	1873, 1874	Hayden v. Goodnow	2525		1541
v. Power	2477	v. Mitchell	1189, 1225,	Hazleton v. Union Bank	1389,
v. Spooner	1314, 1318, 1651		1651		2016, 2017
v. Tinkham	2113	v. Palmer	18	Hazzard v. Vickery	2008
Hathaway's Adm'r v.		v. Rice	1245	Heacock v. Lubuke	
Ins. Co.	569, 682,	v. Stone		107 Ill.	1705
	1722, 1938, 2500		112 Mass.	108 Ill.	2529
Hathaway's Will	613		121 Mass.	v. Stoddard	803
Hathorn v. King	1938			v. Williams	1074
Hathorne v. Hodges	321	Haydon v. Moore	1225	Head v. Bridges	2570
Hatt v. Nay	199, 208	Haye's Will	2052	v. Hargrave	1920, 2570
Hatton v. Robinson	2291, 2294,	Hayes v. Banks	1292, 1299,	v. State	923, 987,
	2297		2165		1126
Hanenstein v. Gillespie	1230	v. Berwick	2167	Heady v. Turnpike Co.	1168
Hang v. Riley	1273	v. Candee	1958	Heald v. R. Co.	1807
Haughton v. Ewbank	1249	v. Cheatham	1126, 1128,	v. Thing	688, 1362
Hank v. State	1726, 2497		1129	Healey v. R. Co.	1040
Haulenbeck v. Cronkright	1943	v. Frey	2165	v. Thatcher	1062
Hau v. Wilson	2354	v. Mut. Prot. Ass'n	613	Heane v. Rogers	1058
Haupt v. Henninger	1387	v. Parmalee	616	Heap v. Parrish	581
Hausenfluck v. Com.	775, 2061	v. People	2086	Heard v. McKee	1188, 1391
Hauser v. Leviness	1539	v. Pitts-Kimball Co.	266,	v. Russell	2123
Hausknecht v. Claypool	6		1576, 2097	v. State	18
Hautz v. Rough	1312	v. R. Co.		v. Tappan	2525
Haven v. Foster	1271	54 Ill.	1943	Hearn v. Ins. Co.	2464
v. Mo. R. Co.	2495	17 Utah	460, 1951	v. Smith	1651
v. Wendell	736, 747, 754	v. Smith	1005, 1807,	Hearne v. De Young	
Haver v. R. Co.	949		1984	119 Cal.	406, 1078, 1971,
v. Tenney	1955	v. State		132 Cal.	74
Haverhill L. & F. Ass'n v.		Tenn.	1350	Heaton v. R. Co.	2572
Cronin	1984	112 Wis.	1385	Heath, re	2260
Hawes v. Dingley	321	v. Wells	728, 1623,	Heath v. Com.	363
v. Ins. Co.	1946, 1947		1831, 1959	v. Glisan	1951
v. State	1644, 1680, 1683,	v. West	1304, 1738	v. Keyes	609
	1684, 2167, 2302	Haymond v. Saucer	64, 288	v. Page	334
Hawhe v. R. Co.	2475	Haynes v. Brown	1074	v. State	
Hawkesworth v. Showler	609	v. Burlington	451	Fla., 20 S. E.	993
Hawkins v. Craig	1267	v. Gas Co.	2509	7 Tex. App.	2059
v. Grimes	2008, 2027	v. Heller	1350	v. Waters	1390
v. Hanson	1564	v. Hillsdale	438	v. West	1621
v. Howard	2200, 2211,	v. Ledyard	1890	Heaton v. Bank	1347
	2307	v. McRae	287	v. Dennis	1841
v. Publishing Co.	2354	v. State	10, 111	v. Findlay	2304, 2311
v. Rice	1212	v. Trenton	2220	Heaton's Estate	
v. Ross	1296, 1300, 1318	Hays v. Bonthalier	1681	135 Cal.	1492, 1495, 1605
v. State		v. Briggs	463	139 Cal.	1492
25 Ga.	111, 247	v. Harden	1033, 1505,	Heavy v. Odell	1873
7 Mo.	832, 861		1511, 1513	Hebbard v. Haughian	2312
v. Sumter	2211	v. Hays	2245	Heberd v. Myers	1271
v. Warre	2184	v. Millar	65, 1984	Hebert's Succession	1644, 2159
Hawks v. Baker	1819	v. State		Heckert v. Haine	1291, 1293
v. Charlemont	451	110 Ala.	1104	Heckle v. R. Co.	1750
v. Chester	1722	40 Md.	391	Hecla P. Co. v. Signa I.	
v. Patton	1971	v. Tacoma R. & P. Co.	905	Co.	1684
Hawksland v. Gatchel	2405	v. Terr.	1802, 1803	Hecox v. State	826
Hawley v. Robinson	1206	Hayslep v. Gymer	1072	Hector v. State	833
Hawley D.-D. F. Co. v.		Hayward v. Barron	1406, 1409	Hedden v. Overton	1275, 2105
Hooper	2442	v. Knapp		Heddle v. R. Co.	1012, 1721
Haws v. Hand	1409	22 Minn.	1802	Heddles v. R. Co.	1018
Hawthorne v. Hoboken	1674,	23 Minn.	1951	Hedge v. Clapp	1026, 1027,
	1680	Hayward Rubber Co. v.			1028
Hawver v. Hawver	406, 614, 615	Dunklee	1083, 1086,	Hedger v. Horton	1080, 1084
Hay v. Coventry	2459		1213, 2104	v. Ward	1651, 2141

	Section		Section		Section
Hedlum v. Holy Terror		Henderson v. State		Hepburn v. Cassel	529
Min. Co.	949	12 Tex.	63, 246	Hepler v. Bank	2098
Hedrick v. Gobble	1778	14 Tex.	2089	v. Hosack	1938
Heely v. Barnes	586	v. Terry	2311	Herbert v. Berrier	1312
Heflebower v. Dietrick	289	v. Wanamaker	1082	v. R. Co.	2552
Heffron v. Brown	715	v. Williams	1382	v. Tuckal	1503
v. Gallupe	1802, 2349,	Henderson Bridge Co. v.		Herblay v. Norris	1878
	2354	McGrath	2414	Herbst v. Asiatic Prince	1271
Hei v. Heller	2433	Hendon v. Morris	2433	Hercules, The	1641
Height v. People	1028	v. White	1225	Herd v. State	1450
Heilman Milling Co. v.		Hendrick v. R. Co.	461	Hereford v. Combs	66, 2054
Hotaling	1234	Hendrick's Case	318	v. People	2042
Heim B. Co. v. Gimber	2536	Hendricks v. State	2042	Herendeen Mfg. Co. v.	
Hein v. Holdridge	64	Hendrickson v. Com.		Moore	2155
Heintz v. Thayer	1651, 1677	64 S. W.	1263	Herlock's Adm'r v. Riser	1543
Heinze v. District Court	1862	Ky., 73 S. W.	1450	Herman v. Mason	1646
Heisler v. State	770	v. People	389, 390, 823,	v. State	363, 2497, 2511,
Heister v. Davis	2296		845, 852, 2266		2512
Helland v. Allen	96	Hendron v. Robinson	1878, 1899	Hermann v. State	222, 261,
Helbreg v. Schumann	2437	Hendry v. State	348		1154, 1335
Heldt v. State	841	v. Willis	1678	Hermes v. R. Co.	1750
Helfenstein v. Medart	461, 561,	Heneky v. Smith	1181	Herndon v. Black	17
	571	Henion v. R. Co.	461	v. Casiano	1239, 1651
Helfrich L. & M. Co. v.		Henislaw v. Freedman	2287	v. Givens	1195, 1258
Bland	1029	Henley v. Phillips	4, 1311, 1312	v. State	1938
Heller v. People	2354	Henly v. Hemming	1291, 1301	Herne v. Brown	2250
Hellman v. Hellman	1651	Henman v. Dickinson	2235	Herren v. People	925, 2277
Hellyer v. People	968, 1976	v. Lester	986, 1256, 1270	v. Strong	1651
Helm v. Cantrell	2097	Hennell v. Lyon	1215, 1218,	Herrick v. Ammerman	1681
v. Ducayet	2054		2158, 2529	v. Odell	2336
v. Shackelford	1681	Hennen v. Hacker	2240	v. Swomley	1669, 1890,
v. State	1476	v. Monro	1388		2008
Helms v. Green	916	Hennequin v. Naylor	321	Herries v. Waterloo	2382
v. U. S.	111, 968	Hennessey v. Ins. Co.		Herring v. Clobery	2294,
Helser v. McGrath	1890	74 Conn.	1261, 2537		2295, 2308
Helton v. Asher	1188, 1195	8 Wash.	1414	v. Levy	1532
Helwig v. Lascowski	987, 1005,	v. Wright	2375, 2376	v. Rogers	1297
	1270	Hennicutt v. Kirkpatrick	561	v. Skaggs	
Helzer v. Helzer	1209	Henry v. Adey	1681, 2163,	62 Ala.	1966
Hematite M. Co. v. R. Co.	748		2164	73 Ala.	777, 912, 1872
Hemenway v. Smith	2324	v. Bank of Salina	2222, 2282	Hersey v. Barton	1072
Hemingway v. Garth	905	v. Bishop	1290, 1292	v. Hutchins	285
Heminway v. Miller	1603	v. Brown	64	Hersom v. Henderson	1003,
Hemmens v. Bentley	1896	v. Diviney	1195		1612
Hemmenway v. Townner	2063	v. Hall	1736	Herster v. Herster	233, 1738
Hemmi v. R. Co.	283, 2509	v. Ins. Co.	1858	Herstine v. R. Co.	2509
Hemming v. Assur. Co.	1890	v. Lee	758, 759, 763	Hertfordshire murder	9
Hemmings v. Gasson	406	v. Leigh	1244, 1639	Hertig v. People	2165, 2167
v. Smith	2085, 2529	v. Norwood	73, 209	Herton v. U. S.	1854
Hempstead v. Reed	2573	v. People	105, 216, 968,	Hertrich v. Hertrich	1081, 1938,
Hempton v. State	233, 773,		1157, 1807, 2497		2336, 2341
	1639, 2354	v. R. Co.		Hesdra's Will	1033, 1129
Hendershof v. Tel. Co.	2382	50 Cal.	454, 455, 456	Hesler v. Degant	406
Henderson v. Anderson	529	2 Ia.	1943	Heslop v. Heslop	280
v. Cargill	2083	v. Salina Bank	2260	Hess v. Griggs	1291
v. Com.		v. Sneed	2338	v. Lowrey	940, 1700,
Ky., 72 S. W.	1447	v. State	293		2220
98 Va.	2513	v. Taylor	1960	v. Oregon G. B. Co.	2554
v. Galloway	1664	Henry Coxon, The	1641	v. R. Co.	2220
v. Hackney	1678	Hensel v. Maas	2530	v. State	703, 1339
v. Hart	1086	Henshaw v. Davis	1549	v. Wilcox	1873, 2115
v. Haynes	987, 1615,	Hensley v. Com.	987	Hesse v. C. S. & H. R.	
	1985	v. Tarpey	1219	Co.	2509
v. Jones	1124, 1125, 1126,	Hensoldt v. Petersburg	1350,	v. St. John R. Co.	285
	1127, 1131		1684	Hesser v. Rowley	1633
v. R. Co.	454, 455, 456	Henson v. State	111, 1037	Hessick v. Hessick	2526
v. State		v. Veatch	73, 74	Hester v. Com.	390, 1124,
70 Ala.	580, 1781	Henthorn v. Doe	1680,		1127, 1131
95 Ga.	852, 2281		2141, 2573	v. Hester	610, 2237, 2336

TABLE OF CASES.

RES

	Section		Section		Section
Hester v. Lumpkin	1035	Higdon v. Rice	2477	Hill v. Hill	1320
Hetch v. Eherke	1640	Higdon's Heirs v. Higdon's		v. Hill's Adm'r	
Heth v. Young	1387	Devises	2235	9 Ala.	728
Hetherington v. Kemp	95	Higginbotham v. State		32 Pa. 1603, 1645,	2086
Hengh v. Garrett	2212	Ala., 29 So.	1974	v. Home Ins. Co.	561
Heuston v. Simpson	2384	Tex Cr., 20 S. W.	166	v. Kerr	665
Hewatson v. Tookey	2218	Higgins v. Andrews	89	v. Manchester & S. W.	
Hewes v. Fruit Co.	1078	v. Cal. P. & A. Co.	2463	Co.	1074
v. Glos	2515	v. Carlton	1029, 1244,	c. Miller	
v. Wiswell	1314		1938	50 Kan.	1876, 2503
Hewett v. Hurley	1958	v. Dewey	1951	7 La. An.	1878
Hewitt v. Bank	1684	v. Higgins	561	v. Montgomery	1011
v. Clark	771, 1969, 2097	v. Nethery	1938, 2500	v. Nall	1308
v. Corey	1126, 1128, 1129	v. People		v. Nisbet	1651, 2140, 2146
v. Eisenbart	1719	157 Ind.	736	v. Norris	1676
v. Pigott		58 N. Y.	1135	v. North	416
7 Bing.	1858	v. Reed	1267, 1269	v. Packard	1271, 1279
5 C. & P.	2104	v. Shepard	1062	v. People	1850, 1852, 1853
v. Praine	2383	v. Senior	2438	v. Pratt	1073
v. State	1244	v. Spahr	1086	v. Proctor	613, 1566, 1568
Hewlett v. Wood	1390	v. State	343	v. R. Co.	
v. Henderson	1233	v. Watson	1195, 1196	55 Me.	461, 1951
v. Cock	2141	Higginson v. Clowes	2442	100 Ala.	461
v. Wood	1958	Higgs v. Dixon	1290	v. State	
Hey's Case	1842	v. Shehee	1536	Ala., 34 So.	398
Heylor v. Hall	2352	High v. Pancake	1566, 1569,	41 Ga.	605, 1438
Heyn's Case	2239		1778	64 Ga.	2355
Heyward, re	1909	Higham v. Ridgway	1465, 1476,	91 Ga.	2354
v. Hazard	689, 1938		1584	4 Ind.	133, 987
Heywood v. Reed	64, 253,	v. Vanosdol	17, 1730	5 Lea	784
	1109	Highfield v. Peake	1215, 2158	64 Miss.	1443
Hibbard v. Russell	581, 1969	v. Phelps	1651	42 Nebr.	987
Hibberd v. Knight	2308	Highland Avenue & B. R.		91 Tenn.	987, 1117,
Hibbs v. Ross	1647	Co. v. Sampson	571		2277
Hice v. Cox	905, 907	Highland Turnpike Co. v.		22 Tex. App.	1842
Hickey v. Campion	2061	McKean	1074	17 Wis.	759
v. Fitzgerald	364, 986	Highlander v. Fluke	1086	v. Sturgeon	1951, 2103
v. Morrissey	1646	Highley v. Bank	907	v. Taylor	1225, 2143
v. R. Co.	461	Highsmith v. State	1219, 1672	v. Townsend	1209, 1298
Hickinbotham v. Leach	73	Hight v. Wilson	1290	v. Whidden	2433
Hickman v. Gillum	1215	Hightower v. Ogletree	702	v. Wiggett	2426
v. State	1938	v. Williams	2132	v. Wilson	2065
Hickory v. U. S.		Higley v. Bidwell	1587	v. Winston	1404, 1405
151 U. S.	905, 907, 1028,	Higlister v. French	216	Hill's Case	1749
	2008, 2016, 2018	Higman v. Camody	2508	Hill Estate Co. c. Whittlesey	
160 U. S.	276	Hihn v. Peck	1664		2580
Hicks v. Bradner	619	Hilbert v. Com.	2336	Hill Mfg. Co. c. P. & N. Y.	
v. Chouteau	2135	Hilborn v. Alford	1300, 2132	S. Co.	461
v. Coleman	1225, 2132	Hildebrand v. Carroll	2508	Hillian v. State	2060
v. Cram	1624	Hildeburn v. Curran	1020, 1021	Hiiliard v. Beattie	220, 1908
v. Hinde	2444, 2445	Hilders v. McCartney	461	c. Enders	1275
v. Ivey	2463	Hildreth v. Martin	1072	v. Wylie	923, 1985
v. Person	709, 2008	Hildyard v. Smith	1858	Hills v. Barnes	2525
v. R. Co.		Hiler v. People	2085, 2086	v. Farmington	2434
S. C., 38 S. E.	763	Hilker v. Hilker	64	v. Ins. Co.	1946, 1947
63 S. C.	1984	Hill v. Aland	1858	v. Jacobs	1208
v. Stone	1021	v. Amer. Surety Co.	1947	c. Ludwig	1085
v. Thomas	1062	v. Aultman	1195	v. State	2239, 2395
v. Williams	1960	v. Bacon	1352, 2582	v. Union L. & S. Co.	1862
Hicks' Estate v. Blanchard		v. Bahrns	1738	Hilton v. Guyot	1697
	2325	v. Bellows	1678	v. Mason	1960
Hieronymus v. Glass	2437	c. Bigge	2368	v. Roylance	1699, 2569
Hiers v. Risher	1587	v. Canfield	18	v. State	166
Hiersche v. Scott	75, 770	v. Com.	910, 2079, 2080	Hilts v. Colvin	1270
Higbee v. Dresser	2298	v. Crook	2463	v. R. Co.	96, 249
v. McMillan	608, 2235	v. Eldredge	667	Hilyard v. Harrison	1185, 1861
Higbie v. Ins. Co.	658, 1947	v. Goode	905, 1028	Himmelman v. Hoadley	1680,
Higdon v. Heard	2260, 2275,	v. Gust	1029		2167
	2282	v. Helton	584	Himrod v. Gilman	2008

	Section		Section		Section
Hinchcliff v. Hinman	1318,	Hoadley v. Hammond	1960	Hogan v. Robinson	1086
	1651	v. Northern Transp. Co.	5	v. Roche's Heirs	1938
Hinckley v. Somerset	252	v. Seward & S. Co.	451,	v. State	1620
v. Thatcher	2467		1896	Hoge v. Fisher	689
Hinde v. Valtier		Hoag v. Wright	991, 2015	v. Turner	617
1 McLean	1311	Hoard v. State	290, 500, 1106	Hoghton v. Hoghton	1062
5 Pet.	1684	Hoare v. Allen	1795	Hogins v. Brashears	1676
Hinde's Case	2250	v. Graham	2444	Hogsett v. Ellis	1195, 1778
Hindman v. Van Dyke	233	v. Silverlock	2582	Hoit v. Russell	463
Hinds v. Barton	454, 455	Hobart v. Hobart	1303, 1511,	Hoitt v. Moulton	694, 726,
v. Evans	1225		1513		923, 933, 987,
v. Harbon	571	Hobbs v. Batory	2438		1943, 1969, 1985
v. Keith	253, 1966	v. Beard	1189, 1269, 1651	Hoke's Exr's v. Fleming	1126
v. Kersey	1304	v. Duff	1329	Holbrook v. Debo	1587
v. State	391	v. Massasoit W. Co.	2413	v. Dow	987, 2277
Hindson v. Kersey	2049	v. Norton	2047	v. Gay	1561
Hine, re	771	v. State		v. Holbrook	
v. Pomeroy		75 Ala.	1878	113 Mass.	1086
24 Vt.	93	133 Ind.	1126, 1132	30 Vt.	1021
30 Vt.	379	Hobby v. Alford	1298	v. Jackson	18, 260
v. R. Co.	451, 1729	v. Dana	1947	v. Murray	1777
Hines v. Greenlee	1239	v. Wisconsin Bank	616	v. Nichol	1651, 1677, 2105
v. Johnston	1272, 1273	Hoby v. Jones	2083	v. Trustees	1195
v. Miller	2582	Hobe v. Swift	1249	Holcomb v. Holcomb	
v. Potts	2538	Hobhouse v. Hamilton	1650	28 Conn.	493, 932,
v. Soule	1080, 1082,	Hobson v. Ogden	1066		1822
	1083, 1085, 1257	v. Porter	1188, 1195	95 N. Y.	1934, 1938
v. Thorn	1225	Hock v. Hock	2048	v. Mosher	1195
v. Wilcox	2442	Hockenbury v. Carlisle	1680,	v. State	689, 1938
Hinkle v. R. Co.	987		2158, 2159	v. Tift	1681
v. State		Hockett v. Alston	2573	Holcombe v. Hewson	462
94 Ga.	857, 1841, 2264	Hocking, re	2528	v. State	1248
157 Ind.	1003, 2062	Hockmoth v. Des Grands		Holcroft v. Smith	1409, 1650
Hinkley v. Davis	1474	Champs	1956	Holden v. Ins. Co.	2388
Hinshaw v. State	41, 278, 285,	Hocks v. Sprangers	282, 1067	v. Jenkins	1295
	390, 1126, 1330,	Hodgdon v. Shannon	1778	v. Mfg. Co.	1976
	2363, 2497	v. Wright	2518	Holder v. State	987
Hinton v. Locke	2463	Hodge v. Palms	1240, 2141	v. U. S.	1842
Hipsley v. R. Co.	283, 437,	Hodges v. Bales	1126, 1127	Holdfast v. Dowling	1304
	438, 458	v. Bearse	458	Holdrege v. Watson	1014
Hirsch, re	1219, 2375	v. Bennett	2061	Holdsworth v. Mayor	905
v. Leatherbee L. Co.	1213	v. Drakeford	2434	Holladay v. Littlepage	1476
v. State	2281	v. Eastman	1300	Holland, re	2454
Hirschfeld v. Williamson	1086	v. Hodges		v. Barnes	923
Hirschman v. People	968,	2 Cush.	1278	v. Carter	1651
	1983	106 N. C.	1483	v. Holland	2067
Hirst's Case	1328	v. Percival	283	v. Huston	571
Hissrick v. McPherson	1536	v. Windham	211	v. Kindregan	2494
Hitch v. Wells	1511	Hodgkins v. State	1614	v. Reeves	1884
Hitchcock v. Burgett	132, 675,	Hodgkinson v. Willis	1215,	v. State	826, 861, 862,
	1021, 1755		2526		2071, 2073
v. Clendinen	1955	Hodgson, re	2065	v. Zollner	689
v. Grant	1141	Hodnett v. Forman	1312	Holleman v. De Nyse	2164
v. Moore	949, 963, 1106,	Hoe v. Nathorp	1215, 1218	Hollenback v. Fleming	1300
	1807, 2341	Hoener v. Koch	1951	v. Todd	2297
Hitchcox v. Hitchcox	2069,	Hoes v. Van Alstyne	1271	Hollenbeck v. Marion	1978
	2085	Hoff v. Fisher	1417	v. Ristine	2517
Hitchins v. Eardley	1492	Hoffman v. Crerar	2311	v. Rowley	792
Hitchon v. Best	2152	v. Harrington	1871	v. Stanberry	1234, 1245
Hite v. Com.	852	v. Kemerer	75, 210	Holler v. State	111
v. Shrader	1573	v. North Milwaukee	438	Holleran v. Meisel	1956
Hitner's Appeal	2336	v. Pack	1230	Holley v. Burgess	74
Hitt v. Sterling-Gould Mfg. Co.	2237	v. R. Co.,		v. Coffee	1672
		40 Minn.	657, 736, 754	v. State	
Hittner v. State	276	143 Pa.	451, 1168	105 Ala.	609, 1108
Hittson v. Davenport	1267, 1269	v. Smith	2121	39 Tex. Cr.	106, 396,
Hitz v. Algreen	2531	v. State			2277
Hix v. Drury	406, 1064, 2349,	93 Md.	923	v. Young	2593, 2594
	2354	97 Wis.	2497	Holliman v. Cabanne	1984

TABLE OF CASES.

HOL

	Section		Section		Section
Hollingham v. Head	377	Holt v. Walker	1083	Hopkins v. R. Co.	1951
Hollingsworth v. State		Holten v. Board	1623, 1943	v. Simmons	2005
53 Ark.	923, 953,	Holton v. Lloyd	2145	v. Smith	
	969, 987,	Holtz v. Dick	2337, 2341	11 John.	2117
	1022, 1112	Holtzman v. Hoy	1621	1 Ont. L. R.	2260
79 Ga.	907	v. Wagner	619	v. State	1451
111 Ind.	1230	Holy Cross G. M. & M. Co.		v. Stump	1387
v. Walker	2530	v. O'Sullivan	1951	Hopkins' Will	2026
v. Warnock	111	Homans v. Corning	581	Hopkinson v. Burghley	2286
Hollingsworth's Will	1738	Home v. Bentinck	2375	v. Knapp Co.	2570
Hollingworth v. Lucy	575	Home Fire Ins. Co. v. Berg	2304	v. Leeds	1890
Hollis v. Dashiell	2141	Home Ins. Co. v. Baltimore		Hopkinson's Adm'r v. Steel	770
v. Sales	1458	W. Co.	1062	Hopkinton v. Waite	1876
v. State	1974	v. Clark	1710	Hoppe v. Byers	112, 1736
Hollister v. Cordero	1671	Home Protection of N. A.		v. R. Co.	571, 1977
v. McCord	1684	v. Whidden	1202, 1206	Hopper v. Ashley	694
v. Young	1593, 1778	Homer v. Cilley	1225, 1651,	v. Beck	760
Holloway v. Rakes	1778		2138, 2141	v. Com.	660, 770, 1842
Holly v. Bass	1681	v. Everett	281	v. Dunsmuir	1856
v. Bennett	1684	v. Inter-Mountain A.		Hopps v. People	59, 228
v. Com.	949	Co.	2354	Hopson v. Caswell	2485
v. State	111, 247, 2550	v. Wallis	1312, 1320,	Hopt v. Utah	7, 824, 860,
Hollywood v. Reed	1807, 1908		1994, 2016		865, 866, 1977
Holman v. Austin	2210	Honeywood v. Selwin	2256	Horah v. Knox	1938, 1958
v. Bachus	2337	Honselman v. People	1135, 2056	Horan v. Byrnes	1042
v. Bank	1031, 1035, 1388	Honyman v. Campbell	401, 2090	Horbach v. State	246, 247
v. Kimball	2300	Hood v. Bloch	1161	Hord v. Colbert	18, 586
v. R. Co.	461, 682	v. French	1777	v. Dishman	1225, 1651
v. Riddle	2349	v. Mathers	1225, 1651, 1658	Horford v. Wilson	21
v. Whitaker	2465	v. Maxwell	716	Horkan v. Benning	1076
Holman's Heirs v. Bank of		v. R. Co.	340	Horn v. Noel	1249
Norfolk	2593	v. Reeve	1070	v. Ross	1257
Holmberg v. Johnson	2016	Hoodless v. Jernigan	1660	v. State	
Holmes v. Anderson	1651	Hook v. George	1040	102 Ala.	364
v. Baddeley	2294	v. Payee	167, 1151, 1154	Wyo., 73 Pac.	141, 363,
v. Boydston	1388	Hooker v. R. Co.	1750		866, 905, 1021,
v. Brown	406	Hooks v. Houston	1131		1974, 2497
v. Coryell	2141, 2143, 2146	Hooper v. Chism	1278, 2105	Hornbeck v. State	1138
v. Deppert	2105	v. Gumm	2317	Hornberger v. State	2512
v. Fond du Lac	613	v. Hall	1225	Horne v. Mackenzie	745, 749
v. Goldsmith	377, 693,	v. Harcourt	2306	v. Mehler	2572
	2016, 2026	v. Moore		v. Smith	2220
v. Hinkle	1873	3 Jones	953, 1028, 1985	v. Williams	
v. Holloman	1310, 1316	5 Jones	2573	12 Ind.	786, 1842
	1317, 2222	v. R. Co.	1387	23 Ind.	2098
v. Holmes	2083	Hoopes v. De Vaughn	1404	Horner, re	2463
v. Hunt	1354	Hoosier Stone Co. v. Mc-		v. Com.	953
v. Jones	1064	Cain	2509	v. Spelman	1681
v. Marsden	750, 1532	Hoover v. Gehr	1548, 1558, 1561	v. Yance	1730, 2338
v. Matthews	2437	v. McChesney	2264	Hornish v. People	2501
v. Pontin	1312	v. Patton	20	Horsburg v. Baker	2256
v. Roper	1085	v. State		Horseman v. Todhunter	1195,
v. Sawtelle	1779	Ind., 68 N. E.	15		1269
v. State		48 Nebr.	1938	Horsley v. Garth	1352
88 Ala.	692, 988, 1983	35 Tex. Cr.	2242	Horton v. Green	569, 662, 1975
108 Ala.	1239	Hope v. Hurt	1681	v. State	
136 Ala.	1966	v. People	351, 414	18 Ala.	1398
v. Stateler	928, 1117	v. R. Co.	2390	110 Ga.	396
v. W. R. E. Co.	1058	Hope's Appeal	112, 1203	v. U. S.	682, 944, 1938
Holmesly v. Hogue	334	Hopkins v. Albertson	1304, 1306	Hosack v. Rogers	603
Holsenbake v. State	2071	v. Chung Wa	2527	Hosford v. Rowe	1461
Holsten v. Jumpson	2466	v. Com.	106	Hoshauer v. Hoshauer	1738
Holston v. R. Co.	1013	v. De Graffenreid	1304,	Hosic v. R. Co.	461
Holt v. Collyer	2464		1306, 1321,	Hoskins v. Miller	1238
v. Miers	1208		1513, 1664	v. State	318, 2484
v. State		v. Grimshaw	2334	Hoskinson v. Adkins	1651
9 Tex. App.	1840	v. Hopkins	1154, 1807	Hoskison v. R. Co.	455
39 Tex. Cr.	273, 347,	v. Megguire	728	Hosmer v. Groat	1040
	1079, 2279	v. Millard	1678	Hotard v. R. Co.	1225

	Section		Section		Section
Hottle v. Weaver	1671	Howard v. Gt. Western Co.	665	Howland v. Crocker	1587
Houck v. Wright	2435	v. Howard	1072	v. Jacobs	2349
Houdeck v. Ins. Co.	1062	v. Illinois T. & S. Bank	797,	v. R. Co.	
Houghtaling v. Kilderhouse	66		1644, 1646	110 Cal.	571, 1951
v. R. Co.	716	v. Ins. Co.		115 Cal.	199
Houghton v. Jones	1890	4 Den.	379, 987, 1021,	v. Westport	714
v. Koenig	1300		1023, 1770, 1943	Howley v. Whipple	1236, 2154
v. Page	529	109 Mass.	2464	Howser v. Com.	655, 1375,
v. Paine	1249	v. Johnson	770		1395, 1639,
Houk v. Allen	2354	v. McCall	2356		1710, 1910
Houlditch v. Donegall	1347	v. McDonald	1012	v. Pepper	1351
Houlton v. Manteuffel	667, 1493,	v. McDonough	736, 745,	v. R. Co.	2509
	1503, 1646		747, 748, 754, 763	Hoxie v. State	2230
Haupt v. Haupt	2085	v. Moot	1354, 1398	Hoxsie v. Lumber Co.	719
House v. Beak	1519, 1538,	v. Newsom	2115	Hoy v. Morris	2326
	1552, 1555	v. Patrick		v. State	1038
v. Camp	913	38 Mich.	1018, 1404,	Hoyatt v. Phifer	1082
v. Fort	571		1406, 1408	Hoye v. State	111, 2354
v. House	2311	43 Mich.	1029, 2015	Hoyle v. State	2059
v. Metcalf	461	v. People		Hoyt v. Beach	2531
v. Robertson	2525	27 Colo.	78, 204, 1620	v. Des Moines	438, 458
Household F. & C. A. Ins.		185 Ill.	682, 1726	v. Hoyt	2382, 2388
Co. v. Grant	2410	193 Ill.	2515	v. Jeffers	454, 455, 461
Houseman v. Roberts	1208	v. Providence	561, 714,	v. People	2056
Houser v. State			1943	v. R. Co.	
86 Ind.	133	v. Quattlebaum	1275	57 N. Y.	571
93 Ind.	64	v. R. Co.	747	118 N. Y.	458
Housh v. People	347	v. Russell		v. Shipherd	1684
Houstman v. Thornton	2531	104 Ga.	1309	Hronek v. People	1820, 1828
Houston v. Blythe	797, 1239,	75 Tex.	270, 797,	Hubbard v. Briggs	1032
	1408		1487, 2019	v. Dewey	1352, 1676
v. Brush	1951	v. Sexton	406	v. Greeley	2420
v. Gran	104	v. Sheward	94	v. Hubbard	1842
v. McCluney	1085	v. Shields	1351	v. Kelley	1244, 1678
v. Perry		v. Smith	1256	v. Lees	1496
3 Tex.	1239	v. Snelling	1085, 1513	v. Moore	1640
5 Tex.	1239, 2159	v. State		v. R. Co.	458
v. Spruance	1684	108 Ala.	2494, 2497	Hubbell v. Bissell	1938
v. State		73 Ga.	2570	v. Grant	2242
114 Ala.	1305	109 Ga.	1079	v. Osborn	1908
13 Ark.	2570	32 Ind.	905	v. Ream	1839, 1873
Houston E. & W. T. R. Co.		v. Tenney	615	Hubert v. Bartlett	1239
v. Campbell	1078	v. Thompson	2374	Huckabee v. Shepherd	1186,
v. De Walt	1067	v. Tremaine	1371		1225
Houston & T. C. R. Co.		Howard Co., Division of	1350	Huckins v. Ins. Co.	770, 777,
v. Burke	657, 760	Howard H. I. Co., <i>ex p.</i>	1350		2125
v. Cowser	461	Howe v. Fleming	1195	v. State	2201
v. Patton	208, 1984	v. Howe	1739	Huddle v. Martin	1012, 1013
v. Smith	1951	v. McBride	1955	Huddleston v. Coyle	701, 2008,
Houston & T. R. Co. v.		v. McKernan	2212		2016
Odum	1350	v. Medaris	283	Hudgins v. Bloodworth	1021
Houze v. Houze	1186, 1681	v. Reed	334	v. State	247
Hoverson v. Noker	613	v. Taylor	1195	v. Wrights	167, 1154,
Hovey v. Chase	672, 680, 728	v. Thayer	376, 1908		1605
v. Grant	321	Howe M. Co. v. Stiles	1195	Hudnutt v. Comstock	760
v. Hovey	1075	Howel's Case	987, 1896, 1898	Hudson v. Appleton	1384
v. Long	1387	Howell v. Barden	1738	v. Daily	1681
v. Sawyer	1977	v. Cheatham	406	v. Green H. & S.	
Hovill v. Stephenson	583, 1316	v. House	1188, 1304,	Co.	1680, 1684
How v. Hall	1202, 1205		2521, 2522	v. Hulbert	529
Howard v. Bell	575	v. Howell	1779	v. Puett	1291
v. Braithwaite	528	v. Huyck	1204, 1205	v. R. Co.	
v. Brower	620	v. Lock	586	59 Ia.	283, 458
v. Canfield	735, 753	v. Reynolds	1029, 1031	92 Ia.	463, 719
v. Com.		v. Smith	715	v. Revett	2408, 2410, 2419
Ky., 61 S. W.	987,	v. State	247	v. Solomon	1351
	1079, 2059	Howell's Lessee v. Tilden	1564	v. State	
Ky., 69 S. W.	2354	Howes v. Colburn	233,	61 Ala.	396, 714
v. Coon	1681		682, 1021	137 Ala.	2115

TABLE OF CASES.

HUD

	Section		Section		Section
Hudson v. State		Hume v. Hopkins	1194	Hunter, The	291
3 Coldw.	1432	v. Scott	923, 987	Huntingdon v. Mildmay	1211
101 Ga.	276	Humes v. Bernstein	791, 794	Huntington v. Attrill	463
9 Yerg.	2349, 2354	v. O'Bryan	253, 255,	v. Cast	2577
Hudson's Case	528, 689, 1302,		1415, 1457, 1463	Huntington B. T. M. R.	
	2049	Hummel v. Kistner	2311	Co. v. Decker	96
Hudspeth v. State	1985	Humphrey v. Archibald	2374	Huntley v. Cage	2250
Huebener v. Childs	1556, 1576	v. Humphrey	64	v. Terr.	1045
Huet v. Le Mesurier	1644	v. State	133, 1005,	v. Whittier	95
Huey v. Huey	1876		1876, 1896	Huntly v. Compstock	1644
Huff v. Bennett	736, 758, 759,	Humphreys v. Blevins	2047	Hunton v. Hertz & H. Co.	2200
	760, 2098	v. Boyce	2232	Huntress v. R. Co.	2570
v. Campbell	1680	v. Collier	1244	Huntsman v. Nichols	377
v. Hall	714, 1195, 1280	v. N. N. & M. V. Co.	461	Huntsville R. Co. v. Cor-	
v. Nims	2016, 2018	v. Pensam	1388	pening	1890
v. State		v. Spear	1538	Huot v. Wise	2239
104 Ga.	1044, 1270,	Humphries v. Parker	728	Hupfer v. Nat'l Distilling Co.	
	1877	v. Taylor D. Co.	1856	114 Wis.	792
106 Ga.	1040	Hunley v. State	1877	Wis., 96 N. W.	794, 1750
Huffman v. Cauble	784	Hunnicutt v. Higinbotham	1960	Hupp v. Boring	1908
v. Click	1690, 1700	v. Kirkpatrick	714	Hurd v. Haggerty	1777
v. State	832, 861	v. Peyton	20, 1567, 1568	v. People	390, 2079,
Huggins v. Drury	2500		2079	v. State	2080
Hughes, re	1836	Hunscom v. Hunscom	1817	v. R. Co.	458
v. Biddulph	2294	Hunsinger v. Hofer	1086, 1890	v. West	1083
v. Budd	1208	Hunt v. Blackburn	2327	Hurlburt v. Bellows	903, 905
v. Canal Co.	1081	v. Boston	655, 1720	v. Dusenbery	2410
v. Clark	1388	v. Chosen Friends	1643,	v. Hurlburt	
v. Coal Co.	1890		1644	128 N. Y.	2312
v. Com.	1750	v. Coe	916	63 Vt.	905
v. Easten	1201	v. Collins	2524	v. Wheeler	1082, 1133, 1257
v. Felton	1350	v. Dubuque	437, 458	Hurlburt's Estate	1481, 1605
v. Garnons	2294	v. Eaton	2240, 2336	Hurlburt v. Leper	1013
v. General Electric L.		v. Gray	2525	Hurlbutt v. Butenop	1225
& P. Co.	451	v. Hewitt	1857, 1859	Hurley v. Osler	1082, 1086
v. Hays	1206	v. Hort	2473	v. State	
v. Hughes	21	v. Johnson	1304, 1651, 2141	29 Ark.	1404
v. Hughes' Ex'r	1738	v. Kile	1951	46 Oh. St.	761, 905,
v. Listner	2349	v. Lowell Gaslight			907
v. Muscatine Co.	1976	Co.	442, 457,	v. West St. Paul	1195
v. People	2354		681, 1378	Hurpurshad v. Sheo Dyal	1805
v. R. Co.		v. Massey	2520	Hurricane Tel. Co. v.	
Ky., 48 S. W.	1750	v. Owings	1651	Mohler	1856
65 Mich.	505, 506,	v. Rousmanier	2417	Hurst v. Beach	2475
	508, 509, 1820	v. Roylance	1133, 1249	v. Dippo	1196, 1672
v. Rogers	1994, 2021	v. Selleck	1225, 1651	v. Larpin	803
v. State		v. State		v. Parker	2538
70 Ark.	1908	135 Ala.	833	v. R. Co.	
109 Wis.	1442	22 Tex. Cr. App.	1350	49 Ia.	682
v. Ward	1028	v. Van Alstyne	1350	163 Mo.	1951
v. Wilson	2529	v. Weiner	1347	v. State	821
Hughey v. State	247	Hunt's Case	2250	Hurt v. Davis	1249
Huguot, ex p.	1404	Hunt's Heirs v. Hunt	689, 1938	v. Evans	1564
Huguley v. Holstein	728	Hunter v. Allen	2221	v. R. Co.	1944
Huidekoper v. Cotton	1416, 2363	v. Blount	2169	Hussey v. Elrod	2232
Huizega v. Lumber Co.	1951	v. Cobb	2184	v. Roquemore	1225
Hulet v. Barnett	2354	v. Grand Trunk R. Co.	2319	v. State	
Hulett v. Carey	1073	v. Hunter	2506	77 Ala.	619
v. Hulett	581	v. Leathley	2211	86 Ala.	205, 1620
Hulin v. Powell	1388	v. N. Y. O. & W. R.		87 Ala.	63, 195, 1614,
Hull v. Horner	1193	Co.	2568, 2580		1983
v. Lyon	2312	v. Randall	2363	Huston v. Council Bluffs	1639
v. Miller	1350	v. State		v. Plato	1872
v. State	904, 905	112 Ala.	1079	v. Schindler	2008, 2016
Hull's Will	689, 1073, 1511	74 Miss.	826	Hutchason v. State	619, 620,
Huls v. Buntin	1239	40 N. J. L.	1714, 1725,		2245
v. Kimball	1195, 1272		1745, 2236	Hutcheon v. Mannington	2165
Humble v. Hunter	2438	v. Trustees	1257	Hutchings v. Castle	1086
v. Shoemaker	905	v. Turnpike Co.	1354	v. Cavalier	923

	Section		Section		Section
Hutchings v. Corgan	1330, 1388	Illinois C. R. Co. v. Ely	1842	Ingram v. State	
v. Van Bokkelen	2535	v. Greaves	2570	27 Ala.	2576
Hutchins v. Denziloe	2045	v. Griffin	2220	39 Ala.	203
v. Hutchins	1082, 2437	v. Hyatt	283	67 Ala.	988
v. Kimmell	1644, 2085	v. Houghton	1778	v. Watkins	2098
v. Van Vechten	1066	v. LeBlanc	2472	Inman v. Foster	406
Hutchinson v. Consumers'		v. McClelland	455, 456	v. State	
Coal Co.	2349	v. Manion	1062	65 Ark.	2237
v. Glover	2319	v. Smith	1943	72 Ga.	1851, 1852
v. Gordon	1189, 2125	v. Sutton	688, 1721, 1722	Innerarity v. Byrne	1871
v. Hutchinson	2538			v. Mims	1271
v. Kelly	1653, 1664	v. Taylor	612	Innes v. Milwaukee	1951
v. Peyton	1249	v. Treat	458, 1808	Inness v. R. Co.	104, 1725
v. R. Co.	1943	v. Van Horn	1941	Innman v. Jackson	2144
v. Sandt	2356	v. Wren	1350, 2577	Inslee v. Prall's Ex'r	1539
v. Tatham	2431, 2438	v. Wyatt	252	Insley v. Shire	1951
v. Wheeler	1022	Illinois Land & L. Co. v.		Insurance Co. v. De Wolf	1010
Hutchinson Cooperae		Bonner	1201, 1273	v. Eshelman	1947
Co. v. Snider	1951	Illinois Masonic Orphans'		v. Forcheimer	2573
Hutchison v. Bowker	2556	Home v. Gracy	1303	v. Gotthelf	770
v. Partick	1681	Imboden v. Mining Co.	1195	v. Higginbotham	1073
Hutchison Mfg. Co. v.		Imhoff v. McArthur	916	v. Mosley	1714, 1747, 1775
Pinch	2442	v. Richards	754	v. Newton	1073, 2120
Hutmacher v. R. G. &		Imlay v. Rogers	2363	v. Rodel	1938
E. Co.	1034	Imperial Gas Co. v. Clarke	1858	v. Smith	1374
Huttman, re	2375	Imperial Loan Co. v. Stone	2413	v. Tobin	443, 458, 1951, 1976
Hutton v. Mansell	1770	Independence v. Pompton	1501		
v. Warren	2440	Independence, The,	6	v. Weide	
Huxtable, re	2465	Independence Boulevard,		9 Wall.	736, 749, 754
Huyett v. R. Co.	456	re	2575	11 Wall.	38, 379, 461
Hyam v. Edwards	1644, 1651, 1709	Independent School Dist.		v. Weides	735, 736, 747, 754
Hyde v. Buckner	905	v. Hewitt	1225	International & G. N. R.	
v. Gannett	2334	Indiana C. Co. v. Parker	1158	Co. v. Anderson	1750
v. Stone	1062	Indiana R. Co. v. Maurer	1719	v. Dalwigh	770, 772
v. Swanton	794, 952	Indianapolis v. Huffer	1976	v. Dyer	933, 1029
v. Terr.	1270, 2277	v. Kingsbury	1967, 2413	v. Gordon	2354
v. Woolfolk	1923, 2020, 2021	v. McAvoy	1956	v. Klaus	1951
Hyde Park v. Canton	2506	v. Scott	571, 1168	v. Underwood	2220
v. Dunham	1943	Indianapolis D. & S. R.		Interstate Commerce Com'n	
Hygeia D. W. Co. v. Hygeia		Co. v. Pugh	1943	v. Brimson	2195
I. Co.	561	Indianapolis P. & C. R.		Ionides v. Pender	1946, 1947
Hygienic P. I. M. Co. v. R.		Co. v. Anthony	923, 928, 1985	Iowa V. S. Bank v. Sigstad	2445
Co.		Indianapolis St. R. Co. v.		Iowa & M. R. Co. v. Per-	
122 N. C.	2509	Whitaker	1750	kins	2451
126 N. C.	456	Indianapolis & C. R. Co.		Ireland v. Com.	149
Hyland v. Miller	1871	v. Caldwell	2572	v. R. Co.	456, 1890
Hylton v. Hylton	1296	v. Jewett	1203, 1268	v. Stiff	1263
Hylton's Lessee v. Brown	1859	Indianapolis & St. L. R.		Irish v. Smith	233, 1738, 1938
Hyman v. Eames	2354	Co. v. Stout	1388	Irish Society v. Bishop of	
Hynes v. McDermott	700, 797, 1271, 1684, 2008, 2011, 2536	Ingalls v. State	83, 85, 987, 1270, 2056	Derry	29, 1632, 1633, 1634, 1639
		Inge v. Murphy	1703	Irlbeck v. Bierl	1078
		Ingersol v. McWillie	2270	Irnham v. Child	2425
		v. Van Gilder	1680	Iron Mountain Bank v.	
		Ingersoll v. English	907	Murdock	377, 1003, 1013
		v. Hopkins	2475	Ironton Land Co. v.	
		Ingham v. Primrose	2419	Butchart	1944
		Ingilby v. Shafto	1856	Iroquois F. Co. v. McCrea	792
		Ingle v. Jones	1225	Irvin v. State	
		Inglebright v. Hammond	1624	19 Fla.	2354
		Inglis v. Usherwood	1271	1 Tex. App.	2060
		Ingoldsby v. Juan	2120	Irvine, ex p.	2271, 2280, 2282
		Ingraham v. Bockius	751, 1555, 1558	v. Buckloe	377
		v. Chapman	150	Irving v. Brownell	1225
		Ingram v. Music House	2434		

TABLE OF CASES.

IRV

	Section		Section		Section
Irving v. Irving	1312, 1513	Jackson v. Claw	2083	Jackson v. Packer	529
v. Motly	321	v. Cody	1313, 2529	v. People	1644, 2088
v. Shethar	1918, 1978	v. Cole	1257, 1275, 1674	v. Perkins	2205
Irwin v. Bear	1085	v. Com.		v. Phillips	2000, 2002,
v. Lever	1200	19 Gratt.	1448		2008, 2016
v. Reed	1409	Ky., 37 S. W.	961,	v. Rice	1225, 1290
v. State	247		1750	v. Robinson	1238
Isaac v. U. S.	2497	100 Ky.	238, 390	v. Root	1194, 1315
Isaack v. Clark	2549	96 Va.	581, 1841	v. Rumsey	583
Isabella v. Pecot	1271	98 Va.	246	v. Russell	1195, 1335, 1573
Isenhour v. State	569, 687	v. Cooley	1487, 1605	v. Shearman	1257
Isham v. Cooper	2406	v. Crilly	1374	v. Sill	2471
v. Post	461	v. Crissey	1388	v. Smith	377
Isherwood v. Lumber Co.	1974	v. Cullum	1267	v. Son	914, 916, 1890
Isler v. Dewey		v. Davis	2141	v. State	
71 N. C.	1108, 1109	v. Denison	1232, 1257, 2307	53 Ala.	2245
75 N. C.	500, 934	v. Dickenson	2355	77 Ala.	287, 1111
Israel v. Brooks	2539	v. Dillon	1285	78 Ala.	988, 1612, 1983
v. State	2192, 2201, 2203	v. Ely	2432	106 Ala.	276, 2497
Itata, The	2566	v. Evans	1538, 1552, 1555,	131 Ala.	1350
Ivat v. Finch	1080, 1083, 1476		1558	6 Baxt.	246, 247
Ivelchester Case	1712	v. Etz	1124, 1125, 1126,	56 Ga.	1451
Iverslie v. Spaulding	1335		1502, 1605	Ga., 45 S. E.	1878, 2183
Ives v. Ellis	19	v. Feather R. W. Co.	1312,	14 Ind.	1842
v. Hamlin	1969		1890	56 Miss.	852
v. Kimball	1651	v. Filteau	1898	59 Miss.	843
v. Leonard	561, 2027	v. French	2326	75 Miss.	1270
v. Medcalfe	1065	v. Frier	1192, 1194, 1196	39 Oh. St.	852, 855
Ivey v. State	1012, 1013	v. Gager	1309, 1312	7 Tex. App.	2089
Izer v. State	2362, 2363	v. Goes	2465, 2529	8 Tex. App.	2085
		v. Gridley	1817, 1820	31 Tex. Cr.	2273
		v. Hart	2463	81 Wis.	1397, 1398,
		v. Heath	2235		2098
		v. Huey	2054	v. Stetson	406, 1064
		v. Irvin	382	v. Tallmadge	1877
		v. Jackson		v. Thomas	
J.		5 Cowen	586	1 B. & S.	905, 917,
Jaccard v. Anderson	1387,	40 Ga.	2337, 2341		1040
	1668, 2098	47 Ga.	1195	8 Jur. n. s.	958
Jack v. Kiernan	1681	80 Md.	1492, 1603	v. Thompson	744, 1311
v. Mutual R. F.		82 Md.	564, 1612	v. Timmerman	334
Life Ass'n	340, 1750,	4 Mo.	2106	v. Tollette	1949
	1754	v. Johnson	1677, 1680	v. U. S.	826, 841
v. Naber	2349	v. Jones	1858	v. Vail	1257, 1314
v. Russey	2237	v. Kniffen	1367, 1432, 1738	v. Van Dusen	610, 693,
v. Woods	1408	v. King	1644, 2529		2008, 2016
Jackman's Will	1738	v. Kingsley	1297, 1298,	v. Van Slyck	1207
Jacks v. Adamson	2450		1314	v. Varick	901, 913, 1890
Jackson v. Alsop	2471	v. Lamb	1198, 2141	v. Vickory	1304, 1306, 1513
v. Bailey	1373, 1388, 2098	v. Lambert	1956	v. Vosburgh	1257
v. Bard	610, 1082, 1257	v. Laroway	2141, 2145	v. Vredenburg	1432, 1445,
v. Barron	2237	v. Lawson	1388		1778
v. Belknap	1257, 1674	v. Leek	900, 907	v. Waldron	1320, 1321,
v. Benson	2105	v. Leggett	1219		1513
v. Betts	1736	v. Legrange	1304, 1306,	v. Warford	1021, 1023
v. Blanshan	1195, 1311,		1513	v. Williamson	2356
	2138, 2141, 2145	v. Lewis	923, 937, 1292	v. Witler	1665
v. Boneham	1501, 1502,	v. Litch	1890	v. Woolsey	1195, 1199
	1644	v. Livingston	1257, 1267	Jackson Co. v. Arnold	2577
v. Boone	687	v. Lucett	1238, 1267, 1268	Jacksonville T. & K. W.	
v. Bowley	1295	v. Luquere	1304, 1306,	R. Co. v. Lock-	
v. Bradt	2141		1513, 2141	wood	950
v. Brooks	704	v. M'Call	1082	v. P. L. T. & M. Co.	456,
v. Browner	1487, 1490	v. M'Vey	291, 1257, 2105,		714, 1873
v. Burleigh	2158		2309	Jacob v. Bob	2067
v. Burnham	682	v. Miller	1257, 1587, 1633	v. Lee	1208
v. Burtis	2307	v. Myers	1257	v. Lindsay	735, 748, 754,
v. Burton	1306, 1313		1195, 1299		1253
v. Cary	1257	v. Osborn	987	v. U. S.	2535
v. Chamberlain	1313, 2141				
v. Christman	1302, 1309,				
	1311, 2141, 2529				

	Section		Section		Section
Jacob Tome Institute; see		Jefferson, <i>re</i>	2235	Jewell's Lessee <i>v.</i> Jewell	1486,
Tome Institute.		<i>v.</i> Burhans	392		1489
Jacobi <i>v.</i> Alabama	1404	<i>v.</i> Chapman	1797	Jewell Filter Co. <i>v.</i> Kirk	451
<i>v.</i> State	1404, 1405,	<i>v.</i> Conaway	1206	Jewett <i>v.</i> Brooks	682
	1725	<i>v.</i> State	995	<i>v.</i> Draper	2027
Jacobs <i>v.</i> Callaghan	1778	Jefferson Ins. Co. <i>v.</i> Co-	1947	<i>v.</i> Sundback	2446
<i>v.</i> Cater	406	theal		Jewison <i>v.</i> Dyson	380
<i>v.</i> Davis	1154	Jeffersonville M. & I. R.		Jenkins <i>v.</i> Noel	1871
<i>v.</i> Farrell	2117, 2122	Co. <i>v.</i> Bowen	1168	Jinwright <i>v.</i> Nelson	1651, 2168
<i>v.</i> Hesler	2336	Jeffery <i>v.</i> Walton	2447	Joannes <i>v.</i> Bennett	1198
<i>v.</i> Laybourn	585, 586, 587	Jeffries <i>v.</i> Harris	67	Job <i>v.</i> Tebbetts	1318, 2109
<i>v.</i> State	811, 1109, 1841	Jelks <i>v.</i> Barrett	2105	Jodrell, <i>re</i>	2462, 2463
<i>v.</i> Whitcomb	1714, 1730	Jenkin <i>v.</i> Ins. Co.	1726, 2510	Joe <i>v.</i> State	833
Jacob's Case	1327	Jenkins <i>v.</i> Biddulph	1650	John <i>v.</i> Bridgman	7
Jacobsen <i>v.</i> Metzger	344, 1890	<i>v.</i> Bisbee	2083	<i>v.</i> John	2308
<i>v.</i> Sidal	2088	<i>v.</i> Blizzard	255	John Hancock M. L. Ins.	
Jacocq <i>v.</i> Gilliams	1644	<i>v.</i> Irrigation Co.	283, 461	Co. <i>v.</i> Dick	1073
Jacques <i>v.</i> Horton	1267, 1268	<i>v.</i> Lewis	613	Johncan <i>v.</i> State	1841
<i>v.</i> Sax	261	<i>v.</i> N. C. O. Dressing		Johns <i>v.</i> Johns	2069
Jaffray <i>v.</i> Dennis	1271	Co.	1807	<i>v.</i> State	108
<i>v.</i> Thompson	1225	<i>v.</i> R. Co.	1164	Johnsen <i>v.</i> Oakland S. L.	
Jahnke <i>v.</i> State	363, 2312	<i>v.</i> State		& H. E. R. Co.	571
Jakway <i>v.</i> Jenison	1654	82 Ala.	1974	Johnson <i>v.</i> Allen	2349
James, <i>ex p.</i>	2235	Ala., 17 So.	1669	<i>v.</i> Anderson	1960
<i>v.</i> Biou	291	35 Fla.	852, 1669,	<i>v.</i> Armstrong	1890
<i>v.</i> Crockett	2494		2363	<i>v.</i> Arnwine	1194, 1195
<i>v.</i> Hodsdon	571	78 Ind.	2110	<i>v.</i> Ashland L. Co.	1225, 1269
<i>v.</i> Kirk	1219, 1680	41 Miss.	2071	<i>v.</i> Baker	2408
<i>v.</i> Letzler	1573	<i>v.</i> Tobin	2164	<i>v.</i> Blackman	1076
<i>v.</i> Mills	2309	Jenkins' Will	1302	<i>v.</i> Boice	613
<i>v.</i> Parnell	1313	Jenkinson <i>v.</i> Andrews	2320	<i>v.</i> Bolton	1278, 1677
<i>v.</i> R. Co.	1778	Jenks, <i>ex p.</i>	2206	<i>v.</i> Boorman	1168
<i>v.</i> State		Jenkyns <i>v.</i> Bushby	2294, 2319	<i>v.</i> Boyles	1778
115 Ala.	1124, 2512	Jenne <i>v.</i> Piper	616	<i>v.</i> Brown	112, 692, 923,
41 Ark.	2535	Jenner <i>v.</i> Joliffe	1257		928, 987, 1037, 1618,
<i>v.</i> Turnpike Co.	1186	Jenner's Case	2250		1738, 1908, 1985
James' Estate	987, 1481,	Jenness <i>v.</i> Jones	1062	<i>v.</i> Browning	1416
	1495, 1719	<i>v.</i> State	2088	<i>v.</i> Burden	1352
James R. & K. Co. <i>v.</i>		Jenney Electric Co. <i>v.</i>		<i>v.</i> Chambers	2573
Littlejohn	2596	Branham	561, 715,	<i>v.</i> Chapman	2063
Jameson <i>v.</i> Drinkald	1949		1938, 2570	<i>v.</i> Clinton	1876
<i>v.</i> Weld	795, 1158	Jennings, <i>ex p.</i>	2210	<i>v.</i> Com.	
Jamieson <i>v.</i> R. Co.	463	<i>v.</i> Albion	283	29 Gratt.	2081
Jamison <i>v.</i> People	13, 276, 1938,	<i>v.</i> Blocker	1083	Ky., 61 S. W.	987, 1750
	2115, 2497	<i>v.</i> Machine Co.	946, 987	115 Pa.	2265
<i>v.</i> R. Co.	1021	<i>v.</i> People	988	<i>v.</i> Culver	689, 736,
Jammison <i>v.</i> R. Co.	1078	<i>v.</i> R. Co.	456		1938, 1943
Janes <i>v.</i> Williams	1304	<i>v.</i> Rooney	254, 944	<i>v.</i> Davenport	2354, 2355
Jannay <i>v.</i> Howard	1669	<i>v.</i> Sturdevant	2304	<i>v.</i> Daverne	701, 2317
Jansen <i>v.</i> People	357	<i>v.</i> Webb	1491	<i>v.</i> Donaldson	2257
J'Anson <i>v.</i> Stuart	71, 73, 195	Jensen <i>v.</i> McCorkell	95	<i>v.</i> Fry	2048
Janssen's Case	2372	Jermain <i>v.</i> Denniston	1083	<i>v.</i> Gilsen	2104
Janvrin <i>v.</i> Fogg	15, 1058	Jerman <i>v.</i> Hudson	1313, 1320	<i>v.</i> Griswold	2454
<i>v.</i> Scammon	2269, 2271	Jernigan <i>v.</i> Carter	1273	<i>v.</i> Gulick	321
Jaques <i>v.</i> Horton	738, 2052,	<i>v.</i> State	1194, 1195	<i>v.</i> Gwinn	761
	2106	Jesse <i>v.</i> Parker	1304, 2049	<i>v.</i> Haight	1206, 1234
Jardine <i>v.</i> Sheridan	1062	<i>v.</i> Preston	1664	<i>v.</i> Harder	392
Jarrett <i>v.</i> Jarrett	689, 1938	<i>v.</i> State	1896	<i>v.</i> Hocker	1674
Jarvis <i>v.</i> Albro	2517	Jessup, <i>re</i>	166, 792, 1154	<i>v.</i> Holliday	1072
<i>v.</i> Robinson	2573	<i>v.</i> Cook		<i>v.</i> Husband	2354
<i>v.</i> State	1450, 1852	1 Halst.	1373	<i>v.</i> Johnson	
<i>v.</i> Vanderford	704	6 N. J. L.	2349	187 Ill.	2491, 2500
Jasper Co. <i>v.</i> Osborn	1951	<i>v.</i> Osceola Co.	437	44 S. C.	528
Jaspers <i>v.</i> Lano	1044	Jester <i>v.</i> Steiner	2008	14 Wend.	168, 2386
Jastrzemboki <i>v.</i> Marx-		Jesus College <i>v.</i> Gibbs	1212	<i>v.</i> Kerr	1779
hausen	406	Jeter <i>v.</i> Headley	1351	<i>v.</i> Kershaw	1230
Jeans <i>v.</i> Wheedon	1327, 1349	Jevens <i>v.</i> Harridge	1858	<i>v.</i> Kinsey	1028, 1031
Jefferds <i>v.</i> Alvard	1777	Jewell <i>v.</i> Center	912	<i>v.</i> Lawson	1487
<i>v.</i> People	499, 933	<i>v.</i> Chamberlain	1312	<i>v.</i> Leggett	905

TABLE OF CASES.

JOH

	Section		Section		Section
Johnson v. Levy	291	Johnson v. State		Jones v. Coopridger	1312
v. Lewellin	1298	17 Oh.	1135, 1136,	v. Degge	613
v. M'Call	1080		1138	v. Duchow	987
v. McDuffee	1416	27 Tex.	2349	v. Edwards	1208
v. McGehee	1680	1 Tex. App.	1375, 1398	v. Ellis	377
v. McGregor	617	10 Tex. App.	1841	v. Failes	1267
v. McGuire	1676, 2159	28 Tex. App.	2242	v. Finch	705, 2024
v. McKee	1718, 1938	Tex. Cr., 62 S. W.	568	v. Flint	1064
v. Marble Co.	1249	Tex. Cr., 71 S. W.	857	v. Fort	1390, 1872
v. Marlborough	2525	8 Wyo.	1750, 2079	v. Foxall	1061, 1062
v. Mason	1299	v. Stevens	2500	v. Fuller	1922, 1944
v. Mays	1678	v. Sullivan	2294, 2297	v. Galbraith	1873, 1938
v. Melville	605	v. Terr.	2513	v. Gale	2167
v. Morgan	415, 1237	v. Thompson	1944	v. Glidewell	1351, 1908
v. Parrotte	2354	v. Timmons	2141, 2144	v. Grantham	2111
v. Patterson		v. Van Velsor	1347	v. Grogan	1738, 1958
2 Hawks	1086, 1126	v. Ward	1075, 1674	v. Guano Co.	1672
13 Lea	2311	v. Watson	2235	v. Hagler	1186, 1225
v. People		v. Wiley	950, 1022, 1890	v. Harrell	1078
3 Hill	923, 1985	v. Wilson	1062	v. Harris	1817
197 Ill.	821, 866, 2071	v. Winship M. Co.	1164	v. Hatchett	1951
202 Ill.	778	Johnson's Will	1736, 2052, 2106	v. Henry	1296, 1300, 1456, 2132
v. Portwood	2446			v. Hoey	2053
v. Powell	1195	Johnson Steel Rail Co. v.		v. Hollopeter	1678
v. Powers		N. B. S. R. Co.	2194, 2212	v. Howard	1066, 1250, 2116
65 Cal.	1067	Johnston v. Cox	1225	v. Howland	581
40 Vt.	2098, 2100	v. Darrah	2450	v. Hunter	1603
v. Price	1549	v. Ewing Female Uni-		v. Hutchinson	1350
v. R. Co.		versity	1677	v. Inge	1573
111 Ill.	714	v. Haines	1651	v. Ins. Co.	379, 461, 944
47 Minn.	688, 1722	v. Ins. Co.	463, 728, 761, 1839	v. Jones	
56 Vt.	1976	v. Jones	944, 987, 1873, 1890	38 Cal.	1203
91 Wis.	2570	v. R. Co.	1696, 2507	1 Cox	1406
v. Rannels	1680	v. Slater	601	2 Hen. & M.	2118
v. Richardson	2415	v. Spencer	1021, 1041	102 Ky.	2516
v. Russell	1063, 1066	v. Todd	781, 804	9 M. & W.	1513, 2313, 2529
v. Sargent	1404, 1406, 1415	Johnston Harvester Co.		45 Md.	166, 1154, 1496
v. Shaw	2144	v. Bartley	1195	48 Md.	1603
v. Skipworth	1272, 1273	v. Clark	720, 1943	18 Me.	1645
v. Spaulding	736	Joice v. Branson	613	80 N. C.	1028, 1126, 1129, 1131
v. State		Joliet v. Blower	1698	17 N. J. Eq.	2067
17 Ala.	273, 276, 363, 389, 390, 397, 770	Joliet A. & N. R. Co. v.		137 N. Y.	1085, 2500
35 Ala.	705	Velie	2495, 2496	12 Pa.	1350
47 Ala.	619	Joliet S. R. Co. v. Caul	2220	12 Rich.	1510, 1513
50 Ala.	1432	Jolley v. Taylor, 1 Camp.		13 Tex.	923
59 Ala.	826, 2071	143	1205	v. Lake View	2572
73 Ala.	1684	Jolly v. State	63, 246	v. Lanier	2223
102 Ala.	1439, 1966	Jones v. Arterburn	1290, 1302, 1304, 1306, 1310, 1312, 1316, 1513, 2048	v. Layman	1770
14 Ga.	10, 664, 1839, 1842			v. Lee	1862
46 Ga.	1270	v. Blount	1320	v. Levi	1186, 1273
61 Ga.	506, 987, 1821, 1828, 1832, 2231	v. Botsford	1073	v. Loney	1013
65 Ga.	1750	v. Boyce	1949	v. Long	751, 1550, 1555
76 Ga.	1821	v. Brewer	1300, 1315	v. Love	1378
92 Ga.	2059	v. Brine	1354	v. Lovell	1174, 1312
4 G. Greene	2059	v. Brinkley	1311, 1513	v. Lumber Co.	461
2 Ind.	705, 1841, 2024, 2056	v. Brooke	529	v. McMullen	2144
21 Ind.	1109	v. Call	1254	v. Maffet	1684
65 Ind.	2056	v. Carrington	1633	v. Manchester	2286
80 Ind.	1267	v. Casler	2052, 2106	v. Marks	1651
54 Miss.	111, 247	v. Chiles	658	v. Mason	1316
63 Miss.	2243	v. Collins	233, 1938, 1958	v. Melindy	1269
Miss., 27 So.	247	v. Com.		v. Morgan	1651, 2138, 2141, 2143
53 Nebr.	2497	Ky., 46 S. W.	1018, 1442, 1447	v. Morrell	1072
59 N. J. L.	1157	86 Va.	1142		

	Section		Section		Section
Jones v. Morse	1086	Jones v. State		Joyce v. Ins. Co.	1947
v. Murphy	2048	32 Tex. Cr. 108	222	v. R. Co.	1976
v. Murray	2557	32 Tex. Cr. 135	521	Joyner v. Roberts	2553
v. N. Y. L. Ins. Co.	2520	v. Stevens		Joyines v. Statham	2417
v. Newman	2472	36 Nebr.	782	Judd v. Brentwood	1126, 1128, 2120
v. Orton	1556	11 Price	66, 70, 73, 74,	v. Fargo	461
v. Overstreet	2582		207, 209	v. Gibbs	852, 1065
v. P. B. L. Assur. Co.	2384	v. Stroud	745, 749	Judevine v. Weeks	290
v. Packet Co.	1621	v. Swayze	2408	Judge of Probate v. Briggs	2450
v. Parker		v. Tarlton	1214	Judges, Answer of the; see	
97 N. C.	2349	v. The Phoenix	1641	Answer, etc.	
20 N. H.	2529	v. Thompson	1730	Resolutions of the	
v. Pemberton	1856	v. Tucker	561	7 C. & P.	1262, 1349
v. People	2501	v. Turberville	1081	Judice v. Chretien	1678
v. Perry	251, 282	v. U. S.	2566	Judson v. Blanchard	1141
v. Phelps	1316	v. Walker	1225, 1239	v. Giant Powder Co.	2509
v. Pitcher	1647	v. Waller	2139	Judy v. Gilbert	2477
v. Portland	1721	v. Ward	736, 2098	v. Johnson	905, 1028
v. Pugh	2296	v. White		Julius K. Optical Co.	
v. R. Co.		11 Humph.	675	v. Treat	1208
107 Ala.	994	1 Stra.	1671	Jumpertz v. People	143, 144, 460, 1160, 2016
43 Minn.	683	v. Williams	378	Juneau Bank v. McSpedon	1389
80 Minn.	5	v. Wood	1387	Juniata Bank v. Brown	736, 1539, 1540
3 Sawyer	1417	Jones' Adm's v. Perkins	1938	Juniata Bldg. Ass'n v.	
v. Randall	1218, 1219, 2426	Jones' Will	1304	Hertzel	581, 2047
v. Reilly	2307	Joost v. Craig	1635	Junkin v. Davis	2164
v. Risley	2442	Joplin v. Johnston	1298, 1456	Jupitz v. People	56, 439
v. Roberts	1312	Joplin Waterworks Co. v.		Justen v. Schaaf	794
v. Robinson	1206	Joplin	1877	Justice v. Com.	2277
v. Ross	1674	Jordaine v. Lashbrook	528, 529, 1302	v. Elstob	1208
v. Shattuck	278	Jordan v. Black	1681	v. Luther	794, 1196, 1213
v. Simpson	1086	v. Bradshaw	1664	v. State	1442
v. State		v. Cameron	2141, 2145	Justices, Opinion of the	
61 Ark.	2497	v. Duke	794	35 N. H.	1350
76 Ala.	248, 951	v. Faircloth	1293	52 N. H.	1350
96 Ala.	925	v. Foster	658	Justus' Succession	1644, 1646
107 Ala.	1126	v. Holkham	2256		
113 Ala.	1290, 1651	v. Jordan	803	K.	
115 Ala.	907, 911	v. Lewis	2183		
116 Ala.	247	v. Money	2042	Kadlec v. Pavik	1712
120 Ala.	852, 988	v. Osgood	321, 334, 1978	Kaelin v. Com.	1398, 1404, 1418
137 Ala.	852, 1750	v. State		Kaenders v. Montague	1738
52 Ark.	1445	81 Ala.	293	Kahai v. Kamai	2525
59 Ark.	278	142 Ind.	2245, 2338	Kahlenbeck v. State	1873
Fla., 32 So.	1976	32 Miss.	825	Kahn v. Kahn	2433
1 Ga.	580	29 Tex. App.	2272	v. Triest-Rosenberg	
63 Ga.	413	v. Thomas	1681	Co.	283, 1976, 2509
65 Ga.	1072	v. Warner	1230	Kaime v. Omro	613
105 Ga.	2513	v. Wilkins	2125	Kain v. Larkin	1086
106 Ga.	222, 1154	Jordan's Case	1748	v. Old	2425, 2434
11 Ind.	2024	Jory v. Orchard	1234	Kairson v. Puckhaber	1890
60 Ind.	2008, 2016, 2021	Joseph v. Morrow	1898	Kaiser v. Alexander	1540
64 Ind.	1044, 1476	v. National Bank	2016	Kalankoa v. Henry	1890
71 Ind.	460, 1441, 1750, 1756	Joseph B. Thomas, The	285, 2509	Kaler v. Ins. Co.	1021
89 Ind.	2354	Joseph Hargreaves,		Kalk v. Fielding	1263
118 Ind.	18	Limited, re	2374, 2376	Kalmes v. Gerrish	1291
65 Minn.	1029	Joseph v. Furnish	1051, 1072, 1085	Kamm v. Bank	1066
65 Miss.	2327	Josephine v. State	852	Kane v. Ins. Co.	2047
67 Miss.	1021, 1022	Josey v. R. Co.	2169	v. N. C. R. Co.	2552
79 Miss.	1445, 1451	Joske v. Irvine	2494	v. N. Y. El. R. Co.	462
51 Oh. St.	1164	Joslin v. Giese	2432	Kankakee & S. R. Co.	
54 Oh. St.	745	v. State	1442	v. Horan	791
13 Tex.	1133, 2056, 2071, 2100	Josselyn v. McAllister	396		
3 Tex. App.	150 1840	Joy v. Hopkins	1943		
3 Tex. App.	575 2059	v. State	1029		
Tex. App., 31 S. W.	278	Joyce v. Hamilton	1085		

TABLE OF CASES.

KAN

	Section		Section		Section
Kannon v. Galloway	795, 2008, 2016	Kearsley v. Philips	1859	Kelly v. People	1072, 1079
Kansas Cent. R. Co. v. Allen	1948	Keash v. Santa Ysabel		v. Proctor	601, 619, 692, 1615, 1985
Kansas City F. S. & M. R. Co. v. Becker	2540	G. M. Co.	1698	v. Richardson	556, 715, 1919
v. Murray	2383	Keating v. Pacific S. W. Co.	2441	v. Riggs	1267
v. Perry	2494	v. People	570, 1157, 2497, 2513	v. Schupp	377
v. Stoner	1721	v. State	107	Kelliher v. Sutton	334
Kansas City M. & B. R. Co.		Keaton v. Greenwood	2235	Kellington v. Trinity College	1670
v. Burton	461	v. Jones	2432	Kello v. Maget	736, 1267, 1269, 2105, 2158
v. Smith	792	v. Mayo	1062	Kellogg, re	285
v. Spencer	1951	Keator v. People	928, 1985	v. Clyne	334
v. Weeks	1976	Kee v. State	56, 59	v. Krauser	1083, 1943
Kansas City Star Co.		Keefer v. Pacific M. L. Ins. Co.	1750	v. McCabe	987
v. Carlisle	406, 1781	v. Zimmermann	1320, 1513	v. Northrup	2437
Kansas City & S. W. R. Co. v. Baird	714, 720, 1168	Keeling v. Ball	1314, 1321	v. Scheuerman	1330
v. Ehret	714, 720	Keen v. Keen	112, 1736	Kellogg Co. v. Holm	916
Kansas City & T. R. Co.		v. Priest	1073	Kellum's Will	1511
v. Splitlog	463	Keenan v. Hayden	251	Kelly, re	2282
v. Vickroy	463	Keene v. Acc. Ass'n	2510	v. Alderson	68
Kansas M. O. M. Ins. Co.		v. Meade	2432	v. Brooks	1890
v. Rammelsberg	2498	Keener v. State	38, 111, 246, 247, 1616, 1852	v. Craig	1192, 1195, 1281
Kansas Pac. R. Co.		Keenholts v. Becker	406	v. Cunningham	2425
v. Miller	283, 702, 784, 1182, 1492, 1496, 1644, 1873	Keesier v. State	278, 949	v. Drew	2231
v. Peavey	1951	Keesling v. Powell	1460	v. Elevator Co.	1235
v. Watson	1503	Kefferv. State	20, 390, 1874	v. French	788
Kansas S. Y. Co. v. Couch	437	Kehoe v. Com.	580, 1986, 2287	v. Goodbread	1878
Kansas & T. Coal Co. v. Galloway	1416	Keist v. R. Co.	461, 1722	v. Oliver	2410
Kanter, re	2264	Keister v. Myers	2416	v. People	2060
Kaoru Yamataya v. Fisher	1354	Keith v. Kibbe	1540	v. Perrault	682, 689
Kapohaku v. Koa	2354	v. Lothrop	697, 2014	v. R. Co.	
Karr v. Jackson	1680	v. Marcus	1072	28 Minn.	283, 438, 458, 461
v. State	246	v. N. H. & N. Co.	208, 221, 1154	60 Wis.	1856
v. Stivers	1521, 1538, 1547	v. State		v. Sharp S. Co.	1299, 1302
Kassing v. Walter	1062, 1867, 2349	157 Ind.	140, 1977	v. Small	2232
Kasson's Est.	783, 987	Tex. Cr., 56		v. Smith	1876
Kastner v. State	969, 1853	S. W.	2061	v. State	
Katzer v. Milwaukee	2580	v. Taylor	318	60 Ala.	928
Kaufer v. Walsh	334	v. Tilford	415, 1943	72 Ala.	852
Kauffman v. Shellworth	1225	v. Wilson	1842	75 Ala.	1506, 1821
v. Swar	86, 334	Keithler v. State	2056	133 Ala.	133, 166, 1154
Kaufman v. Caughman	568, 1414, 1738	Keithley v. Stafford	1958	39 Fla.	2354
Kaufman's Estate	1738	Keithley's Estate	689, 1938	19 Ga.	784
Kaut v. Kessler	2312	Keithsburg & E. R. Co.		82 Ga.	1476
Kay v. Brookman	1312, 1513	v. Henry	1943	Ga., 45 S. E.	1841
v. Fredrigal	1028	Kelch v. State	2501	51 Nebr.	1853
v. R. Co.	1943	Kell v. Charmer	2467	v. Thuey	2525
Kean v. Com.	1668	Kellenberger v. Sturtevant	1256	v. U. S.	569
v. Davis	2444	Keller v. Donnelly	398	v. West Bend	1951
v. M'Laughlin	406	v. Gilman	1719, 1721, 1974	Kelly's Heirs v. McGuire	689, 1934, 1938
v. Rice	1681, 1684	v. Holderman	2414	Kelsea v. Fletcher	463, 754
Kearney v. Farrell	1730	v. Ins. Co.	2388	Kelsey v. Bush	2115
v. King	2575	v. Moore	1651	v. Hanmer	1188, 1194, 1195, 1225, 1651
v. London B. & S. C. R. Co.	2509	v. State		v. Ins. Co.	944, 995, 1719
v. State		102 Ga.	205, 770, 1841, 2060	Kelton v. Hill	1554
101 Ga.	784, 1243, 1447	123 Ind.	2079	Kelway v. Kelway	2290
58 Miss.	682	v. Vernon	613	Kemerer v. Bournes	1878
68 Miss.	194, 988	Kelly v. Andrews	2340	Kemp v. King	2211
v. Themanson	748	v. Combs	1062	Kemper v. Pryor	1312, 1314
Kearns v. Kearns	1267, 2052	v. Crawford	1525	Kempsey v. McGinniss	672, 681, 683, 1938, 1958
		v. Dillon	74	Kendall v. Field	1548
		v. Fond du Lac	1951	v. Limberg	1951
		v. Kelley			
		161 Mass.	2536		
		20 Wis.	1082		

	Section		Section		Section
Kendall v. May	492, 495, 496, 715 2450	Kent v. State		Kidd v. Manly	1680
v. Powers		64 Ark.	2059	v. State	1896
Kendall's Ex'rs v. Collier	656, 696, 705	42 Oh.	950, 1018, 1021, 1022	Kidder v. Bacon	1719
Kendrick v. Com.	2255, 2271, 2281	v. Walton	1083	v. Blaisdell	2579
v. Dellinger	907, 2520	v. Weld	1225, 1651	v. Dunstable	458
v. Kemp	73, 74, 406	Kent Co. v. Ransom	718	v. Smith	392
v. State		Kentucky C. R. Co.		Kidwell v. Com.	580
10 Humph.	1330, 1398, 2098	v. Barrow	455	v. State	2079
55 Miss.	111, 247	v. Smith	1164	Kierstead v. Brown	1062, 1073
Kenerson v. Henry	1640	Kentucky Cit. B. & L. Ass'n	2465	Kiesel v. Ins. Office	1978
Keniston v. Rowe	166	v. Lawrence		Kieth v. Kerr	1085
Kennard v. Burton	1718	Kentucky Lumber Co. v.		Kilbee v. Sneyd	1065, 1518, 2118
v. Carter	1186	Abney	1839, 1841	Kilbourn v. Fury	1225
v. Kennard	1703	Kenworthy v. Williams	689, 1938, 2500	v. Thompson	2195
Kennedy, re	905	Kenyon v. Ashbridge	2086	Kilbourne v. Jennings	
v. Com.		v. Mondovi	2383	38 Ia.	571
14 Bush	276, 995, 1021, 1040	v. People	2062	40 Ia.	2103
78 Ky.	2578	v. State	204, 205, 1620	Kilbride v. Carbon D. & M. Co.	451
v. Dear	1244, 2168	Kerber, re	2201	Kilburn v. Bennett	1784, 2530
v. Divine	1086	Kerfoot v. Chicago	961	v. Mullen	923, 2088
v. Dodson	1856	Kerker v. Carter	1891	v. Ritchie	1082
v. Doyle	1523, 1527, 1643, 1644	Kerkow v. Bauer	2582	Kilgore v. Bulkley	2440, 2567
v. Towke	1202	Kermott v. Ayer	565, 1271	v. Cross	1938
v. Gifford	74, 406	Kern v. Bridwell	20, 2220	v. Hanley	608, 620
v. Hensley	391, 397, 1730	v. Ins. Co.	1947	v. Jordan	2349
v. Kennedy	2354	v. Kern	2315	v. Magee	1350
v. Lubold	1567	Kernin v. Hill	2016	v. State	59, 279
v. Lyell	2319	Kerns v. Perry	2580	Killen v. Side	664
v. People	118, 382, 390, 1975, 1977	v. R. Co.	571	Killian v. R. Co.	664, 987, 1270
v. R. Co.		Kerr v. Com'rs	463	Killins v. State	363
67 Barb.	783	v. Gibson	1388	Kilmer v. Smith	2416
130 N. Y.	1719, 1750	v. Lunsford	681, 682, 689, 1669, 1738, 1938	Kilpatrick v. Com.	1442, 2578
v. Rountree	2184	Kerrains v. People	364, 581	Kilpatrick Co. v. Box	1067
v. Spring	208	Kerrans v. Brown	1021	Kilrow v. Com.	967, 2056, 2059
v. State		Kerrigan v. Conelly	2477	Kilvert's Trusts	2462
101 Ga.	293	v. R. Co.	1698	Kimball v. Bellows	1064
19 Tex. App.	1840	Kershane v. Collins	1678	v. Borden	455, 456, 2509
v. Upshaw		Kersher v. Kersher	680	v. Carter	1699
64 Tex.	1736, 1738, 2008, 2016	Kesse v. R. Co.	1908	v. Davis	1513, 2529
66 Tex.	923	Kessler v. Best	2372	v. Kimball	1104, 2046
Kennedy's Will	1081, 1736	v. M'Conachy	1550	v. Ladd	1778
Kennett v. Chambers	2566	Ketchingman v. State	398, 779, 923, 987, 1028	v. Morrill	1189
v. Engle	1005	Ketchum v. Brennan	1232	v. People	2167
v. Fickel	715, 720	Ketland v. Bissett	64	v. Saguin	1877, 1878
Kenniff v. Caulfield	1194, 2105	Kettering v. Jacksonville	1710	Kimberley's Appeal	1938
Kennon v. Gilmer	201	Ketterman v. R. Co.	2494, 2495	Kimble v. Joslin	1208
Kenny v. Clarkson	564, 1271, 2125	Key v. Thomson	21, 221, 681, 1133, 1871	Kimbrough v. Mitchell	2336, 2341
v. Walker	1891	Keyes v. Cedar Falls	1719, 1750	Kimmarle v. R. Co.	1651
Kenosha Stove Co. v. Shedd	1225	v. Mooney	1681	Kimmel v. Kimmel	52, 692, 979, 1985
Kenrick v. Kenrick	238, 2046	v. State	792, 925, 2277	Kimpton v. Glover	1382
Kensington v. Inglis	1195, 1198, 1268	Keys v. Warner	1879	Kinchelow v. State	106, 2056
Kent v. Garvin	751, 1530, 1558	Keyser v. Pickrell	2008, 2016	Kindel v. Le Bert	2578
v. Gray	7	Keystone Axle Co. v.		Kine v. Beaumont	1206, 1234
v. Lincoln	458, 1751, 1873, 1874	Leyda	2054	King v. Atkins	1890
v. Lowen	1080, 1084	Keystone Mfg. Co.		v. Badeley	2473
		v. Adams	379	v. Barrett	2327
		v. Johnson	1086	v. Bolling	1206
		Kibbe v. Bancroft	1525	v. Carpenter	1195
		Kibby v. Rucker	2085, 2086	v. Cole	1256
		Kibler v. McIlwain	1890	v. Dale	1680
		v. Com.	2513	v. Donahue	2018
		Kidd v. Alexander	1676	v. Faber	736
		v. Henderson	321	v. Fowler	2531

TABLE OF CASES.

KIN

	Section		Section		Section
King v. Frost	1779	Kingston v. R. Co.	64, 96, 987	Klenk v. Knoble	613
v. Hall	1225	v. Tappen	1898	Klepsch v. Donald	1164
v. Hersey	928	Kingwood v. Bethlehem	1195,	Kline v. Baker	1271, 2558,
v. Hopkins	575, 1354,		1314, 1513,		2573
	2494		2132	v. R. Co.	1976
v. Ins. Co.	1223, 1683	Kinnaird v. Saltoun	2165	Kling v. Tunstall	747
v. Jordan	791, 1339	Kinnard v. Willmore	2098	Klingemann's Goods	1674
v. Kenny	1186	Kinne v. Kinne	233, 689	Klinkner v. Schmidt	1586
v. Kent's Adm'r	2575	Kinnear v. Gallagher	1064	Kloke v. Martin	2526
v. Kersey	1770	Kinneberg v. Kinneberg	64	Kloman v. Kloman	2067
v. King		Kinney v. Berran	1404	Klotz v. James	1028
28 Ala.	2067	v. Farnsworth	1587	Klug v. State	1035
49 Ga.	2349	v. Flynn	693, 1300, 1316,	Knapp v. Fuller	406
Ky., 42 S. W.	2502		2004, 2008, 2529	v. Haskall	1873
2 Rob. Eccl.	2260	v. Hosea	1013, 1684, 2098	v. Schneider	1086, 1890
4 Taunt.	1858	Kinsman v. Crooke	1408	v. Smith	1960
90 Va.	2517	Kipp v. Silverman	763, 1126,	v. Wing	1871
v. Little	2144		1890	Knapp Case	219, 444
v. McCarthy	1404, 1725	Kirby v. Com.	1750	Knard v. Hill	1624
v. Maddux	2118	v. Gibbs	1650	Kneass' Case	2215
v. Mims	1225, 1651	v. Ins. Co.	1947	Kneeland v. State	2282
v. Mittalberger	770	v. Masten	1779	Knickerbocker v. Wilcox	1213
v. R. Co.		v. State	18	Kniffen v. McConnell	1623
34 Ia.	463, 1164	v. Tallmadge	285, 289	Knight v. Barber	2425
72 N. Y.	437, 1154,	v. U. S.	1388	v. Danler	1193
	1977, 1978	Kircher v. Larchwood	252	v. Epsom	2354
v. Raines	1658	Kirchner v. Collins	946	v. Fisher	2349, 2354
v. Randlett	1195, 2447	Kirk v. Carr	1505, 1511	v. Goodyear Mfg. Co.	461
v. Root	73, 74, 209,	v. Garrett	1051, 2363, 2554	v. House	1985
	406, 1974	v. Mowry	1668	v. Knight	
v. Ruckman	923, 1985	v. Nowell	1064	178 Ill.	254, 1778, 1960
v. Scheuer	1225	v. State	1304	12 La. An.	1225
v. Sears	2141	v. Terr.	861	v. Lawrence	1653, 1676
v. Shepard	2593	Kirkendall v. Omaha	463	v. Martin	1200, 1203,
v. State		Kirkham v. People	928, 968,		1205, 1297
40 Ala.	832, 841		1442, 1852	v. Overman W. Co.	1976
100 Ala.	2190, 2220	Kirkland v. Nisbet	1955	v. Packard	529, 531
17 Fla.	78	v. Smith	1681	v. Rothschild	716, 905, 1075
65 Miss.	246, 248	v. Trott	1799	v. Rushwood	575
74 Miss.	1873, 2512	Kirkman v. Oxley	73	v. Smythe	568, 1974
91 Tenn.	1450, 2501	Kirkpatrick v. Clark	1246	v. State	290
13 Tex. App.	1157	v. Jenkins	1738	v. U. S.	2272
v. U. S.	2374	v. Love	2122	v. Waterford	
v. Westbrooks	770	v. Pope Mfg. Co.	1859, 2219	2 Y. & C.	2294
v. Wicks	1025, 1028	v. Snyder	1943	4 Y. & C.	1205, 1465
v. Wilkins	1083	Kirksey v. Kirksey	2015, 2016	v. Whitmore	1187
v. Worthington		Kirschner v. State	987, 1270,	Knights v. Piella	2508
73 Ill.	1234,		1681, 2271	v. State	354
	1705, 2105	Kirsher v. Kirsher	2530	Knobell v. Fuller	73, 209
104 U. S.	6	Kirwan v. Cockburn	1684, 2535	Knoll v. State	1700, 1977
King Charles' Trial	1177, 2250	Kissam v. Forrest	1390	Knopke v. Ins. Co.	392, 2498
King of the Two Sici-		Kissel v. Lewis	1620	Knowles v. Crampton	1159
lies v. Wilcox	2258, 2259,	Kiskimmins v. Shaver	2260	v. People	1010, 2228,
	2276	Kitchell v. Beach	1738		2243, 2273
King's Lynn Case	1712	Kitchen v. Robbins	1053	v. Scribner	2498
King's Proctor v. Daines	2452	v. Tyson	1985	v. State	
Kingery v. Berry	1351	v. Union Tp.	1951	80 Ala.	457
Kinghorne v. Tel. Co.	1236	Kitchens v. Kitchens	2052	Tex. Cr., 72 S. W.	133
Kingman v. Cowles	1681, 2164	Kittanning Ins. Co.		Knowlton v. McMahon	2349,
v. Lynn & B. R. Co.	451	v. O'Neill	1770		2354
Kingsbury v. Davidson	2515	Kitteringham v. R. Co.	1951	v. R. Co.	2580
v. Moses	463, 658,	Kittredge v. Elliott	251	Knox v. Clark	1963
	2097	v. Russell	2097	v. Johnson	1017
Kingsford v. Hood	1777	Klanowski v. R. Co.	460	v. Knox	1738
Kingsley v. Kingsley	1703	Klatt v. Lumber Co.		v. Rossi	6, 2184
Kingston v. Horner	1267	92 Wis.	2525	v. Silloway	1225, 1314,
v. Lesley	1196, 1219,	97 Wis.	949		1651, 1676
	1644, 1672, 1709	Kleeberg v. Schrader	1213	v. State	286, 579
v. Phelps	1056	Kleiman v. Geiselman	1194	v. Vinsant	1350

	Section		Section		Section
Knox Co. v. Davis	1351	Kring v. Missouri	7	Lafayette v. Weaver	283
Knoxville Nursery Co. v. Com.	1275	Krippner v. Biebl	1951, 1976	Lafayette B. & M. R. Co. v. Winslow	1943
Knudson v. Grand Council	2434	Krise v. Neason	1188, 1195, 1279, 2052, 2132	Laffan v. U. S. Pulp Co.	1633
Koch v. State	1913, 2497	Kritzer v. Smith	1416	Lafiam v. Missisquoi	1058
Koechl v. U. S.	1699	Krogg v. R. Co.	1078	Lafin v. R. Co.	1943
Koehler v. Hill	1350, 1352	Krom v. Vermilion	1651, 1676	Lafone v. Falkland Islands Co.	2319
v. Koehler	377	Krueger v. Sylvester	1288, 1698	La Fontaine v. Southern Underwriters' Ass'n	2261, 2271, 2282
Koenig v. Arcadia	2509	Kruse v. S. & W. Lumber Co.	581, 778	Lafoon v. Shearin	2354
v. Bauer	1874	Kuen v. Upmier	1963, 1984	Laidlaw v. Sage	2494
v. Union D. R. Co.	949, 1756	Kuenster v. Woodhouse	933, 1005	Laing v. Barclay	2307
Koepke v. Milwaukee	1164	Kugadt v. State	2081	v. Kaine	1296
Koerner v. State	397	Kuglar v. Garner	253	v. R. & C. Co.	463
Kohl v. Frederick	2463	Kuhl v. Kuaner	2083	Laird v. Ass'n Co.	106
v. State	21, 905, 914	Kuhlman v. Brown	799, 811	v. Campbell	1556
Kohler v. Lindenmeyr	1074	v. Medlinka	571, 811	v. Kilbourne	1225
v. R. Co.	770	Kuhns v. Gates	1779	v. Laird	286
v. Wells Fargo & Co.	1873	v. R. Co.	65 Ia. 70 Ia.	Lake, re	1354
Kohley's Estate	1303, 1304	Kumberger v. Congress S. Co.	1951	v. Brown	1651
Kohn v. Marsh	2590	Kumler v. Ferguson	112, 392	v. Gilchrist	2124
Koiner v. Rankin	2349	Kupfer v. Bank	1195	v. People	672, 681
Kokes v. State	2577	Kurtz v. Hibner	2476, 2477	Lake's Case	1518
Kolb v. R. Co.	211, 987	v. Kurtz	2067	Lake Erie & W. R. Co. v. Craig	376
Kollock v. Parcher	1280	v. R. Co.	1085	v. Middlecoff	456
Kolsti v. R. Co.	461, 571, 1951	Kusch v. Kusch	613	v. Mugg	442, 451, 461
Komp v. Raymond	2432	Kusler v. Crofoot	2110	v. Nooker	2594
Konold v. R. Co.	199, 451	Kutcher v. Love	1062	v. Wilson	792
Koons v. R. Co.	461, 1951	Kux v. Bank	2025	Lake Lighting Co. v. Lewis	928
v. State	994, 2088	Kvammen v. Mill Co.	392	Lake Merced W. Co. v. Cowles	2579
Koontz v. O. R. & N. Co.	455, 456	Kwong Lee Wai v. Ching Sai	905	Lake Shore R. Co. v. Herrick	1714, 1725
Kopke v. People	1271	Kyburg v. Perkins	1633	Lake Shore & M. S. R. Co. v. Taylor	1671
Koplan v. Gaslight Co.	451, 949	Kyle v. Craig	112, 581, 770, 804, 1725	Lake Street Elev. R. Co. v. Burgess	791
Kornegay v. Kornegay	2012	v. Kavanagh	2466	v. Shaw	1719
Kossakowski v. People	2497	v. Kyle	1779	Lalance & G. M. Co. v. Haberman M. Co.	2319
Kost v. Bender	719	Kynaston v. East India Co.	1862, 2221	Laliberté v. R.	200, 986, 2196
Kosteletzky v. Scherhart	1938			Lallande v. Brown	1072
Koster v. Merritt	5			Lally v. Rossman	1680
v. Reed	1339, 2531			Lalane v. U. S.	2498
Kota v. People	1852			Lalor v. Lalor	1457, 1466
Kotwitz v. Wright	1549			Lamalere v. Caze	1021
Kotz v. Belz	1705, 1778			Lamance v. Byrnes	1873
Kowring v. Manly	2026			Lamar v. Allen	1605
Krager v. Pierce	1890			v. Pearre	657, 1065, 1066, 1458, 1678
Kramer v. State	617, 1106			v. Raysor	1651
Kramer v. Com.	354			La Master v. Dickson	2232
v. Goodlander	1567			Lamb v. Lippincott	1304, 1938
v. Kister	2312			v. Littman	1616
v. Messner	442, 451			v. Lynch	1938
v. State	1750			v. Moberly	1204, 1242, 1247
v. Weinert	233			v. People	2079
Krebaum v. Cordell	615				
Kreckeberg v. Leslie	1082				
Kreider v. Wisconsin R. P. & P. Co.	283, 458, 916				
Kreiter v. Bomberger	1061				
Kreitz v. Behrensmeyer	1493, 1497, 1712, 1784				
Kretzschmar v. Meehan	2575				
Kreuger v. Walker	1225				
Kreuzberger v. Wingfield	1960				
Kreuziger v. R. Co.	681, 1696				
Krewson v. Purdom	1086				
Kribs v. People	331				
Krider v. Philadelphia	1041				
Krieger, ex p.	2195, 2210				

TABLE OF CASES.

LAM

	Section		Section		Section
Lamb v. Stewart	1040	Landy v. Humphries	1750	Laros v. Com.	232, 857,
v. Ward	1890	Lane v. Agric. Soc.	1871, 1978		858, 1984
Lambe v. Manning	1777, 2410	v. Boicourt	2389	Larrabee v. Tribune Co.	406
Lambe's Case	848, 1327,	v. Bommelmann	1239	Larrison v. R. Co.	1350
	1328, 1475	v. Brainerd	1386	Larry v. Sherburne	1072
Lambert v. Cooper	2049	v. Bryant	1021, 1756	Larson v. Eau Clair	1908
v. La Conner T.		v. Cameron	1267	v. First Nat'l Bank	2572
& T. Co.	1756	v. Clark	1238	La Rue v. St. Anthony &	
v. Lambert	2239	v. Dighton	89	D. E. Co.	1067
v. People		v. Harlan Co.	949	Lasater v. Van Hook	1275
6 Abb. N. C.	1070	v. Harris	1662	Las Caygas v. Lari-	
29 Mich.	1142	v. Hill	1736	onda's Syndics	1272, 1676,
v. Weir	1651, 2167	v. M. & T. Hardware			2165, 2168
Lamberton, re	2375	Co.	1550	Lascelles v. State	318
Lamberts v. Cooper	1302, 1304	v. Moore	233, 1737	Lassels v. Chatterton	529
Lambeth v. Caldwell	2165	v. R. Co.		Lassing v. State	2477
v. State	1397, 1398,	132 Mo.	96	Lassiter v. State	1842
	1438, 1451	21 Wash.	2220, 2386	Lassone v. R. Co.	1527
Lambie's Estate	291, 1736,	v. Stanhope	2462	Last Chance Co. v.	
	2132	v. State		Ames	1013
Lambright v. State	1750, 2071,	Fla., 32 So.	247, 581	Laster v. Blackwell	1189, 1195,
	2073	151 Ind.	1447, 1450		1278, 2105
Lammiman v. R. Co.	2384	Lang v. Sanger	283	Latham v. Latham	238, 1379
Lamoille Valley R. Co. v.		v. Terry	1951	v. Smith	6, 2184
Bixby	561	v. Waters	619	v. Tombs	2531
Lamoureux v. Att'y-Gen'l	1503	Langdon v. Hulls	1206	Lathrop v. Atkinson	1668
Lamoureux v. Huntley	1778	v. Roane	1073	v. Bramhall	19
Lamos v. Snell	73, 209	v. Wintersteen	716	v. Mitchell	1208
Lamoure v. Caryl	1943	Lange, ex p.	2450	Latimer v. Elgin	1703
Lamoureux v. R. Co.	1116, 1117,	v. Perley	2311	v. Sovereign Camp	770
	2570	v. Schoettler	950	Latkow v. Eamer	1670
Lampley v. Scott	1142, 1362	v. Wiegand	987	Latour's Estate	2502
Lampton v. Lampton's		Langford v. Jones	904, 905	Latters v. Sussex	2250
Ex'rs	2123	v. U. S.	1819, 2349	Lattourett v. Cook	1271, 1681,
Lamson v. Boyden	2264, 2279,	Langham v. Sanford	2475		2110
	2281	Langhammer v. Munter	1640	Lau v. Fletcher	1951
Lanahan v. Com.	118, 276	Langhorne v. Com.	949, 987,	Lauer v. Estes	1712
Lanark v. Dougherty	1158		1003, 1005,	Laufer v. Traction Co.	199, 2125
Lanauze v. Palmer	1206		1021, 1022, 1985	Laughlin v. Com.	
Lancashire Ins. Co. v.		Langley v. Fisher	2235	13 Bush	7
Stanley	966	v. Mark	1154	Ky., 37 S. W.	855, 2081
Lancaster v. Lancaster's		v. Oxford	2593	v. Eaton	2086
Trustees	1698	v. Wadsworth	944, 2014	v. Harvey	1158
v. Smith	1352	Langsdale v. Woollen	1195	v. R. Co.	
v. State	2081	Langsdorf v. Field	1779	62 Mich.	1951
Lancaster Co. Nat'l Bank		Langston v. R. Co.	1984	80 Mich.	1721
v. Moore	1621	Langton v. Higgins	2425, 2440	v. State	1138, 1842
Lancey v. Brock	378	Langtry v. State	2086	Laughran v. Kelly	2042
Lancot v. State	2336, 2337,	Langworthy v. Green	1158	Laupahoe Sugar Co.	
	2505	Langigan v. North	1684	v. Wilder S. S. Co.	1951
Landecker v. Hough-		Lanning v. R. Co.	456	Laurence v. Laurence	1730
taling	1082	Lannum v. Brooks	1225	Laurenson v. State	531
Lander v. Goodenough	461	Lanpher v. Clark	204, 207	Laurent v. Lanning	1676
v. People	1745,	Lanphere v. State	398, 1013,	v. Vaughn	720, 1943
	1754, 1757		2061	Lauterbach v. Netzo	1890
v. Propper	1676	Lanquist v. Chicago	463, 1168	Lavalle v. People	2572
v. Seaver	64	Lansburgh v. Winsatt	561	Lavenburg v. Harper	1015
v. State	247	Lansky v. R. Co.	1873	Lavergne v. Elkins	1239
Landers v. Bolton	1225, 1312,	Lanter v. McEwen	406	Lavigne v. Lee	1126
	1320, 1321,	Lapham v. Atlas Ins. Co.	1947	Lavin v. LeFevre	1354
	1648, 1651, 1676	v. Kelly	764	v. Mutual Aid Soc'y	1646
Landis v. Turner	1537, 1538,	Laplane v. Mills	233, 437	Lavretta v. Holcomb	1250,
	1550, 1552,	v. Warren Cotton			1291, 1292
	1554	Mills	1938	Law v. Fairfield	1018
Landreth v. State	2081	Lapleine v. R. Co.	613	v. Merrills	1879, 2094
Landry v. Klopman	1681	Laporte v. Cook	461	v. Scott	2375
v. Landry	1267	Larkin v. Avery	1404	v. Woodruff	291
Landsberger v. Gorham	1890,	v. Baty	1779	Lawder v. Henderson	1890
	2301, 2327	Larkins v. Tartar	2349	v. Lawder	770

	Section		Section		Section
Lawes v. Reed	758, 759, 761	Leach v. Prebster	1938	Lee's Case	1022
Lawhorn v. Carter	1556	v. Shelby	2245	Lee Gon Yung v. U. S.	1354
Lawless v. Grogan	2466	v. Simpson	4, 1326, 1329, 1349, 1666	Lee Sing Far v. U. S.	2034
v. Guelbreth	1312, 1514	v. State	499	Leedom v. E. F. & C. Co.	344
v. Queale	1255, 1256	v. Swallow	2221	Leeds v. Cook	1207
v. Stamp	1664, 2579	Leach's Goods	1302	v. Debuys	2054
Lawlor v. Wolff	1976	Leache v. State	1841	v. Ins. Co.	1076
Lawrence, ex p.	2286	Leader v. Barry	1644, 2083	v. Lancashire	2444
Lawrence v. Barker	736, 900, 905, 907, 1021	Leahy v. R. Co.	1749	Leek v. Chesley	716
v. Boston	561, 677	v. State	1808	Lees v. U. S.	2257
v. Boswell	2355	Leake v. Westmeath	2110	Leese v. Clark	291
v. Burris	1225	Leaphart v. Leaphart	2235	Leeson v. Holt	255
v. Campbell	2294, 2300	Learned v. Hall	290	Leete v. State Bank	616, 2240
v. Clark	1208, 1244	v. Tillotson	1073	Lefebure v. Worden	1518, 1521
v. Dana	371, 1230	Learoyd v. Halifax J. S. B. Co.	2319	Lefever v. Johnson	784
v. Dowdell	2426	Leary v. Fitchburg R. Co.	2570	Lefferts v. State	1339
v. Dubois	613	v. R. Co.	461	Leforge v. State	398
v. Fulton	1225	Leath v. State	154	Le Franc v. Hewitt	1539
v. Grout	1680	Leathers v. Wrecking Co.	797	Leftley v. Mills	1635
v. Haynes	1563	Leavenworth T. & S. W. R. Co. v. Paul	1943	Legard v. Foot	2290
v. Hudson	1951	Leavitt v. Bartholomew	20	Legare v. Ashe	1267
v. Ins. Co.	1858, 2121	v. Cutler	1064, 1067	Legatt v. Tollervey	2183
v. Kimball	1469	v. Kennicott	2463	Legg v. Annapolis	1350
v. Lanning	1021	v. Simes	1206	v. Drake	915, 916, 1700, 1890
v. Mt. Vernon	65	Leazure v. Hillegas	1194, 1651, 2159, 2169	v. Legg	1271
v. State	363	Le Baron v. Crombie	1410	Leggate v. Clark	1671
v. Tennant	1566	Le Barron v. Le Barron	2220	Legge v. Edmonds	68, 269, 2063
v. Van Horne	2125	Leber v. R. Co.	1943	Leggett v. Boyd	607, 1481
Lawrence Co. v. Schmaulhausen	1351	Le Blanc v. Nolan	1877	v. Patterson	1660
Lawrence & W. R. Co.		v. Sweet	2509	v. State	
v. Hawk	714, 720	Le Brun v. Le Brun	2046	97 Ga.	1326
v. Ross	720	Leckey v. Blosier	64, 1770, 1974	15 Oh.	1781
Lawson, re	2525	v. Cunningham	1511	Leggo v. N. O. C. & B. Co.	1225
Lawson v. Conaway	568	Le Cointe v. U. S.	664	Legore v. State	357, 1135, 1898
v. Glass	745, 760	Lederman v. R. Co.	283		1835
v. Orear	253, 1186, 1623, 1959	Lee v. Birrell	2375	Le Grange v. Ward	
v. R. Co.	1951	v. Blandy	1225, 1657	Lehigh V. C. Co. v. Chicago	463, 1943
v. State		v. Gansell	521	Lehigh V. R. Co. v. McKeen	456
20 Ala.	1072	v. Getty	1239	Lehman v. Knapp	2486
32 Ark.	928	v. Hamilton	2119	Lehmann v. Chapel	1779
v. Swinney	398, 399	v. Heath	1064	v. Rivers	1681
Lawton v. Chance	1263	v. Henley	2426	Lehmie v. R. Co.	463, 714, 720, 1943
v. Chase	463, 716	v. Hill	1416		
v. Tarratt	20, 1086, 1235	v. Huson	406	Leibe v. Hebersmith	1676
Lawyer v. Smith	1511, 1737	v. Kilburn	253	Leiber v. Com.	1362, 1434
Laybourn v. Crisp	1594	v. Lee	2046	Leicester v. Haydon	1662
Layer v. Wagstaff	759	v. Meacock	2450	v. Walter	73, 74
Layman v. Brown	1675	v. Missouri P. R. Co.	1828	Leidlein v. Meyer	437, 792, 1164
Layman's Will	2329	v. Murphy	2529		
Layson v. Cooper	613	v. Pain	2463, 2477	Leigh v. Evans	2538
Layton v. Chaylon	564	v. R. Co.	1066	v. Leigh	2467
v. Hastings	1513	v. Read	2260, 2275	Leigh's Case	2250
v. Kirkendall	1898	v. State		Leighton v. Leighton	1670
Lazarus v. Lewis	1302, 1320	66 Ark.	987, 1138	v. Manson	1561
Lazier v. Com.	580	102 Ga.	821	v. People	1873
v. Westcott	1681	51 Miss.	580	v. Sargent	1984, 2349
Lea v. Henderson	210, 987, 2260	21 Oh. St.	987	Leinkauf v. Brinker	64
v. State	1618	Tex. Cr., 64 S. W.	498	Leiper v. Erwin	93
v. Wheatley	2290	v. Tapscott	1239, 1651	Leitch v. Ins. Co.	1947
Lea's Case	1674	v. Tinges	39, 377, 770	Leland v. Cameron	1195, 1521, 1523, 2107
Leach v. Burr	2495, 2500	v. Water Co.	1943	v. Wilkinson	1678, 2572
v. Hall	2506	v. Wheeler	392	Lemann v. Bonsall	2106
v. Hill	1067	v. Wisner	1318, 1677	Le Mere v. McHale	2203
v. Money	2264	Lee's Adm'x v. Lee	2110		

TABLE OF CASES.

LEM

	Section		Section		Section
Letmon v. Hartsook	1779	Letton v. Young	406, 1010	Lewis v. State	
Lem Moon Sing v. U. S.	1354	Lever v. Lever	1316	91 Ga.	1040, 1911
Lemon v. Dean	1303	Levers v. Van Buskirk	2313	4 Kan.	293, 326,
v. Johnson	1213	Levi v. Gardner	1082		347, 1037
Lemons v. State		v. Mylne	2559	v. Sutliff	1681
97 Tenn.	1442	Levin v. El. R. Co.	463	v. Terr.	2276
4 W. Va.	923, 1614	Levine v. Ins. Co.	1551, 1558	v. Turnley	2442
Lench v. Lench	89, 2054	Levison v. State	38, 142, 273,	Lewy v. Fischl	1129
Lendrum v. Deazley	380		276, 278, 826,	Lexington v. Long	463
Le Niemen	1641		855, 1475	Lexington & E. R. Co. v.	
Lenert v. State	2497	Leviston v. French	1387	Lyons	377
Lenney v. Finley	747	Levy v. Burley	1674	Ley v. Ballard	1302
Lennig v. Ralston	2413	v. Chicago N. Bank	2540	v. Barlow	1858, 2211
Lenning v. Lenning	2498	v. Pope	2313	v. Huber	1943
Lenoir Car Co. v. Smith	1841	v. State	2572	Ley's Case	1933
Lenox v. Fuller	1612, 1614	v. Superior Court	2257	Leyfield's Case	1179, 1193,
Lent v. Shear	1086, 1362, 1364	Levy & Cohn M. Co. v.			1211, 1681
Lentz v. Dallas	1951	Kauffman	2444	Leyman v. Levy	610
v. Martin	1186	Lewin v. Dille	1195	Lezinsky v. Superior	
Leo v. State	784, 1270	v. Simpson	437	Court	2195
Leominster Case	1712	Lewis v. Adams	1133	Li Sing v. U. S.	516, 2066
Leon v. Bouillet	2232	v. Alexander	2538	Libby v. Brown	1455, 1460
Leonard v. Bolton	1141	v. Alkire	1879	v. Clark	2437
v. Huntington	1647	v. Barker	142, 340, 1021	v. Land Co.	2446
v. Kingsley	1028, 1263	v. Beatty	1213, 1225	v. Scherman	458
v. Leonard	2351	v. Bell	568	Lichfield v. Bond	2257
v. Mixon	747	v. Bergess	1484, 1487	Lichtenberg v. Mair	1890
v. R. Co.	442, 451	v. Brown	658, 2097	Liddle v. Bank	1041
v. State		v. Bullard	2110	Liddon v. Hodnett	1239
115 Ala.	154	v. Burns	1774, 1777	Lide v. State	1807
60 N. J. L.	351	v. Com.	967	Liebman v. Pooley	1272, 1275
v. Young	1232	v. Dunne	488	Liebrandt v. Sorg	1770
Leonard's Succession	701, 2008,	v. Emery	1984	Life & Fire Ins. Co. v.	
	2016	v. Fernor	461	Ins. Co.	291, 1199
Leopold v. Van Kirk	1956, 1976,	v. Freeman	728	Liggett v. Glenn	1074, 2310,
	1977	v. Fullerton	371, 1230		2325
Leport v. Todd	1778, 2515	v. Gaslight Co.	199, 1040	Lightfoot v. Com.	247
Leppa v. Tribune Co.	2336, 2341	v. Gibson	2115	v. People	351, 1263, 1329,
Lerch v. Times Co.	2442	v. Glenn	1074		1667, 2103
Leroux v. Brown	5, 2454	v. Harris	2575	v. State	2081
Leroy & W. R. Co. v. Ross	1943	v. Hartley	1181, 1210	Lightner v. Wike	736, 2098
Leslie, re	2282	v. Havens	2154	Ligon v. Ford	75, 923
v. Com.	987	v. Hodgdon	1010	Lihs v. Lihs	2241
v. Hanson	1530	v. Hudmon	1254	Liles v. State	278
v. Hervey	2287	v. Ins. Co.		Lillibridge v. McCann	2570
v. R. Co.	655, 1951	10 Gray	719, 1390	Lillstrom v. R. Co.	2507
v. Sims	586	71 Ia.	1943	Lilly v. Larkin	1526
v. State	266, 285, 290, 2513	v. Kramer	736, 748, 751	Limburg v. Glenwood	
Lessee v. Hoge	2530	v. Londesborough	1869	L. Co.	283, 1951
Lesser v. New Hampshire		v. McClure	2580	Lime Rock Bank v.	
F. Co.	987	v. McGrath	2503	Hewett	2098
Lesser Cotton Co. v. R. Co.	455	v. McMullin	2349	Limerick Nat'l Bank v.	
Lester, re	2373	v. Maris	1290, 2048	Adams	377
v. Ins. Co.	2102	v. Marshall	1644	Linch v. Linch	1738
v. Jenkins	2450	v. Morris	1862	Lincoln v. Barre	561
v. People	1859, 2219, 2579	v. Norton	1518	v. Battelle	1271, 1275, 1832
v. Pittsford	458, 1938, 1951	v. Payn	1232	v. Chrisman	73, 406
v. State		v. Post	1028, 1029, 1037	v. Claffin	321
32 Ark.	499, 933	v. R. Co.	2415	v. Com.	714
37 Fla.	111, 1440, 1441,	v. Ringo	1297	v. Detroit	2383
	1442, 1446, 2277	v. San Antonio	1239, 1268,	v. Fitch	529
106 Ga.	2513		269	v. Haugan	1350
v. Thompson	1560	v. Sapio	696	v. Mfg. Co.	451, 655
Le Targe v. De Tuyll	2437	v. Smith	458	v. Power	2566
Letcher v. Morrison	2355	v. Stammers	1668	v. R. Co.	663, 1920
Le Texier v. Auspach	2232	v. State		v. Wright	1647
Lethulier's Case	2462	35 Ala.	1022, 1044,	Lincoln Ave. & N. C. G.	
L'Etoile	1641		1106, 1108	R. Co. v. Madaus	608, 619,
Lett v. State	1404	62 Ark.	2497		2235

	Section		Section		Section
Lincoln Mill Co. v. Wissler	2155	Lissac v. Crocker Est. Co.	1750,	Livingston's Appeal	1081
Lincoln R. Co. v. Cox	2509		2390	Livingstone v. Colpitts	1075
Lincoln V. P. & P. B. Co.		Lister v. Perryman	2554	v. Gartshore	2307
v. Buckner	93	Litchfield v. Merritt	610	Livermore F. & M. Co.	
Lincoln & B. H. R. Co. v.		Litcot v. Blackwell	1674	v. Union S. & C. Co.	792, 1005
Sutherland	714	Liter's Estate	4	Liverpool Ins. Co. v. Mc-	
Lind v. Lind	2530	Little v. Beazley	2016	Guire	1947
Lindauer v. Ins. Co	1960	v. Birdwell	2349	Liverpool & G. W. S. Co.	
v. Teeter	2356	v. Chauvin	1812	v. Ins. Co.	2573
Linde v. Gaffke	716	v. Com.	2363	Liverpool & L. & G. Ins. Co.	
Lindeman v. Desborough	1947	v. Downing	1229, 2144,	v. Southern Pac. Co.	454
Lindenthal v. Hatch	682		2159	Llanover v. Homfray	1388
Linderberg v. Mining Co.	1078,	v. Gibson	1082	Llewellyn v. Winkworth	377
	1750	v. Head & D. Co.	451, 1978	Lloyd v. Giddings	1246
Lindgren v. Lindgren	2474	v. Indianapolis	1195	v. Lloyd	2220
Lindle v. Com.	290	v. Johnston	1195	v. McClure	2349
Lindley v. Lindley	2498	v. Keon	1911	v. McGarr	2427
v. Smith	1635	v. Knox	2503	v. Mostyn	1204, 1208,
Lindner v. Ins. Co.	1066, 1067	v. Larrabee	2355		2325
Lindo v. Belisario	564	v. Marsh	291	v. Passingham	1644, 2269,
Lindsay v. Chicago	1680	v. R. Co.			2272
v. McCormack	1304	N. H., 55 Atl.	1072	v. Simons	18
v. McCormick	607, 613	88 Wis.	1010	v. Supreme Lodge	1268
Lindsay & P. Co. v.		v. Rogers	2020	v. Willan	1070
Mullen	1672	v. Wyatt	1559	Lochlibo, The	905, 907
Lindsey v. Attorney-		Little Rock C. Co.		Lock v. Mayne	1649, 1676
General	2576	v. Hodge	2110	Lockard v. Com.	925, 2277
v. State	318	Little Rock Granite Co.		Locke v. R. Co.	792, 794,
Lindsley v. R. Co.	1951	v. Dallas Co.	1521		1951, 2466
Line v. Mack	1684, 1271	Little Rock J. R. Co. v.		Lockett v. State	2059, 2276
v. Taylor	1161	Woodruff	463	Lockhart v. Camfield	1208,
Linehan v. State		Little Rock M. R. & T. R.			1847, 1651
113 Ala.	100, 789	Co. v. Haynes	1944	v. Harrell	334
120 Ala.	1966	Little Rock R. Co. v.		v. Luker	619
Lines v. Alaska C. Co.	716	Leverett	1747, 1750,	Lockhead v. Berkeley	
Linfield v. O. C. R. Co.	1389		1757	Springs W. & I. Co.	1679,
Lingenfelter v. Simon	1244	Little Rock T. & E. Co.			2573
Lingle v. Chicago	1248	v. Nelson	1750, 1951	Locklayer v. Locklayer	269,
Lingo v. State	111, 247,	Little Rock & F. S. R.			1502, 1605
	2341	Co. v. Alister	719	Lockwood v. Crawford	2567
Link v. R. Co.	437	Little Rock & M. R. Co.		v. Lockwood	1730, 2235
v. Sheldon	681, 1719	v. Harrell	199	Lockyer v. Lockyer	398
Links v. State	347	Little Rock & S. F. R.		Loder v. Whelpley	2314, 2391
Linn v. Sigsbee	1944	Co. v. Payne	1354	Lodge v. Phipper	2008
Linnell v. Sutherland	1538,	Littlefield v. Rice	612, 751,	v. State	949
	1552		1538	Loeb v. Huddleston	1201
Linsday v. People	273, 437, 451,	Littlehale v. Dix	2569	Loennecker's Will	1738
	568, 580,	Littlejohn v. Fowler	2447, 2495	Loftin v. Nally	1226
	1975, 2056	v. Shaw	1921, 1951	Lofts v. Hudson	1062
Linsee v. State	1203	Little v. Franklin	1195	Logan v. Com.	821
Linsley v. Lovely	1890, 1971	Littleton v. Clayton	1203, 1204,	v. McGinnis	1938
Linthicum v. Remington	2297		1208, 2484	v. R. Co.	2257, 2259, 2264
Linton v. Baker	1681	v. State	1975, 1976	v. Steele	142, 803
v. Com.	1911	Litton v. Com.	581, 1163	v. U. S.	6, 522, 523, 1079,
v. Cooper	1676	Livingston v. Arnoux	1460,		1854
v. Wilson	1186		1523	v. Watt	1658
Lipe v. Eisenlerd	987	v. Com.	1880	Logansport v. McMillen	1943
Lipes v. State	660, 1385, 2265	v. Cox	1666	Logansport & P. G. T. Co.	
Lipscomb v. Lyon	736, 754,	v. Harris	2256, 2268	v. Heil	1126
	1669	v. Heck	987, 2446	Logg v. People	1852
v. R. Co.	1951	v. Ins. Co.	1271	Lohman v. People	950, 987
v. State	18, 21, 1398,	v. Kettelle	1635, 2168	Loid v. State	2582
	1442, 1445, 1447,	v. Kiersted	492	Loker v. Haynes	529
	2497, 2550	v. M'Donald	1225	Loloff v. Sterling	468
Lipshitz, re	2066	v. Rogers	1177, 1198	Lombar v. East Tawas	252,
Lisbon v. Bath	20	v. Stevens	377		283, 458
Liscomb v. Eldredge	2529	v. Tompkins	2256	Lombard v. Johnson	1280
v. R. Co.	2515	v. Tyler	1521, 1530	v. Mayberry	2276
Lisman v. Early	1873	v. Wagner	2312	v. Oliver	581

TABLE OF CASES.

LOM

	Section		Section		Section
Lombard R. Co. v. Christian	568	Lord v. Bigelow		Louisville N. A. & C. R.	
Lombardo v. Ferguson	1206	124 Mass.	1063	Co. v. Pedigo	461
Londegan v. Hammer	2535	8 Vt.	1257	v. Richardson	928
London v. Lynn	1074, 1661	v. Colvin	762	v. Shires	571, 675, 681,
v. Perkins	1415	v. Ins. Co.	1777		689, 1219, 2535
London Gaslight Co.		v. Mobile	987	v. Snyder	688
v. Chelsea	2319, 1859	v. Moore	1527, 1530	v. Spain	1951
London G. O. Co. v.		v. State		v. Wallace	463
Lavell	1168	17 Nebr.	2239	v. Wood	222, 675, 678,
Londonderry v. Andover	1503	18 N. H.	1854		682, 688, 1158,
Londonderry Case	1646	v. Wood	1063		1168, 1974
Londoner v. Stewart	1195,	Lord Electric Co. v.		v. Wright	458, 461,
	1213	Morrill	2155		1062
Loneragan v. Assur. Co.	2203	Loree v. Abner	2573	Louisville & C. P. Co. v.	
v. Buford	2465	Lorimer v. Lorimer	2311	Samuels	1750
v. Whitehead	1541, 1544	Loring v. R. Co.	454	Louisville & N. R. Co. v.	
Long v. Baile	583	v. Steineman	2531	Alumbaugh	1044
v. Barrett	406	Lorton v. Kingston	21, 1075	v. Banks	1951
v. Booe	944, 949, 1730	Lorts v. Wash	1304	v. Barker	1899
v. Brougher	74	Losee v. Losee	928, 1033,	v. Berry	791
v. Colton	1567, 1587		1505, 1514	v. Binion	1978
v. Davidson	1955	Loshbaugh v. Birdsell	1960	v. Bizzell	987
v. Davis	1387, 1388, 1404	Lothrop v. Blake	1681	v. Bowen	1951
v. Dollarhide	1086	v. Clapp	2282	v. Brinckerhoff	2566
v. Dow	1141	v. Roberts	2270	v. Brown	18
v. Drew	2125	Lott v. Buck	1195	v. Carothers	1755
v. Hitchcock	1037	v. Burrel	2222	v. Carter	805
v. Ins. Co.	1975	v. King	772	v. Cassibry	747
v. Lamkin	334, 950	Loucks v. R. Co.	680, 715	v. Com.	2259
v. McDow	2141, 2529	Loud v. Merrill	95	v. Ellis' Adm'r	1078
v. McKissick	1240	Louden v. Blythe	233	v. Fox	428
v. Martin	616, 2336	Loudermilk v. Louder-		v. Frazee	1706
v. Morrison	987	milk	2444	v. Hall	1626
v. Perline	2442	Lougee v. Bray	1388	v. Henry	438
v. Pierce Co.	1062	Louie You, re	2068	v. Hill	
v. R. Co.	1951	Louis v. Easton	578	114 Ala.	460
v. Regen	736	Louis Cook M. Co. v.		115 Ala.	367, 949, 1078,
v. State		Randall	1195		2327, 2498
86 Ala.	391, 2237, 2341	Louisiana Elections	2287	v. Hurt	905
11 Fla.	1985	Louisiana State Lottery		v. Jones	382
Fla., 32 So	2511	Co. v. Richoux	1350	v. Kelly	1698
22 Ga.	2100	Louisiana & N. W. R. Co.		v. Kice	1706
56 Ind.	2272	v. Phelps	2573	v. M'Clish	1109
95 Ind.	2354	Louisville v. Muldoon	1415	v. Malone	21, 283, 456,
52 Miss.	238	Louisville Banking Co. v.			2509
Tex. Cr., 47 S. W.	351	Asher	1073	v. Marbury L. Co.	2509
v. Steiger	778	Louisville Bridge Co. v.		v. Miller	21, 456
Long-Bell Co. v. Thomas	1770	R. Co.	1230	v. Milliken	1951
Longabaugh v. R. Co.	455, 456	Louisville Ins. Co. v.		v. Pearson	1158
Longenecker v. Hyde	1362,	Monarch	80, 1373,	v. R. Co.	1955
	1455		1898	v. Ray	769
Longman v. Winchester	371	Louisville J. C. Co. v.		v. Reagan	1951
Longstreth v. Korb	1194	Lischkoff	716, 1003	v. Samuels	455
Lonsdale v. Curwen	1862	Louisville R. Co. v. Hart-		v. Sandlin	561, 571
Lonzer v. R. Co.	2495	lege	2220	v. Shaw	1750
Look v. Mays	1275	Louisville Water Co. v.		v. Simpson	1755
Loomis v. Bedel	1225, 1651	Upton	1404, 1668	v. Stewart	
v. Day	2416	v. Weis	451	Ala., 29 So.	571
v. Ins. Co.	1947	Louisville N. A. & C. R.		56 Fed.	1078
v. Kellogg	1316	Co. v. Buck	1757	v. Sullivan	287
v. R. Co.	1063	v. Falvey	18, 675, 678,	v. Summers	376
v. Wadhams	1256		682, 684, 688,	v. Tegner	949, 1951
Looper v. Bell	1722		991, 992, 1974	v. Webb	1021
Loos v. Wilkinson	1083, 1086	v. Frawley	1108, 1109	v. Williams	2536
Lopes v. De Tastet	2203	v. Howell	1700	v. York	1838
Lopez v. Bergel	2054	v. Jones	1977	Louisville & N. T. Co. v.	
v. State	2059	v. Lucas	663	Jacobs	1626
Loranger v. Jardine	1206	v. Miller	1719	Loury v. Cady	2450
Lord v. Beard	934	v. Patchen	1684	Lovat Peerage Case	413

	Section		Section		Section
Love v. Bentley	1661	Lucas v. State		Lynch v. Benton	1871
v. Harbin	1651	96 Ala.	1404	v. Clements	1738
v. Masoner	205, 210, 987	23 Conn.	619, 620	v. Clerke	1193, 1199, 1224, 1275, 2121, 2137
v. People	580	v. U. S.	1461	v. Coffin	278, 281
v. Peyton	1312	v. Williams	1175, 1181	v. Cronin	1543
Loveden v. Loveden	2081	Luce v. Carley	1082	v. Doran	1938
Lovejoy v. Howe	658, 1201	v. Ins. Co.	1947	v. Lively	1640
Lovell v. Briggs	334, 338	Luck v. State	1166	v. M'Hugo	1549
v. Hammond Co.	1963	Lucker v. Liske	736	v. Moore	660
v. State	398	v. Phoenix Assurance Co.	1859	v. O'Hara	1256, 2308, 2309
Loveridge v. Botham	1058	Luckett v. Anderson	1247	v. Peabody	289
Loving v. Com.	1021	Luco v. U. S.	797	v. Postlethwaite	1312
v. Warren Co.	2167	Ludden & Bates S. M. H.		v. State	1555
Low v. Atwater	1300	v. Sumter	1873	Lynch's Adm'r v. Petrie	1549
v. Burrows	1681	Ludlam's Will	1233, 1268, 2143	Lynde v. Judd	1212, 1279, 2307
v. Mitchell	64, 987, 2276	Ludtke v. Hertzog	1005, 1230	v. McGregor	334
v. Railroad		Ludwig v. Blackshere	1067	Lynds v. Plymouth	458, 1021
45 N. H.	1943, 1977	Lueck v. Heisler	1890	Lynn v. Cumberland	1230
46 N. H.	1974	Luft v. Linganie	2354	v. Lyerle	2312
v. State	1072	Luhrs v. Kelly	960	Lyon v. Assur. Co.	2153
Low's Case	2364	Luke v. Calhoun Co.	792, 794	v. Hancock	389, 390, 949
Lowden v. Blakey	2294, 2297	Lum v. Kelso	1275	v. Lyman	728, 1999, 2000, 2002, 2016, 2026
Lowe v. Dorsett	2004	Lumbert v. Woodard	1254	v. Lyon	1730, 2067
v. Firkins	2307	Lumley's Case	1364, 2038	v. McCadden	1672
v. Jolliffe	528, 907, 1302, 1303, 1933, 2084	Lumpkin v. State	2059	v. Marriott	2124
v. Lehrman	2464	Lunay v. Vantyne	616	v. Perry	1225, 1651, 1676
v. Lowe	770, 778	Lund v. Rice	1275, 1651	v. Prouty	2336
v. State		v. Tyngsborough	1362, 1363, 1774, 1951	v. R. Co.	2220
86 Ala.	1404	Lunday v. Thomas	1213	v. Ricker	1458, 1473
88 Ala.	857	Lundy v. Lundy	1081	v. State	1476, 1477
97 Ga.	1045, 1135	Luning v. State		v. U. S.	2580
Wis., 96 N. W.	569, 784, 1041	1 Chand.	681, 1693, 1976	v. Washburn	1195
v. Vaughn	1404	2 Pinn.	1693	Lyons v. Holmes	1513
v. Waller	2414	Lunniss v. Row	1258	v. Marcher	1388
Lowell v. Com'rs	463, 561	Lunsford v. Smith	1215	v. Red Wing	438
Lowenfeld v. Curtis	2435	Lupton v. Lupton	2465	v. Van Gorder	1219
Lowenstein v. Lombard	377	Lurton v. Gilliam	1662, 1684	v. Ward	1064
Lower v. Winters	1111	Lush v. Druse	719	Lytle v. Bank	377
Lowery v. People	605, 2086	v. McDaniel	132, 1722	v. Bond	15
v. State		Lusk v. State	1109		
98 Ala.	1404	Luther v. Clay	2593		
72 Ga.	2060	v. Skeen	74, 988		
Lowman v. State	1951	v. State	1041		
Lowrance v. State	2089	Lutterell v. Reynell	1123, 1364, 1406		
Lowry v. Cady	1664	Luttrell v. State	280, 1106		
v. Coster	2083	Lycoming Co. M. I. Co. v.			
v. Downey	2442	Schreffler	1770		
v. Harris	1245, 1651	Lycoming F. I. Co. v.			
v. M'Durmott	2110	Wright	1240, 2558		
v. Moss	1456	Lydiard v. Chute	1676		
v. Pinson	334, 1254	Lyell v. Kennedy	1524, 1856, 2301, 2319, 2322		
v. Saginaw	95	Lyford v. Thurston	664, 1225, 1651, 1871		
v. State	1476	Lygon v. Stuart	2139		
Loy v. Kennedy	2110	Lyle v. Ellwood	1602, 1603, 2083		
Loyd v. Freshfield	735, 753, 754, 2286	v. Richards	2556		
v. R. Co.	2220	Lyles v. Lyles	1126		
Luby v. Com.	1445	v. U. S.	1135		
Lucas v. Brooks		Lyman v. Boston	463, 714, 718		
23 La. An.	291	v. Cain	1195		
18 Wall.	619	v. City	1985		
v. Evans	2256	v. Hilo Tribune P. Co.	987		
v. Fliinn	953	v. Ins. Co.	1947		
v. Nichols	406	v. Philadelphia	1614, 2529		
v. Novosilieski	93				
v. Parsons	1062				

TABLE OF CASES.

McA

	Section		Section		Section
McArthur v. Morrison	2146	McClintock v. Curd	1389	McCray R. & C. S. Co. v.	
v. Sears	907	M'Clory v. Wright	2056, 2058,	Woods	2434
Macarty v. Bond	2268		2059	McCrea v. Parsons	1890
McAteer v. McMullen	1028	M'Clure v. Tennessee	1817	M'Crea v. Purmort	2432, 2433
McAulay v. Earnhart	1198	McClurg v. Terry	2414	McCready v. Sexton	1854
Macaulay v. Shackell	1380,	McCoggle v. State	1899	M'Creary v. Grundy	75, 986
	1862, 2257	McCollister v. Yard	1225	McCreary v. Hood	1203
McBean v. State	2349	McCollosh v. State	851	v. Turk	18, 1951
McBee v. Bowman	64	McCollum v. Boughton	2444	McCrory v. State	2059
McBeth v. McBeth	271, 1738	v. Seward	681, 683,	McCullen v. C. & N. W. R.	
McBlain v. Edgar	1051	McComas v. Haas	1195	Co.	2509
McBride v. Bryan	529	McComb v. Dillo	607	McCulloch v. McCulloch	2067
v. Com.	149, 1726	v. Ins. Co.	1878, 1880	v. Ins. Co.	1021
Macbride v. Macbride	986	McComb v. Chandler	2355	v. Judd	1073
McBride v. Macon T. P.		v. State	62, 200, 398,	v. State	
Co.	1392		1138, 2020	11 Ind.	1350
v. Thompson	1778	McConeghy v. Kirk	2529	48 Ind.	2081
v. U. S.	1890	McConnel v. Johnson	1651	35 Tex. Cr.	2349
v. Wallace	774	v. Reed	1273	McCullough v. Davis	1267
v. Watts	1073	McConnell v. Bowdry	1065	v. Dobson	1022
McCabe, re	1807, 1938	v. Hannah	1779	v. R. Co.	1085
McCabe v. Com.	499	v. Lewis	439	Macculum v. Turton	2260
v. Platter	66, 73, 76	v. Martin	613	M'Cully v. Barr	1888
McCabe's Will	288	v. Osage	1908, 2386, 2389	McCully v. Malcom	1339, 1664,
McCague v. Miller	2336	v. State	664		2110
McCament v. Roberts	1668	v. Wildes	1938	McCurdy v. Neall	1511
McCampbell v. Mc-		McConnells v. Ins. Co.	2498	McCurry v. Hooper	689, 1938
Campbell	987, 2067	McCooe v. R. Co.	1896, 2321,	McCurtain v. Grady	1082
McCandless v. McWha	235,		2322	McCutchen v. Loggins	923
	1960	McCool v. Grand Rapids	458	McCutchen's Adm'rs v.	
McCann v. Beach	1195, 1709	M'Cord v. Johnson	1312	McCutchen	923,
v. Gould	1230	McCord v. State	1126, 1128		1404, 1985
v. State	2100	McCorkle v. Binns	2002, 2016,	McDaneld v. Logi	1869
v. Ullman	569		2024	McDaniel v. Baca	1021
McCarragher v. Rogers	451	McCormack v. McBride	1225	v. State	
McCarrick v. Kealy	1750	McCormick v. Cleal	763	53 Ga.	905
McCarthy v. Boston		v. Evans	1651	100 Ga.	108
Duck Co.	675, 1951	v. Grundy Co.	1195	M'Daniel's Will	1938
v. R. Co.	1951	v. Holbrook	1878	McDeed v. McDeed	1271, 1497,
v. Whitcomb	1807	v. Huse	2465		1703
McCartney v. McCartney	2406	v. Irwin	1378	McDermott v. Barnum	1681
v. State	318	v. Joseph	1966	v. Jackson	95, 770
McCarty v. Leary	96, 1106	v. R. Co.	736, 749, 754,	v. McCormick	1512
v. People	194		759, 760	v. Mahoney	581
McCarver v. Herzberg	2578	McCormick Co. v. Faulk-		v. Mitchell	1066
McCaskill v. Elliot	251	ner	2409	v. State	62, 200, 398,
McCausland v. Ralston	736	v. Seeman	1013		1111
M'Caw v. Blewit	2123	McCormick H. M. Co. v.		McDevitt's Estate	1738
McChesney v. Chicago	2463	Davis	715	McDill v. McDill	1676
v. Cook Co. Collector	1248	v. Gray		McDonald v. Ashland	569
McClain v. Com.	839	100 Ind.	451	v. Bowman	1086
v. Esham	702	114 Ind.	1195	v. Carnes	1521, 1530
M'Clain v. Gregg	1299	v. Hiatt	581	M'Donald v. Carson	907
McClain v. R. Co.	663	McCormicks v. Fuller	1085,	McDonald v. Com.	2277
McClaskey v. Barr	1388		1086	v. Conniff	1354
McClean v. Hertzog	1205	M'Corquodale v. Bell	2319	v. Cutter	1388
Maclean v. Scripps	797	McCourry v. Suydam	2520	v. Franchere	1974
McClellan v. Dunlap	1225	McCoy v. Curtice	2535	v. Gilbert	2153
v. F. W. & B. I. R.		v. Julien	20	v. Jacobs	658, 1898
Co.	1041	v. People	18	Macdonald v. Longbottom	2465
v. R. Co.	1021	v. Rhodes	2123	McDonald v. McDonald	
v. State	691, 1839	v. Watson	1871	142 Ind.	675, 944,
M'Clelland v. Lindsay	1066	v. World's Columbian			1736, 2008, 2015,
McCleneghan v. Reid	1867	Exposition	2575		2303, 2310, 2322
McClenkan v. McMillan	1072	McCracken v. West	1731	67 Mich.	1021
McCleod v. Bishop	1778	M'Craw v. Gentry	1303	M'Donald v. M'Donald	1318
McCleskey v. Leadbetter	21,	McCraw v. McCraw	2530	McDonald v. McDougall	2143
	1257, 1367, 1391	McCray v. R. Co.	93, 1951	v. McKinnon	2065
	2139, 2141,	v. Stewart	2364	v. Moore	1878

	Section		Section		Section
McDonald v. Murray	1213, 2593	MacFerson v. Thoytes	1994, 2002	McGuff v. State	505, 506, 1159, 1821, 1841, 2194, 2220
v. People	1807	McGahan v. Crawford	815	McGuire v. Kenefick	928
Macdonald v. Putman	2294	M'Gahey v. Alston	1195, 2535	v. Kouns	2110
McDonald v. R. Co.	1698	McGar v. Adams	289	v. Moloney	2237, 2336, 2341
v. Savoy	65	v. Bristol	792, 794, 1168	v. People	506, 1820
v. Smith	1878	v. Worsteds Mills	461	v. Sayward	1678
v. Stark	1195	M'Garahan v. Maguire	1260	v. State	1168
v. State		McGarr v. Lloyd	2165	McHugh v. Brown	2130
118 Ala.	770	v. National & P. W. Mills	283	v. McHugh	278
89 Tenn.	784	McGarrahan v. R. Co.	2570	v. State	943, 948, 1022, 1441, 1445
80 Wis.	1350	McGarrity v. Byington	728, 1239	McIlvain v. State	282, 1029
v. Wood	571	v. R. Co.	18, 252	M'Iloy v. Kennedy	1249
McDonel v. State	988, 1157, 2221	McGeane v. R. Co.	463, 1943	McInerny v. Irvin	923
McDonnall v. People	246	McGeary v. R. Co.	1976	McIntire v. Funk	1188, 1195, 1299, 1651
Macdonnell v. Evans	1179, 1244, 1258, 1259, 1260, 1270	McGee v. Allison	2525	M'Intyre v. Layward	1389
McDonough v. O'Neil	289	v. Baumgartner	207, 905	v. Mancius	2268
McDonough's Succession	2008, 2016	v. State	351	McIntyre v. Meldrim	2337
McDougald v. Lane	1911	McGehee v. Hansell	1911	v. Mining Co.	291
v. McLean	689, 1938	v. Wilkins	1664	v. R. Co.	2098
M'Dowell v. Hall	1205, 1312	McGennis v. Allison	1311, 1313, 2138, 2141	v. White	15
v. Ins. Co.	95, 1208	McGhee v. Wells	581, 851	v. Young	406, 1021, 1023
v. Preston	235, 934	McGibbons v. McGibbons	1958	McIntosh v. Lee	2581
v. Rissell	1086	McGill v. Rowland	612, 716, 1943	v. State	2497
McDuffie v. Greenway	603	McGinn v. Platt	455	McIsaac v. Lighting Co.	1960
McElhannon v. State	141, 1391	McGinness v. School District	1210	McIver v. Clay	1651
McElheny v. Bridge Co.	714	McGinniss v. Com.	1671	v. Humble	1647
McElmurray v. Turner	1072	v. Grant	959	v. Robertson	1225, 1651
McElrath v. Haley	1062	v. State		M'Kain v. Love	2346, 2354, 2570
McElree v. Darlington	2259	31 Ga.	784	Mackay v. Easton	1783
McElroy v. Phink	68, 1736, 2523	24 Ind.	1205	McKay v. Johnson	65, 1951
McElven v. State	2354	4 Wyo.	580	v. Lasher	706, 791, 2020
M'Elveney v. Connellar	2375	McGinniss v. Sawyer	1278	v. Myers	95
M'Elwee v. Sutton	334, 1033, 1511	McGlasson v. State	2018	McKee, ex p.	2210
McEntire v. Levi C. M. Co.	1078	Mc'Glemery v. Keller	406, 1010	v. Bidwell	283
McEwan v. Milne	2503	McGlothlin v. State	855, 858	M'Kee v. Gilchrist	1086
v. Bigelow	561	McGoldrick v. Traphagen	1538, 1552, 1558	McKee v. Jones	1028, 1124, 1126, 1129
v. Springfield	1108	McGonigle v. Kane	1951	M'Kee v. Nelson	1963
McFadden v. Ellmaker	1082, 1257	McGough v. Wellington	1779	v. People	2232
v. Fritz	1267	McGovern v. Hope	2220	McKee v. State	1977
v. Mitchell	1890	v. Smith		v. White	1511, 1512
v. R. Co.	1890	73 Vt.	283, 905	McKeen v. Bank	1521
M'Fadden v. Murdock	379, 1923, 1976	Vt., 53 Atl.	794, 987, 1270, 1404	M'Keen v. Delancy	1651
McFaddin v. Preston	1651	McGowan v. McDonald	748, 1074, 1078	McKeigue v. Janesville	1698, 1722
McFadin v. Catron	120 Mo. 2337	v. McLaughlin	1513	M'Kenire v. Fraser	1311, 2138, 2145
138 Mo.	2502	v. R. Co.	1873	McKenna v. Gas Co.	1698
McFadzen v. Liverpool	2268	v. Supreme Court	266, 1081, 2384	v. McMichael	1189
McFalls v. State	2060	McGrath v. Cox	1234, 1237	McKennon v. Cotner	1350
McFarlan v. Rolt	2319	McGrath v. Isaacs	2120	Mackenzie v. Coulson	2416, 2417
McFarland v. Accid. Ass'n	1415	McGrath v. Seagrave	2450	McKenzie v. Gordon	564
v. Dey	1709	McGregor v. Keiller	1524	v. Lautenschlager	1730, 2236
v. Lewis	1777	v. McArthur	74, 75	MacKenzie v. Mackenzie	2298
v. Pico	1240, 1680	v. Wait	1204, 1297	McKenzie v. State	
v. Shaw	1432, 1436	McGrew v. State	2079	24 Ark.	580
McFarlane v. Louden	2430	McGruder v. State	916	32 Tex. Cr.	1079
v. Martin	1842	McGuerty v. Hale	283, 1951, 1984	Mackenzie v. Yeo	2048, 2309, 2315, 2319, 2327
v. R.	617			McKenzie's Case	2375

TABLE OF CASES.

McK

	Section		Section		Section
McKeon v. R. Co.	681	McLeod v. Rogers	1225, 1318	M'Namee v. Hunt	2556
McKeone v. Barnes	2020	v. State	398	McNamee v. U. S.	2166
v. People	2277	Macleod v. Wakley	406	McNeal v. R. Co.	1890
McKeown v. Harvey	772, 1195	McLeod's Estate	2106	M'Neale v. Clarke	2168
McKern v. Calvert	64, 75, 1021	McLeroy v. State	1079	McNealley v. State	2056, 2059
McKesson v. Sherman	987, 1270	Maclin v. Wilson	2205	McNeely v. Duff	758
M'Kewan v. Thornton	1005	McLoghlin v. Bank	377	v. McNeely	2527
McKillop v. R. Co.	1974	M'Lughan v. Bovard	1066	v. Pearson	1267, 2106, 2110
McKim v. Foley	290	McMahan v. McGrady	1314	v. Rucker	1195, 1347, 1651
McKinder v. Littlejohn	1321	M'Mahon v. Burchell	1856	McNeil v. Holbrook	6
McKinley v. Bank	2355	McMahon v. Davidson	1246, 1391	M'Neil v. Perchard	1279
v. Irvine	1316	v. Dubuque	1978	McNeill v. Arnold	17 Ark. 1225, 1271, 1651, 1676
McKenney v. Dingley	321	v. Harrison	203	17 Ark.	1623
v. Neil	1028, 1031	v. McHale	461, 664	v. Elam	1530
v. People	1852	M'Mahon v. Spangler	1075, 1389	McNerney v. Reading	904, 1955
v. R. Co.	2389	McMahon v. State	2089	McNichols v. Wilson	1225, 1873
v. State	861	v. Waterworks Co.	782	M'Night v. Biesecker	1770
McKinnon v. Bliss	1573, 1582, 1587, 1591, 1598, 1662	McMakin v. Weston	1212	McNish v. State	852
v. Norcross	1756	M'Managil v. Ross	1141	McNutt v. McNutt	1195, 1877
McKinstry v. Clark	1225	M'Mannus v. State	2298, 2303	v. State	499
v. Collins	286, 682, 1646	McManus v. Com.	390	M'Nutt v. Young	71, 73
McKivitt v. Cone	736, 753, 762	v. Commow	1195, 1290	McPeake v. Hutchinson	1133
McKnight v. U. S.	97 Fed. 290, 951, 953	v. Finan	1878	McPeck v. Tel. Co.	1219
115 Fed.	2273, 2495	v. Mason	1873	McPeters v. Ray	715
M'Knight v. U. S.	1205, 1890	v. State	396	McPhail v. State	1781
McKonkey v. Gaylord	707	v. Wells	1086	McPherrin v. Jennings	142, 461
McKormick v. West Bay City	1721	McMaster v. Ins. Co.	260	v. Jones	1013
McKown v. Hunter	581	v. Morse	2575	McPherson v. R. Co.	571
McLain v. Com.	662, 1374, 1406	v. Scriven	2315	v. Rathbone	1208, 2307
v. Winchester	1209, 1681	v. State	833, 855	M'Pherson v. Rathbone	1321, 1513, 1624
McLamb v. R. Co.	715	v. Stewart	1257	McPherson v. Rockwell	770
McLanahan v. Blackwell	1660, 1680	McMasters v. State	987	v. Ryan	1770
M'Lanahan v. Ins. Co.	21, 1947	81 Miss.	987	v. State	247
McLanathan v. Patten	1083	Miss., 35 So.	852, 2098	M'Pherson v. State	1033
McLane v. State	1407	McMath v. State	961, 1761, 1821	McQuade v. Hatch	2088
McLaren v. Birdsong	463	McMechen v. McMechen	681, 1738	McQueen v. Farrow	1681
v. Gillespie	1911	McMicken v. Ontario Bank	2437	v. Fletcher	1195
McLaughlin v. Cowley	209	McMillan v. Baxley	1206, 1254	v. State	1440
v. Mencke	987, 1270	v. Berthold	1195	v. Wilson	2503
McLean v. Clark	31 Fed. 908	v. Bissell	2437	McQuigan v. R. Co.	2220
47 Ga.	1014, 2304	v. Davis	1621	McQuillan v. El. Light Co.	969
v. Lewiston	770	v. Larned	1313	McQuirk v. State	62, 200, 398
v. McDonell	1219	v. Lovejoy	2110	McRea v. Lilly	64
v. Paine	1898	v. State	1841	v. Malloy	1738, 1938
v. State	233, 568, 1434, 1442, 1445, 1448, 1839, 2115	McMillen v. Andrews	1909	v. Morrison	728
v. Webster	1225	v. State	111	McReynolds v. McCord	291, 2132
McLear v. Hunsicker	2124	McMinn v. O'Connor	1225, 1226, 1312, 1320, 1321, 1651	McShane v. McShane	2046
McLeary v. Norment	1938	v. Whelan	1312, 1320, 1321	McSwyny v. R. Co.	2220
McLellan v. Longfellow	2298	M'Morine v. Storey	1387	McTaggart v. Thompson	233
v. Richardson	2363	M'Mullen v. Brown	1225	McTague v. Finnegan	2442
McLellan's Estate	2502	McMunn v. State	1404	McTavish v. R. Co.	2509
McLenon v. R. Co.	1206	McMurrin v. Rigby	460, 1136, 1138, 1719, 1761	McTeers v. Perkins	391
McLeod v. Bullard	1126, 1127, 1132, 2003	McMurtry v. Frank	1288, 1299	McTyier v. State	2354
v. Crosby	2158	McNail v. Ziegler	614	Macubbin v. Lowell	2016
v. Cinther's Adm'r	1747	McNair v. Com.	694, 2007, 2008	McVay v. State	1976
v. Lee	1873, 1876	v. Stewart	1951	McVey v. R. Co.	571
		McNamara v. People	2512	v. State	55 Nebr. 276
		v. State	1375, 1398, 1405	57 Nebr.	1853, 2511

	Section		Section		Section
McVicker v. Conkle	1291, 1320, 1513, 2016, 2020	Mahaska Co. v. Ingalls	1456, 1464, 1467, 1471, 1474	Manigault v. Hampton	1306, 1313
McWhorter v. State	1842	Maher v. People	390, 2079	Manistee N. Bank v. Sey- mour	1062
M.					
Maas v. Bloch	2296, 2317	Mahoney v. Hardware Co.	1067	Manix v. Malony	2354
Maass v. Phillips	1671	v. Macdonnell	1842	Mankato v. Meagher	1651
Mabe v. Mabe	1387	Mahurin v. Bickford	1681	Manley v. Minneapolis Paint Co.	282
Mabry v. Cheadle	377	Maier v. Benefit Ass'n	1873	v. Patterson	2531
Macclesfield v. Davis	1862, 2221	Maillet v. People	1135, 1136	v. Shaw	1800, 1910
Mace v. Cadell	2086	Main v. Aukam		Mann v. Cavanaugh	1491
v. Reed	933	4 D. C. App.	1200	v. Forein	2132
Macey v. Titcombe	2572	12 D. C. App.	1684	v. Mann	2463
Machette v. Wanless	2572	v. McCarty	259	v. Maxwell	1141
Mack v. Handy	2067, 2069	v. Newson	585	Mann B. C. Co. v. Dupre	2432
v. Porter	1725	Maine v. Harper	1539	Manners v. Postan	1288, 1291
v. R. Co.	199	Mair v. Culy	900, 916	Manney v. Crowell	1273
v. State	390, 527, 1010	Maitland v. Bank	1127, 1132, 1362	Manning v. Carberry	1018
Maekel v. Rochester	2282	v. Goldney	2097	v. Fifth Parish	2451
Mackin v. People	2042	v. Paper Co.	1976	v. Hogan	1681
Mackrall v. R. Co.	1807	v. Zanga	1909	v. Ins. Co.	41
Macomber v. Scott	709, 2008, 2016	Majestic, The	2508	v. Lechmere	1476
Macon D. & S. R. Co. v.		Major v. Barker	2215	v. Lowell	714, 992, 1060, 1640
Moore	1698	v. Collins	2218	v. R. Co.	
Macon & W. R. Co. v.		v. State	2166, 2576	166 Mass.	2570
Johnson	658	Majors v. State	923, 1985	173 Mass.	463
Macy v. Goodwin	1225	29 Ark.	1960	v. Wheatland	529
Madden v. Burris	1290	Miss., 35 So.		Manning's Case	575
v. Farmer	1911	Makin v. Att'y-Gen'l of	363	Manogue v. Herrell	1738
v. Koester	987	N. S. Wales	2059	Mansell v. Clements	1921, 1967
v. State	907, 967	Malachi v. State	1856	Manser v. Dix	2294
Maddison v. Alderson	2065, 2454	Malcolm v. Scott	157, 1065	Mansfield's Case	2250
Maddox v. Maddox	229, 230, 2500	Malcomson v. O'Dea	2525	Mansfield C. & C. Co. v.	
Maden v. Catanach	1820, 1828, 2214	Male v. Roberts	1271	McEnery	458
v. Taylor	2528	Mallery v. Young	1738	Manson v. Wilcox	2195
v. Veevers	2319	Mallonee v. Duff	1126, 1127	Mantel v. R. Co.	1951
Madison v. Nuttall	1082	Mallory v. Aspinwall	2141	Mantonya v. Reilly	1011
v. Zabriskie	1513	Mallow v. Walker	2502	Manufacturing A. I. Co.	
Madison D. & P. R. Co. v.		Malone v. Adams	1491	v. Dorgan	681
Whitesel	1223	v. Bell	1641	Manufacturing Co. v. Platt	762
Madison I. & P. R. Co. v.		v. Dougherty	1890	Manufacturers' Furn. Co.	
Whitesel	1268	v. Hawley	252	v. Kremer	2410
Madox v. Dawson	2355	v. L'Estrange	1527, 1644	Many v. Jagger	1085
Magee v. Magee	2056	v. R. Co.	1848	Maples v. State	855
v. Maiguel	1083	Maloney v. Bartlett	2257	Marande v. R. Co.	285, 1750
v. Mark	2058	v. Purden	1256	Marble v. Marble	68
v. R.	2329	Malton v. Nesbit	1949	Marbury v. Madison	2371, 2375
v. Sanderson	1684	Malynak v. State	672, 681	March v. Com.	2578
v. Scott	2515	Man v. Ricketts	2138	v. Davidson	2257
9 Cush.	1681	v. Ward	529, 580	v. Harrell	1109, 1125, 1126, 1127, 1131
32 Pa.	1681	Manahan v. Halloran	1974	v. Ludlum	2294
Maggi v. Cutts	68, 201	Manatt v. Scott	228, 229, 682, 1938	v. P. & C. R. Co.	463
Magill v. Kauffman	1404	Manby v. Curtis	1311, 1456, 1472, 1476	Marchall's Estate	696
Magnay v. Knight	2447	Manchester v. Manchester	619	Marcy v. Shults	736, 738, 749, 754, 760
Magness v. State	950	Manchester F. A. Co. v.		Marcom v. Adams	64, 988, 2433
v. Walker	619, 2232	Feibelman	1966	Marcott v. R. Co.	664, 1951
Magouirk v. Tel. Co.	1974	Manderschid v. Dubuque	283	Marcy v. Barnes	392, 561, 797
Maguire, ex p.	2271	Mandeville v. Reynolds	736, 747, 1257, 2450	v. Pierce	694
v. R. Co.	199	v. Stockett	2110	v. Stone	1469
Mahaffey v. Byers	2554	Mangold v. Oft	1842	Marder v. Leary	283
Mahanke v. Cleland	987, 2271, 2279	Manhattan L. I. Co. v.		Mardis v. Shackelford	1320, 1871
		Beard	2341	Marguerite v. Chouteau	564, 1698
		Manhattan M. Co. v. Swete- land	1225	Maria das Dorias, The	1639

TABLE OF CASES.

MAN

	Section		Section		Section
Marianski v. Cairns	228, 1066	Marston v. Dingley	437, 561, 1951	Marvin v. New Bedford	458, 461
Marine Investment Co. v. Haviside	2184	v. Downes	2196, 2211, 2308, 2312	v. Richmond	1062
Mariner v. Saunders	1194, 1195, 1269, 1312	Martin v. Anderson	1678, 2313	v. Sager	527
Marion v. Lambert	928	v. Barnes	953, 961, 964	v. State	2042
v. State	660, 792	v. Bonsack	1778	Marx v. Bell	1777
Mark v. Buffalo	2203	v. Bowie	1513, 2139	v. Hanthorn	1354
Markel v. Moudy	1037	v. Brown	1213, 1352	v. Hart	1327
Market & F. N. Bank v. Sargent	2494	v. Cole	2445	v. Hilsendegen	987
Markey v. Angell	64	v. Com.		v. McGlynn	1738
Markham v. O'Connor	1072	93 Ky.	390	Mary v. State	1876
v. Russell	406	2 Leigh	318, 705	Mary, Trial of Queen ; see Queen Mary's Trial.	
Markley v. Swartzlander	1890	v. Cope	2098	Mary or Alexandra, The	2271
Marks v. Beyfus	2374	v. Courtney	1984	Mask v. State	
v. Lahee	1464, 1471	v. Eagle D. Co.	2582	32 Miss.	1887, 1890
v. Orth	1684	v. Ehrenfels	2354	36 Miss.	1618
v. Pell	1257	v. Elden	944, 1871	Mason v. Buckmaster	1859
Marler v. R. Co.	1750	v. Elliot	2221	v. Bull	1267
v. State		v. Farnham	1005, 1022, 1040	v. Cattley	2312
67 Ala.	1408, 2059	v. Fyffe	1538	v. District	1245
68 Ala.	390, 2059	v. Good	735, 747	v. Ditchbourne	783
Marlow v. Marlow	1195	v. Hall	1219, 1275, 1677, 1680	v. Libbey	1198
Marmet Co. v. Archibald	2463	v. Hardesty	258, 1779	v. Mason	74, 406
Marr v. Gilliam	2110	v. Hughes	1567	v. Phelps	736, 754, 1984
v. Wetzel	1392	v. Hurlburt	616	v. Poulson	1018
Marr's Heirs v. Gilliam	2522	v. Ingham	2369	v. R. Co.	1893
Marriage v. Lawrence	1074, 1661	v. Ins. Co.		v. Russell	2354
		1 F. & F.	905	v. State	351
Marriner v. Dennison	1225, 1254	42 N. J. L.	1947	v. Vestal	1125, 1126, 1128
Marriot v. Pascal	2569	v. Jennings	16	Mason's Case	2372
Marriott v. Chamberlain	1856	v. Martin		Mason F. J. Co. v. Paine	2529
Marsden v. Panshall	1862	22 Ala.	2086	Masonic M. B. Ass'n	
Marsee v. Middlesborough		25 Ala.	928, 1985	v. Beck	2361, 2384, 2391
T. L. Co.	2166	174 Ill.	1779	Masonic M. B. Soc'y v. Lackland	1230
Marsh v. Case	1554, 1556	51 Me.	2575	Masons v. Fuller	569, 1503, 1923
v. Collnett	1221, 1311, 2138	v. Mayer	1290	Masons' F. A. A.	
v. Gold	1062	v. Orndorff	1807	v. Riley	1476, 1662
v. Hammond	1021	v. Payne	1271, 1684	Massé v. Robillard	2395
v. Hand	18, 1234	v. People	1012, 1013	Massey, re	2215
v. Jones	736, 2098	v. Perkins	1302	v. Allen	1464, 1524
v. Keith	2317	v. Reeves	1086	v. Farmers' Bank	1253,
v. Marsh	2257	v. Richmond F. & P.			1254, 1985,
v. Pugh	616	R. Co.	1896		2015
Marshall v. Adams	2098	v. Root	1075	v. Huntington	1738
v. Brown	687, 1700	v. Rutt	2232	v. State	106
v. Cliff	1063	v. Sherwood	1719	v. Walker	1917, 1959
v. Fire Ins. Co.	1943	v. Simpson	1778	v. Young	344
v. Gougler	1302	v. Smith	321	Massure v. Noble	1957
v. Hancock	1388	v. State		Mast v. Matthews	2596
v. Hanby	2502	28 Ala.	276, 280,	Masters v. Marsh	21, 747, 2211
v. Ins. Co.	1947		354, 2059	v. Masters	2024, 2025
v. J. Grosse C. Co.	2495	125 Ala.	949, 2081	v. Varner	1664
v. Lynn	2455	63 Miss.	1806	Matchett v. R. Co.	2680
v. May	1086	32 Tex. Cr.	1781	Matchin v. Matchin	2067
v. Mitchell	64	33 Tex. Cr.	1476	Mather v. Clark	1053
v. Morris	1225	v. S. T. & T. Co.	1963	v. Goddard	1248
v. Peck	615	v. Towle	283	Matherly v. Com.	1440
v. R. Co.	1362, 1363, 1431	v. Williams		Mathes v. Robinson	1544, 1548, 1551, 1555
v. Riley	2279	18 Ala.	2200	Mathias v. O'Neill	92, 736, 747
v. Sheridan	1056	42 Miss.	1267	Mathis v. Buford	772
v. State		Martin Brown Co. v. Perrill	291	v. State	
49 Ala.	1974	Martinez v. Planel	458	31 Fla.	1350
5 Tex. App.	1871	Martinstein v. Creditors	1536	Fla., 34 So.	782
v. Westrope	2416	Marts v. State	63, 246, 1984	Mathews v. Boland	530
Marshman v. Conklin	619	Martyn v. Curtis	1564	v. Cedar Rapids	458
Marske v. Willard	2473	v. Hind	77	v. Colburn	1388
Marston v. Allen	2409, 2420				

	Section		Section		Section
Mathews v. Heyward	1890	Maxfield v. State	2497	Mayor v. Minor	1062
v. Mathews	2067	Maxham v. Place	1664	v. Pentz	29, 1918, 1919, 1943, 1976
c. Mattrass Co.	2438	Maxson v. R. Co.	1078	v. Second Ave. R. Co.	736, 750, 751, 1530
v. R. Co.	2509, 2580	Maxted v. Fowler	1263, 2098	v. Wood	1951
v. State	1136, 2061	Maxwell v. Bolles	944, 1890	Mayor of Hull v. Horner	89
v. Yerex	617	v. Chamberlin	2442	Mayor of London v. Ainsley	2257
Mathewson v. Sergeant's Est.	610	v. Durkin	15	v. Levy	2257
v. Spencer	2146	v. Hardy	1141	Mays v. Deaver	2100
Matlock v. Glover	2016	v. Hill	1311, 1789	c. Johnson	1678
Matossy v. Frosh	1187	v. Kennedy	73	v. Mays	1302
Matson v. Buck	406	v. Light	1225, 1651	v. Pryce	1347
Matteson v. Hartmann	1085	v. Maxwell	2083	v. Shields	2420
v. Noyes	1236, 2154	v. R. Co.	1330	Mayson v. Beazley	2105
v. R. Co.	688, 1719, 1721	v. State	105	v. Atlanta	1244
Matthai v. Matthai	2046	v. Warner	2097	Maywood Co. v. Maywood	1168
Matthews v. Castleberry	2141, 2146	v. Willingham	2434	Meacham v. Pell	738
v. Coalter	1278	Maxwell's Ex'rs v. Wilkinson	736, 745, 761	v. State	668
v. Dare	530, 1031	Maxwell Land-Grant Co. v. Dawson	254	Mead v. Daubigny	406
v. Detroit J. Co.	398	May v. Baskin	1665	v. Degolyer	1062
v. Hoagland	2298, 2308	v. Bradlee	233, 568, 1938, 1958	v. McGraw	736, 749
v. Huntly	64, 66	v. Brown	42, 986, 1982	v. Harris	497
v. Lumber Co.	280, 960	v. Dorsett	570, 2012	v. Randall	1644, 1645
v. Port	1364, 1380, 1670	v. Gentry	1082	v. Randolph	2054
v. Poythress	664	v. Hill	1195	Meade v. Black	1778
v. R. Co.		v. Jameson	1684	v. Gilfoyle	616
81 Minn.	1725	v. Jones	1778	v. Smith	2354, 2355
142 Mo.	455, 1856	v. Little	2232	Meaderhouser v. State	2580
v. State	1072, 2071	v. Logie	1481	Meadowcroft v. People	1354
v. Supervisors	1335	v. May		Meadows v. Frost	1530
Matthews' Estate	2527	1 Port.	1245	c. Ins. Co.	1876, 1880, 2495
Mathewson v. Burr	1612, 1614	2 Stra.	1644, 1646	v. State	821, 839
Matthis v. State	1029	v. People	2071	Meagoe v. Simmons	759, 1021
Mattice v. Allen	914, 1890	v. State		Mealer v. State	247
Mattison v. State	42	55 Ala.	1439	Mears v. R. Co.	65, 1639
Mattocks v. Bellamy	1215, 1677	90 Ga.	111, 1841	Meath v. Winchester	
v. Lyman		94 Ga.	1841	3 Bing. N. C.	1053, 2139
16 Vt.	736, 1071, 1072	Mayberry v. Johnson	2428	10 Bligh	2294
18 Vt.	2118	Mayer, re	2235	Mechanics' Bank v. Woodward	1387, 1405
v. Stearns	1189, 1208	v. Brensinger	1869	Mechanics' & F. Bank v. Smith	934
v. Wheaton	2195, 2199, 2201	v. Building Co.	458	Medill v. Snyder	682
Mattox v. U. S.		v. People	320, 321, 1041, 1983	Medlicot v. Joynner	1193, 1280
146 U. S.	1438, 1442, 1545, 1448, 1452, 2349, 2354	v. R. Co.	367	Medway v. U. S.	1362, 2001, 2008, 2016
156 U. S.	1028, 1032, 1398	Mayes v. State	2079	Mee v. Reid	1818
Matuskevitz v. Hughes	1614	Mayfield v. Turner	1195	Meek v. Pierce	616
Matzenbaugh v. People	987, 1784	Mayhew v. Mining Co.	443, 461, 1951	v. Spencer	1195
Mauch v. Hartford	795, 1385	v. Taylor	950	Meeker v. Meeker	
Maugham v. Hubbard	735, 747	Maynard v. Buck	461	75 Ill.	232
Mauk v. Brundage	19	v. Interstate B. & L. Assoc.	1223	74 Ia.	682, 1938
Maupin v. Scottish U. & N. I. Co.	2434	c. Maynard	2408	Meeks v. State	
v. Triplett	1312	v. Render	2465	51 Ga.	1839
v. Whiting	2123	v. State	1781	32 Tex. Cr.	2042
Mauran v. Lamb	2218, 2222, 2223	v. Vinton	2341, 2502	v. Willard	2556
Mauri v. Heffernan	1257, 1676, 1680	Mayne v. Hawkey	2211	Meers v. Stoughton	1825
Maurin v. Lyon	2464	Maynes v. Dolan	1665	Meguire v. Corwine	1073
Maus v. Bome	1779	Mayo v. Mayo	1043, 2269, 2276	Mehlin v. Mutual R. F. L. Ass'n	2409
Maverick v. R. Co.	613	v. Mazeaux	1225, 1651	Meier v. Meier	1082, 1778, 1779
Mawby v. Barber	73	v. Wright	682, 1718	v. Morgan	1908
Mawman v. Tegg	371, 1161, 1230	Mayor v. American Cable R. Co.	1657	Meighen v. Bank	93
Mawson v. Hartsink	692, 1982, 1985	v. Brown	1163	Meinaka v. State	832
		c. Caldwell	497	Meixsell v. Williamson	1012
		v. Craven	2140	Melby v. Osborne	2153
		v. Harwood	1350		

TABLE OF CASES.

MEL

	Section		Section		Section
Melcher v. Flanders	1304	Merriam v. Field	2434	Metz v. Butte	1951
Melen v. Andrews	1072	v. Ins. Co.	1947	v. Metz	1778
Melendy v. Spaulding	1958	v. R. Co.	619, 1104	v. State	2272
Melhuish v. Collier	761, 903, 904, 905, 907, 1005	Merrick v. Wakley	1632, 1634, 1639	Metzgar v. R. Co.	461
Mellish v. Arnold	2352	Merricourt v. Norwalk		Metzger v. Assur. Co.	720
v. Rawdon	2553	F. Ins. Co.	354, 944, 987	Mener v. R. Co.	2536
Mellor v. Union	1951	Merrifield v. Robbins	1684	Meunier, re	2056
v. R. Co.	2390	Merrill v. Berkshire	1890	v. Couet	605
Meloin v. Marshall	1567	v. I. & O. R. Co.	1560	Mewes v. Pipe-Line Co.	714, 720
Melton v. State	216, 363, 2060, 2071	v. Perkins	987	Mexican C. R. Co. v.	
Melvin v. Bullard	1458	v. R. Co.	736, 745, 748	Glover	2536
v. Easley	1690, 1700	v. Sybert	1352	v. Lauricella	2509
v. Hodges	2015	Merrills v. Swift	2408	Mexican N. R. Co. v.	1271, 2558
v. Lyons	1681	Merriman v. Stafe	923, 987, 1985	Slater	2271
v. Whiting		Merriman's Appeal	2354	Mexican & S. A. Co., re	2271
7 Pick.	1387, 2098	Merritt v. Bopden	2525	Meyer v. Barker	1195
10 Pick.	2522	v. Hepenstal	21	v. Berlandi	1354
Memphis & C. P. Co. v.		v. Hinton	1351, 1640	v. Bohlring	406
Buckner	1164	v. Merritt		v. Brown	1530
Memphis & C. R. Co. v.		20 Ill.	934, 1271	v. Everth	2434, 2439
Womack	1671	45 Ill.	1271	v. Krauter	2580
Memphis & O. R. P. Co. v.		v. R. Co.	284	v. Mitchell	1898
McCool	928	v. Seaman	18, 1960	v. Munro	1086
Menage v. Rosenthal	2440, 2463	v. State	1042	v. People's Railway Co.	770
Menard v. R. Co.	283, 1168	v. Stebbins	1082	v. Rothe	18, 811
Mendenhall v. Cassells	1587	Mershon v. State	2277	v. Sefton	1230
Mendenhall's Will	1512, 2500	Mertz v. Detweiler	67, 1960	v. State	367
Mendum v. Com.	569	Merwin v. Ward	291	Meyers v. Menter	851, 2580
Menk v. Steinfert	616	Meserve v. Folsom	1880	v. State	1374, 1442
Menomenie R. S. & D.		Messenger v. Bridgetown	1111	v. U. S.	1778
Co. v. R. Co.	456, 2487	Messer v. Reginniter	660	Meyncke v. State	987, 1612
Meracle v. Down	1350	Messimer v. McCray	7, 1409	Miami & M. T. Co. v. Bailly	2220
Mercer v. Kelso's Adm'r	1938	Metcalf v. Munson	253	Michael v. Foil	2312
v. Mackin	1736	v. Van Benthuysen	2105	v. Gay	2257
v. Patterson	2836, 2341	Metcalfe v. Carr	2165	v. Marshall	2503
v. Sayre	1877	v. Deane	2352	Michaud v. Grace H. L. Co.	720
v. State		Methodist Ep. Church v.		Michener v. Lloyd	2450
40 Fla.	923, 1079, 1108,	Jaques	2117	Michigan B. & P. Co. v.	
2245, 2332, 2339		v. Wood	2123	Coll	2235
41 Fla.	905	Metler's Adm'r v. Metler	613,	Michigan C. R. Co. v.	
17 Ga.	2349		2245	Gilbert	96, 199, 250
v. Vose	715	Metropolitan Asylum		Mickey v. Ins. Co.	1972
v. Wright	1010, 2056	Dist. v. Hill	443, 451	Micklethwart's Case	2360
Mercer's Adm'r v. Mackin	1457	Metropolitan Life Ins.		Middeke v. Balder	2532
Merchants' Bank v. Moffatt	2319	Co. v. Anderson	1646	Middleditch v. Williams	1738
v. Rawls	907	v. Howle	2380	Middlesborough W. Co. v.	
Merchants' Exch. Bank v.		Metropolitan Nat'l Bank v.		Neal	1651
McGraw	2573	Com. St. Bank	1078	Middlesex Case	1712
Merchants' Life Ass'n v.		v. Jansen	529	Middlesex B. Co. v. Smith	782
Yoakum	1890	Metropolitan R. Co. v.		Middleton v. Barned	1876
Merchants National Bank		Collins	1755	v. Croft	2067
v. Glendon Co.	2535	v. Jackson	2552	v. Janverin	1271
Merchants' Nav. Co. v.		v. Snashall	2580	v. Mass	2141
Amsden	1647	v. White	463	v. Melton	1466, 1471, 1474, 1476
Mercier v. Harnan	2109	v. Wright	2552	v. Middleton	1777
Meredith v. Footner	2232	Metropolitan Sav. Bank v.		v. Sandford	2529
Mergentheim v. State	1908	Manion	1960	v. State	2059
Mericke v. King	575	Metropolitan S. O. Co. v.		Miffin Bridge Co. v. Juniata	
Merkle v. Beidleman	1083	Hawkins	1859	Co.	1640
v. Bennington		Metropolitan St. R. Co. v.		Mighell v. Sultan of Johore	2566
58 Mich.	1722, 1749	Gumby	1387	Milam v. State	1750, 1873
68 Mich.	1951	v. Jacobi	2390	Milbourne Port Case	1712
v. State	1693, 1694	v. Johnson	461	Milburn v. Ph. llips	1081
Merle v. Moore		Metropolitan W. S. & E. R.		Mildrone's Case	1813
2 C. & P.	2321	Co. v. Dickinson	451,	Milenovich's Estate	1196
Ry. & Mo.	2327		463	Miles v. Dawson	2211
		v. Fortin	208, 249	v. Loomis	1999, 2000, 2008, 2011, 2012, 2016

	Section		Section		Section
Miles v. O'Hara		Miller v. Road Co.	1249	Milton's Case	2047
4 Binn. 736, 1215, 1666		v. Russel	1406	Milward v. Hibbert	379
1 S. & R.	1911	v. S. S. Co.	88	v. Ingram	2455
v. U. S.	2086, 2231	v. Salomons	1817, 1818	v. Temple	1511
v. Vanhorn	66, 76	v. Shaw	1705	Milwaukee B. Co. v.	2434
v. Wilson	2462, 2463	v. Shay	751, 1555, 1556, 1558	Duncan	
v. Wingate	2116	v. Smith	677, 720, 944, 1040, 1943	Milwaukee R. Co. v.	1947
v. Woodward	1067			Kellogg	
Milford v. Worcester	1644	v. State		Milwaukee & M. R. Co.	
Milich v. Packing Co.	2442	40 Ala.	860	v. Eble	1943
Millar v. Babcock	1267	45 Ala.	619	Milwaukee & S. P. R.	
v. Heinrich	1271	107 Ala.	1974, 1978	Co. v. Smith	1271
Millard v. Hall	1215	110 Ala.	1198, 2257	Mima Queen v. Hepburn	1363
Millaudon v. McDonough	1680	130 Ala.	363	Mimms v. State	106, 1003
Mille v. Dupuy	2054	40 Ark.	1267	Mims v. Sturtevant	
Miller v. Bingham	1084	97 Ga.	1042, 1044	23 Ala.	1777
v. Boykin	1269, 1635, 1639	109 Ga.	1821	36 Ala.	754, 1404
v. Busick	1667	3 Oh. St.	1350	v. Swartz	2573
v. Carothers	1321, 1510, 2048, 2110, 2159	37 Tex. Cr.	2239	Mine & Smelter S. Co.	
v. Childress	2054	25 Wis.	1398	v. Parke & L. Co.	18, 1890
v. Com.		106 Wis.	617, 1012, 1029	Miner v. Phillips	581, 758, 759, 1029, 1086
13 Bush	367	v. Stem	1009, 1013	v. State	2236
78 Ky.	2059, 2060	v. Thatcher	2054	Mineral Point R. Co. v.	
v. Cook	905	v. Travers	2471, 2474	Keep	736, 754
v. Crayon	987	v. Webb	1248	Mineral R. & M. Co. v.	
v. Curtis	75, 192, 200, 202, 209, 212, 340, 963	v. Weeks	2313	Auten	1564
v. Denman	1053	v. Wells	1195, 1651	Minet v. Gibson	2443
v. Dill	273, 282, 398, 987	v. White		v. Morgan	2290, 2294
v. Dumon	795	16 Can. Sup.	1040	Minich v. People	1852
v. Electric Co.	2434	80 Ill.	2083	Mink v. State	2063
v. Feenane	1082, 1778	v. Wilson	2536	Minkler v. Minkler	1267, 2106
v. Foster	2139	Miller's Case	728, 735	Minkley v. Springwells	1896
v. Goodwin	1275, 1350	Miller's Estate	1302	Minneapolis Mill Co.	
v. Gow	2122	Millette v. Litle	2235	v. R. Co.	1370, 1404
v. Hackley	95, 736, 747	Millikan v. Booth	1391	Minneapolis Thresh-	
v. Hale	1186, 2132, 2158	Milliken v. Barr	1245	ing M. Co. v. McDonald	716
v. Harrington	1186	v. Long	1614	Minneapolis Times Co.	
v. Heck	1072	Milling v. Hillenbrand	1086	v. Nimocks	1268
v. Holt	1651	Millman v. Tucker	986, 2272	Minnie, The, v. R.	1672
v. Johnston	2159	Millner's Estate, re	2528	Minor v. Tiltolton	1194, 1195, 1239
v. Jones	2016	Mills v. Catlin	1698	Minters v. People	2261
v. Kerr	406	v. Com.	2062	Minthon v. Lewis	1908
v. Lamb	392	v. Dunlap	18	Minton v. State	507, 832
v. Livingston	1677	v. Duryee	1216, 2555	Mintzner v. Hogg	1164
v. McKinnon	1213	v. Griswold	2286	Mish v. Wood	677, 716, 1943
v. Mariner's Church	1258	v. Hallock	1954	Mishler v. Baumgardner	1911
v. Matthews	2572	v. May	1300	Miskimmins v. Shaver	2271, 2276, 2282
v. Mayer	1960	v. Oddy	2211, 2307	Misner v. Darling	747, 1669
v. Meers	1085	v. R. Co.	2220	Mississippi Co. v. Vowels	1778
v. Metzger	2550	v. Spencer		Mississippi & T. R. Co. v.	
v. Miller		Holt N. P.	73	Ayres	1385
187 Pa.	928	81 Va.	603, 610	Missouri K. & T. R. Co. v.	
S. C., 21 S. E.	2168	v. State	1821	Colburn	2572
v. Miller's Adm'r	1890	v. Twist	1313	v. Dilworth	1213
v. Morrow		v. U. S.	2088, 2228, 2239	v. Elliott	
3 Coldw.	6	v. Winter	20, 1978	102 Fed.	291
5 Heisk.	6	Mills' Estate	2063, 2527	2 Ind. T.	1207, 1404
v. Nicodemus	1067	Milne v. Leisler	10, 1755, 1757, 1768, 2102, 2113	v. Johnson	
v. People	131, 833			92 Tex.	65, 199
v. R. Co.		Miltimore v. Miltimore	1267	95 Tex.	1721
93 Ga.	1109	Milton v. Edgworth	2441	v. Merrill	1951
128 Ind.	792	v. Hunter	2235	v. Moore	792
89 Ia.	461	v. Rowland	568, 784, 1378	v. St. Clair	949
62 Minn.	688	v. State		v. Simonson	1354
71 N. Y.	1960	134 Ala.	1440		
v. Reinhart	1678	40 Fla.	363, 1893		

TABLE OF CASES.

MIS

	Section		Section		Section
Missouri P. R. Co. v. Baier	1749, 1750	Mix v. Woodward	406	Monongahela Water Co. v. Stewarson	1890
v. Collier	1755	Mixer v. Bennett	2004	Monroe v. Ins. Co.	2494
v. Finley	569	Moak v. Moak	2046	v. Lattin	1951
v. Fox		Moale v. Baltimore	463	v. State	
56 Nebr.	1976	Moats v. Rymer	961, 1911, 2211, 2313	5 Ga.	111, 246, 247, 1732
60 Nebr.	561, 1890, 1951	Moberly v. Brooks	2047	71 Miss.	2061
v. Hall	571, 677	v. Preston	74	v. Twistleton	2237
v. Heidenheimer	2155	Mobile Life Ins. Co. v. Morris	1081	Monson v. Palmer	1784
v. Hennessy	283	v. Walker	1415, 1976	Montague v. Dougan	1552, 1560
v. Johnson		Mobile & B. R. Co. v. Ladd	15	v. Perkins	2419
59 Kan.	571	Mobile & G. R. Co. v. Williams	1109	Montague's Case	2250
72 Tex.	2220	Mobile & M. R. Co. v. Ashcraft	458, 461, 1720, 1748, 1755	Montana Co. v. St. Louis	
v. Lovelace	2432	v. Blakely	571	M. & M. Co.	1862
v. Mackey	571, 1951	v. Yeates	2313	Montana R. Co. v. Warren	660, 712, 1943
v. Moffatt		Mobile & O. R. Co. v. Postal T. C. Co.	2580	Montclair R. Co. v. Benson	463
56 Kan.	460	v. Steamer New South	991	Monteeth v. Caldwell	18
60 Kan.	93	v. Stinson	1750	Montefiore v. Montefiore	2106
v. Palmer	715, 1235	Mobley v. Bilberry	1779	Monterey v. Jacks	2535
v. White	1807	v. Breed	1269, 1960	Montgomery v. Com.	2277
Missouri & K. Tel. Co. v. Vandevort	1063, 1951	v. Hamit	923, 1985	v. Deeley	2573
Mist v. Kapiolani Estate	1573	v. Kittleberger	1750	v. Dickey	1582
v. Kawelo	1867	v. State	238, 2085	v. Dorian	1312, 1314, 1651
Mistovski v. Mandelberg	2212	v. Watts	1267, 1273	v. Ins. Co.	1890
Mitchell v. Allison	1944	Mock v. Kelly	715	v. Koester	282
v. Bridger	1225	Mockabee v. Com.	1445	v. Lipscomb	1568
v. Com.		Modawell v. Holmes	2580	v. McLeod	1644
78 Ky.	928	Moddie v. Breiland	2525	v. Page	2445
Ky., 14 S. W.	987	Mode v. Beasley	2529	v. Pickering	2327
Ky., 64 S. W.	1270	Modern Woodmen v. Kozak	1073, 2500	v. Routh	1213
v. Henry	2462, 2463	Modisett v. Governor	2158	v. Scott	568, 569, 1951, 1976
v. Ins. Co.	1947	Moeckel v. Heim	2338	v. Snodgrass	1373
v. Jacobs	1213	Moehn v. Moehn	1461	v. State	
v. McDougall	615	Moellering v. Evans	1899	40 Ala.	1842, 2059
v. Mitchell		Moett v. People	1010, 1013	80 Ind.	1432
11 G. & J.	586	Moffatt v. Tenney	907	v. Taylor	1976
1 Gill	1388, 1651	Moffit v. Hereford	716	Montgomery B. B. W. v. Gaston	1350
3 Stew. & P.	1195, 1225, 1651	v. State	609	Montgomery & W. P. R. Co. v. Varner	1943
80 Tex.	2336	v. Witherspoon	1072, 1432	v. Webb	382
11 Vt.	2085	Mohawk Bank v. Atwater	586	Montreuil v. Pierre	1239, 1680
v. R. Co.		Mohon v. Harkreader	1835	Monts v. Stephens	1219, 1677
87 Cal.	461	Moises v. Thornton	1674, 1680, 2169	Moody v. Pender	1416
85 Ill.	1168	Moldenhaur v. R. Co.	461	v. Rowell	770, 773, 774, 777, 778, 915, 1888, 1890, 2002, 2008, 2016, 2020, 2026
68 N. H.	288	Molina v. U. S.	564	v. State	1350
100 Tenn.	2509	Molineux v. Molineux	2454	Mooers v. Bunker	1481, 2529
v. Ryan	2408	Moller v. Moller	2066	Moog v. Randolph	1350
v. Savings Inst.	1263	v. U. S.	805	Moon v. Hawks	378, 1779
v. Sawyer	908	Molm v. Barton	1195	v. State	791
v. Sellman	15	Molton v. Harris	1202, 1224	Moon's Adm'r v. Crowder	2008, 2012, 2016
v. State		Molynaux v. Collier	1035, 1062, 1195	Mooney v. Davis	289
58 Ala.	569	Momence Stone Co. v. Groves	291, 1263	v. Kennett	2572
94 Ala.	923, 925	Monahan v. Worcester	249	v. Olsen	1738
114 Ala.	1157, 1404, 1405, 1605, 2497	Moncrief v. State	2513	Moor v. Adam	2203
43 Fla.	1807	Monk v. Farlinger	2144	Moor's Case	600
Fla., 33 So	2071	v. Jenkins	1676	Moore v. Andrews	1521
71 Ga.	285, 1668, 2098	Monkton v. Attorney-General	1483, 1484, 1486, 1491, 1496, 1501	v. Arm	1651
Miss., 24 So.	838			v. Bank	
36 Tex. Cr.	2354			6 Mo.	1675
v. Terr.	1781			13 Pet.	18
v. Welch	1890				
v. Work	75, 212				
Mitchell's Case	2307				
Mitchinson v. Cross	619				
Mitchum v. State	1745, 1747, 1750, 1806				

	Section		Section		Section
Moore v. Beale	749	Mordecai v. Bell	1213	Morris v. Hammerle	1669, 2098
v. Beattie	1195	More's Estate	665	v. Hanser	1208
v. Bray	2296, 2310	Morehead Bkg. Co. v.		v. Henderson	18, 1064, 1676
v. Brown	1416	Walker	1208	v. Hubbard	2536
v. Burlington	252	Morehouse v. Mathews	1943	v. Hurst	2118
v. Com.		v. Morehouse		v. Ins. Co.	1951
2 Leigh	852	136 Cal.	2219	v. Jamieson	2120
9 Leigh	1644	70 Conn.	1896	v. Lessees	1597, 1598
v. Craven	2212	v. Potter	1225	v. Miller	1174, 2084, 2085, 2086, 2088
v. Davis	392	Moreland v. Lawrence	923	v. Morris	
v. Gilliam	1248	v. Mitchell Co.	1978	20 Ala.	2083
v. Gwyn	1777	Morell v. Morell	1576, 2500	119 Ind.	2384, 2391
v. Heineke	1770, 2085, 2498, 2505	Morelock v. State	1033	v. Patchin	1681
v. Holmes	2596	Morely v. Dunbar	1010	v. Pugh	2450
v. Jones		Moreton v. Horton	1199	v. R. Co.	
18 Ala.	1021, 1029, 1857	Morewood v. Wood	1587, 1605, 2006, 2017	116 N. Y.	1005
108 Ill.	1021	Morey v. Hoyt	1256	148 N. Y.	2390
v. Jonesboro	2572	Morgan v. Barnhill	64	v. Sargent	736, 747, 2016
v. Kalamazoo	252	v. Bealle	1651	v. State	
v. Moore		v. Brydges	1893, 1894	124 Ala.	1977
39 Ia.	736	v. Burrow	2581	38 Tex.	78, 987
51 Mo.	2245	v. Com.	140	v. Stokes	728, 1072
67 Mo.	689, 1938	v. Griffith	2442	v. Swaney	1278, 1279, 2048
102 Tenn.	2506	v. Halberstadt	2270	v. Vanderen	1056, 1080, 1082, 1196, 1200, 1257, 1267, 1275, 1573, 1658, 1672, 1674, 2286
v. Oastler	73, 209	v. Halverson	1415	v. Wadsworth	1651
v. Palmer	89, 1409, 1416, 2008, 2016	v. Jones	1195, 1225	Morris and Clayton's Case	2297
v. Pearson	2098	v. Livingston	406, 1971	Morrissey v. Ferry Co.	2529
v. People		v. Minor	1249	v. Ingham	688, 951, 952, 1722
26 Colo.	106	v. Nicholl	1388	v. People	609
108 Ill.	1018	v. People	1236	v. Wiggins Ferry Co.	1644
v. R. Co.		v. Purnell	1483	Morrison v. Arnold	1406, 1417
65 Ia.	1976	v. Roberts	1911	v. Chapin	736, 745, 748, 1082
59 Miss.	905	v. S. M. L. V. Co.	2442	v. Coad	1219
v. Smead	2410	v. Seaward	1862	v. Com.	247
v. Smith	1071, 1072	v. State		v. Grand T. R. Co.	1856
v. Steele	1290, 2048	11 Ala.	2086	v. Hinton	1680
v. State		88 Ala.	15, 59, 194	v. Lennard	498, 811
12 Ala.	1033, 1452	31 Ind.	1362, 1431, 1439, 1442	v. Madison	2552
68 Ala.	987	117 Ind.	1354	v. Moat	2212
51 Ark.	2164	51 Nebr.	2497	v. Myers	1263
79 Ga.	1821	56 Nebr.	321	v. People	2167
2 Oh. St.	266, 273	86 Tenn.	524	v. Porter	1651, 1998, 2000, 2008, 2016
17 Oh. St.	676	v. Stevens	2050	v. State	
96 Tenn.	457, 1270, 1385, 1441, 1618	Morgan Co. Bank v. People	1678	42 Fla.	1450
31 Tex. Cr.	364	Moriarty v. Moriarty	2500	40 Tex. Cr.	144, 1722
Tex. Cr., 75 S. W.	2230, 2248	v. R. Co.	278	v. Welty	1202
v. Stone	2498	v. State	111, 246, 247, 248	Morrow v. Campbell	2498
v. Terrell	2294	Moritz v. Brough	1362, 1738	v. Canadian P. R. Co.	2507
v. Townsend	1951	Morley v. Green	2211	v. Com.	1206
v. Triplett	1378	Morly's Case	1374, 1405, 1406	v. Ostrander	738
v. U. S.		Morrell v. Lumber Co.	2155	v. Parkman	1911
91 U. S.	2008, 2016	v. State	246	v. R. Co.	208
150 U. S.	216, 389, 390	Morrill v. Hershfield	682	v. Saunders	1858
v. Westervelt	1951	v. State	2239	v. State	2079
v. Wingate	2334	v. Tegarden	682	v. Waterous	1951
v. Wright	289, 1195	v. Titcomb	1567, 1778	Morse v. Blanchard	1152
Moorhouse v. De Passon	586	v. Whitehead	1552	v. Bruce's Est.	1978
Moots v. State	736, 754	Morris v. Bethell	377	v. Crawford	1938
Mora v. People	821, 1433	v. Briggs	750, 1555	v. Hewett	1651
Morales v. State	2277	v. Callanan	1573	v. Pineo	923
Moran v. McLarty	2416	v. Creel	2374		
v. People	1013	v. Davidson	2573		
Moran Bros. Co. v. Sno-		v. Davies			
qualmie F. P. Co.	791, 1161, 1385	1 Moo. & R.	1646		
		3 C. & P.	2527		
		v. East Haven	65, 199		
		v. Guffey	93, 905, 913		

TABLE OF CASES.

MOR

	Section		Section		Section
Morse v. Potter	1556	Mow v. People	794	Munkers v. Ins. Co.	64, 2008, 2016
v. R. Co.	283, 438	Mowry v. Smith	15	v. State	205
v. Royal	1076	v. Starbuck	1873	Munkwitz v. R. Co.	1168
v. State	1974	Moxie Nerve Food Co. v. Beach	2212	Munn v. Baker	255
Morss v. Morss	1909, 1910, 1912	Moye v. Herndon	2027	v. Baldwin	95
v. Palmer	928, 983, 1105, 1614	Moyer v. Com.	414	v. Godbold	1233
v. Salisbury	1778	v. Moyer	73	Munro v. Callahan	1415
Mortimer v. McCallan	1214, 1215, 1218, 1219, 1223	Moyle v. Congreg. Soc.	1078, 2442	v. Meech	2450
v. Mortimer	2067	Moyler v. Moyler	2047, 2069	v. Stowe	716, 783
Mortlock v. Williams	1208	Moynihan v. Drobaz	1647	Munroe v. Godkin	64
Morton v. Barrett	1674	Mudd v. Dillon	2472	v. Phillips	2111
v. Edwin	1352	Mudgett v. Horrell	1074	Munshower v. State	1040, 1041, 1476, 1698, 1704
v. Fairbanks	2555	Mudsill M. Co. v. Watrous	321	Munson v. Hastings	1125, 1126, 1127, 1129
v. Folger	1568, 1570, 1587	Mueller v. Rebhan	614, 615, 1081, 1873, 1908	Munyon v. State	580, 2235, 2236, 2239
v. Heidorn	1302, 2502	Muetze v. Tuteur	209	Munz v. R. Co.	2381
v. McGlaughlin	1085, 1456	Mugge v. Adams	1195	Murchie v. Peck	2444
v. State	1800	Muir v. Miller	1738	Murdock v. Hunter	1513
Mose v. State		Mulatto Lucy v. Slade	1676	v. Mfg. Co.	1244
35 Ala.	1434	Mulcahey v. R. Co.	1417	v. State	382, 413
36 Ala.	836, 855, 1157, 1616, 1985, 2071	Mulcairns v. Janesville	1698, 1951	v. Sumner	1800, 2349, 2570
Moseley v. Davies	1584, 1588	Muldowney v. R. Co.	1951	Murieta v. Wolfhagen	702
v. Eakin	2063, 2336	Muldorf v. Mueller	2311	Murphy v. State	1896
v. Hanford	2444	v. Tennis	581	Murphree v. Senn	233, 689
Moseley's Adm'r v. Mastin		Mulhado v. R. Co.	1158	Murphy v. Backer	21, 377, 1021
	2582	Mulhall v. Fallon	1960	v. Carter	603, 607
Mosely v. Carr	2052	Mulholland v. Harman	2143	v. Com.	1003, 2235, 2336
v. Mosely	803	Mulkey v. Long	2525	v. Ganey	604
v. Wingo	2110	Mullaney v. Duffy	1587	v. Hagermann	1993
Moses v. Cromwell	2354	Mullanphy S. Bank v. Schott	1195	v. Hendricks	2575
v. Ins. Co.	1947	Mullen v. Ins. Co.	1042, 1807	v. Jack	2155
v. State	2058	v. M'Kelvy	2048	v. Loyd	1573
Moshier v. Knox College	18	v. McKim	1028	v. Lyons	1195
Mosley v. Com.	905	v. Morris	1684	v. Manning	461
v. Ins. Co.	1109	v. Pryor	2530	v. Mulgrew	1086
Moss v. Anderson	1318, 1651, 2143	v. Sackett	2580	v. Murphy	
v. Atkinson	1651	v. Union C. L. Ins. Co.	1064	74 Conn.	1890
v. Dearing	1083	v. U. S.	290	Ky., 65 S. W.	2341
v. State	580	Mullenback v. Batz	1195	1 S. D.	2355
Mostyn v. Fabrigas	1271, 1380, 2368	Muller v. Hospital Assoc.	987	v. Olberding	1198, 1960
(see Fabrigas v. Mostyn)		v. Muller	1736	v. Orr	2530
v. Mostyn	2463	Mullery v. Hamilton	2529	v. People	
v. Spencer	803	Mulligan v. R. Co.	1067	37 Ill.	1442
Motes v. Bates	923	v. Thompson	2063	63 N. Y.	390, 851
v. U. S.	21, 1405	Mulliken v. Boyce	1195	v. Prudential Ins. Co.	1947
Mott v. Doughty	1513	v. Corunna	1164	v. State	
v. Hicks	585	Mullin's Estate	678, 2315, 2390	63 Ala.	830, 857
v. R. Co.	571, 1721	Mullins v. Com.	1018	108 Ala.	194, 1270
Moughon v. State	2354	Mulliner v. Bronson	437	118 Ala.	1957
Moulin v. Dallison	380	Mullis v. Cavins	1676	43 Nebr.	1839
Moulton v. McOwen	571	Mulry v. Ins. Co.	1947	27 Oh. St.	1072
v. Mason	1210	Mulville v. Ins. Co.	97	41 Tex. Cr.	1130
v. State	194, 988, 1614, 1983	Mumford v. Gething	2465	108 Wis.	987
Mounce v. Kurtz	2432	v. Sewall	1350	v. Waterhouse	2312, 2498
Mount v. Bogert	1062	v. Thomas	1202	Murray v. Bethune	1971
Mount Adams & E. P. I. R. Co. v. Lowery	2494	v. Tolman	2444	v. Board	1951
Mount Sterling Bank v. Bowen	1185	Mumma v. McKee	1378	v. Bogue	371
Mountain v. Fisher	616	Muncey v. Sun Ins. Office	1086	v. Buchanan	1188, 1195
Mt. Terry M. Co. v. White	764	Mundy v. Foster	2498	v. Cone	1779
Mousler v. Harding	613	v. Mundy	1511	v. Coster	1062
		Munford v. Green's Adm'r	2437	v. Dublin	1876
		v. Wilson	1210	v. Duff	1681
				v. Elston	2200, 2219
				v. Gregory	1256

	Section		Section		Section
Murray v. Hennessey	2500	Mygatt v. Tarbell	392	National Masonic A.	
v. Hoboken L. &		Mynatt v. Hudson	928, 1117	Ass'n v. Burr	95
I. Co.	1354	Mynd v. Francis	2257	v. Shryock	1750
v. Milner	1492, 1495, 2063	Myrberg v. Baltimore &		National Provincial Bank	
v. R. Co.		L. M. & R. Co	2220	v. Jackson	2456
N. H., 54 Atl.	1750			National Trust Co. v.	
64 S. C.	2465	N.		Gleason	522
16 Utah	568			National Ulster Co. Bank	
v. State	2071	Naanes v. State	1671, 1677,	v. Madden	736, 738,
v. Supreme Lodge	1644,		2166,		754
	1646	Nabors v. Goldforb	762	Natoma W. & M. Co.	
v. Toland	1073	Nachman, re	2282	v. Clarkin	1239
Murrell v. State	276	Nadin v. Bassett	1411	Naugher v. State	246, 1038
Murtey v. Allen	2573	Nailey v. Carpet Co.	283	Nauman v. Zoerhlaut	786
Mushrow v. Graham	1407	Najac v. R. Co.	718	Naumberg v. Young	2431, 2434
Musick v. Barney	1677	Nalle v. Fenwick	1312	Nave v. Baird	2312
v. Ray	912, 1389	Names v. Ins. Co.	786	v. Flack	458
Muskegon v. Lumber		Nance v. Callender	1554	v. Tucker	682, 1770
Co.	1248	Nancy v. Snell	1247	Nave's Adm'r v.	
Mussel v. Tama Co.	1352	Narregang v. Brown Co.	1350	Williams	167, 1605, 1974
Musser v. Hyde	1352	Nash v. Classen	1704,	Naylor v. Semmes	2223
v. State	1079		2556	Neal v. Erving	1249
v. Stauffer	2536	v. Gilkeson	64	v. Neal	2015
Mutter v. Lime Co.	1078	v. Hoxie	89, 1938	v. R. Co.	2495
Mutual Ben. Life Ins. Co.		v. Hunt	1938	v. Thornton	1062
v. Brown	2008,	v. Minn. T. I. & T.		Neale v. McKinstry	1185
	2016,	Co.	581	Neall v. U. S.	2026
v. Higginbotham	2120	v. State	1389	Neally v. Greenough	1060, 1196,
v. Martin	2531	Nashua Savings Bank v.			1205, 1207,
v. Robinson	1699, 2581	Anglo-American L. M.			1267
Mutual Life Ins. Co.		& A. Co.	1684	Nealy v. Brown	2534
v. Boyle	1725	Nashville C. & St. L. R.		Nebonne v. R. Co.	
v. Bratt	1698	Co. v. Lawson	1128	67 N. H.	1078
v. Hillmon	1714, 1725,	Nashville & C. R. Co. v.		68 N. H.	1158, 1921
	1726	Carroll	1955	Nebraska Expos. Ass'n	
v. Jonah	321	Nason v. Jordan	1273	v. Townley	2435
v. Leubrie	568, 1938	Nass v. Vanswearingen	2222,	Nebraska Nat'l Bank	
v. Logan	1459		2223	v. Johnson	2498
v. Selby	266, 1081, 2296	Nathan v. Brand	463	Needham v. Ide	1938
v. Suiter	2018	v. Jacob	1234	v. Smith	586
v. Thomson	1877	v. Sands	908	Neel v. Potter	1738
v. Wiswell	2540	Nation v. People	950	Neely v. Carter	2105
Myatt v. Walker	2540	National Acc. Soc'y v. Spiro		v. Shepard	1968
Myers v. Baker	2094	78 Fed.	2008,	Negus v. Reynal	1199
v. Beals	1195		2016, 2153	Nehring v. McMurrian	270,
v. Bernstein	1779	94 Fed.	1633, 1681		2483, 2531
v. Brownell	1352	National B. & L. Co. v.		Nehrling v. Herold Co.	749
v. Com.	2512	Dunn	451	Neil v. Childs	905, 913
v. Currie	73	National Bank		v. Miller	2130
v. Kinzie	1086	v. Armstrong	2007	v. Thorn	1890
v. Ladd	2476	v. Delano	2310	Neill v. Devonshire	378, 1593
v. Litts	608	v. Emmitt	2516	v. Kees	2054
v. Murphy	18	v. Galland	1674	Neilson v. Crawford	1074
v. People	18	v. National Bank	2287	v. Ins. Co.	1668
v. Sarl	2462, 2463	National Bank of C. v.		v. R. Co.	
v. State		New Bedford	1704	67 Conn.	1415
62 Ala.	247	National Bank of Monti-		58 Wis.	992, 1168,
Fla., 81 So.	770, 1021,	cello v. Bryant	2579		1943
	1041	National Cash-Register		Nelius v. Brickell	1316, 1513
97 Ga.	969, 2100, 2264	Co. v. Leland	6, 1960	Nelms v. State	1033, 1448,
51 Nebr.	987	v. Navy C. R. Co.	1657		2354
7 Tex. App.	2059, 2060	National Express & T.		v. Steiner	29, 288, 334,
33 Tex.	247	Co. v. Morris	1074		344, 944, 2498
v. Taylor	2446	National German A.		Nelthrop v. Johnson	2109
v. Toscan	2016	Bank v. Lawrence	2233, 2240,	Nelson v. Bank	463, 1078,
v. Weger	736		2242, 2243		1335, 1530,
Myers' Estate	987, 1244	National Granite Bank			1675
Myerstown Bank v.		v. Whicher	1576	v. Becker	2312
Roessler	944, 2442			v. Blakey	1275, 1680

TABLE OF CASES.

NEL

	Section		Section		Section
Nelson v. Branford L. & W. Co.	2566	New Gloucester v. Bridg-ham	105, 1732	Newbold v. Lamb	1508, 1511
v. Bridport	690, 1271, 1697	New Hampshire F. I. Co. v. Healey	2363	Newbolt v. Fryce	2477
v. Evans	74	New Hampshire T. Co. v. Korsemyer P. & H. Co.	2104	Newberry v. Carpenter	2221, 2264
v. Haywood Co.	1350	New Haven Co. Bank v. Mitchell	736, 747, 2152	v. State	1442
v. Ins. Co				Newburgh v. Newburgh	1670
110 Ia.	2384, 2390			Newburyport v. Boothbay	2083
71 N. Y.	561			Newby v. Security Co.	2447
v. Iverson				Newcastle v. Broxtowe	1588, 1594
17 Ala.	1779	New Haven & H. Co. v. Goodwin	1554, 1561	v. Haywood	2515
24 Ala.	664, 1029, 1045, 1778	New Jersey Case	1712	Newcomb v. Drummond	1267
v. Land Co.	1195	New Jersey Express Co. v. Nichols	786	v. Griswold	981, 987, 1005, 1263, 1270
v. Oneida	2383	New Jersey R. & T. Co. v. Suydam	1651, 1677, 2105	v. Noble	1244
v. Pierce	2498			v. State	111, 247, 953, 1022, 1732
v. Potter	1658			Newcomb's Ex'rs v. Newcomb	1938
v. R. Co.				Newell v. Clapp	1212
38 Ia.	1029	New Jersey Traction Co. v. Brabban	1976	v. Desmond	1416
104 Mich.	1698	New Jersey Zinc & I. Co. v. L. Z. & I. Co.	561, 1254, 1530, 1696, 1700	v. Homer	1028
v. Southern P. Co.	461			v. Newell	2220
v. State				v. Newton	2578
130 Ala., 32 So.	1750	New London Cred. Syndicate v. Neale	2444	v. Nichols	2532
32 Ark.	1329	New Milford v. Sherman	1640, 1678	v. Roberts	1459
10 Humph.	2349			v. State	826, 1977, 2746
2 Swan	1035, 1124, 1750, 1839, 1840	New Orleans v. Locke	1878	Newgold v. A. E. N. & M. Co.	2257
Tex. Cr., 58 S. W.	1732	New Orleans J. & G. N. R. Co. v. Allbritton	569	Newhal v. Adams	957
v. Terr.	1620	New Portland v. Kingfield	1022, 1026, 1028, 2535	Newhall v. Holt	1256
v. U. S.	1391			v. Jenkins	815
v. Welch	1807	New River Mineral Co. v. Roanoke C. & C. Co.	2534	Newham v. Raithby	1644
v. Whitfield	1278	New York, The	2573	Newhouse v. Miller	613
v. Whittall	1513, 2529	New York v. R. Co.	1225	Newis v. Lark	1177, 2094
v. Wood	571	New York C. & H. R. R. Co. v. Difendaffer	2415, 2494	Newland v. Graham	1712
Nelson's Estate	2314, 2384	New York Central Ins. Co. v. U. S. Radiator Co.	1951	v. Reeves	1894
Nelson's Will	1739	v. Watson	1073	Newlin v. Lyon	1086
Neosho V. I. Co. v. Hannum	1225	New York Dry Dock v. Hicks	1651, 1677	Newman v. Bradley	1911, 2117
Nepean v. Knight	2531, 2538	New York El. Eq. Co. v. Blair	18, 675, 1921, 1951	v. Cobleigh	1225
Nesbit v. Crosley	1977			v. Dodson	1722
v. People	1350, 2382			v. Doe	1633, 1639, 1671, 1674
v. State	1443			v. Mackin	928
Nesbitt v. Turner	2525			v. Newman	1818
Netter v. Brett	1658			v. Studley	1651
Neubrandt v. State	351			v. V. T. C. S. & I. Co.	2110
Neuffer v. Moehn	1085			v. Willets	1681
Neuman v. R. Co.	2220			Newmark v. Ins. Co.	720
Neural v. Cowell	2132			Newport News & M. V. R. Co. v. Carroll	1158
Nevan v. Roup	1378, 1414			Newport's Case	1238
Nevil v. Johnson	1388			Newsam v. Carr	73, 258
Neville v. Northcutt	1554			Newsom v. Holesapple	1215
Nevling v. Com.	111, 247			v. Jackson	1246
New Albany & S. R. Co. v. Huff	1943			v. Luster	1225, 1320, 1321, 1515
New Albany & V. P. R. Co. v. Stallcup	1064			Newstrom v. R. Co.	2336, 2341
New Boston v. Dunbarton	157, 1267, 2522			Newton v. Bank	1664
				v. Belcher	1058
New England Bank v. Lewis	2123			v. Chaplin	2211, 2307
New England D. M. & W. Co. v. Standard				v. Fay	2437
Worsted Co.	2465			v. Foot	809
New England Glass Co. v. Lovell	1923, 1976			v. Harland	2202
New England L. & T. Co. v. Robinson	2516			v. Ins. Co.	1750
New Era Ass'n v. Mac-tavish	1947			v. Jackson	1109
				v. Liddiard	1058
				v. Rowe	1416
				v. State	1807

	Section		Section		Section
Newton v. Tolles	2417	Niles v. Brackett	586	Norman v. Wells	663, 1943
Ney v. Mumme	1289	v. Burke	1082	Norman's Will	689, 1938
Niagara F. Ins. Co.		v. Hancock	1347	Normanshaw v. Norman-	
v. Greene	1951	v. Patch	1778	shaw	2394
v. Whittaker	1205	v. Sprague	1275, 1492, 1644, 2063	Norris v. Cargill	1890
Nias v. R. Co.	2294			v. Clinkscales	16, 1194, 2495
Nicolls v. Foster	2349	Niller v. Johnson	2004	v. Crandall	714, 1029
Nicewander v. Nicewander	1215	Nims v. Johnson	2110	v. Hall	1573
Nichol v. Ridley	1186	Nininger v. Knox	1623	v. Haverhill	1721
Nicholas v. Austin	613	Nino v. People	2501	v. Le Neve	1670
v. Com.	88, 238, 363	Niosi v. Laundry	1164	v. Monen	1388
v. Kershner	689, 1938	Nishimura Ekiu v. U. S.	1354	v. Russell	1195, 1219
v. Lansdale	2529	Nix v. Gilmer	620	v. Spofford	392
Nicholl v. Jones	2319	v. Hedden	1699	v. State	
Nicholls v. Dowding	770, 772, 778	Nixon v. Beard	1899	16 Ala.	689, 1934, 1938
v. Downes	1072	v. Brown	2088	87 Ala.	968
v. Parker	1585, 1588	v. McKinney	581, 987	3 Humph.	2349, 2354
v. Roland	2508	v. Mayoh	2307	North v. Drayton	1195, 1256
v. Webb	1862, 1518, 1521, 1523, 1524,	v. Porter	1511, 1684, 2141	v. Mallory	18
	1675	v. State	347	North American Acc.	
Nichols v. Alsop	2134	Noah v. Angle	1943	Ass'n v. Woodson	682, 1750
v. Bardwell Lodge	2566, 2568	Noble v. Epperly	2442	North Austr. T. Co. v.	
v. Boston	2522	v. Kennoway	379	Goldsbrough	1263
v. Goldsmith	1523	v. Martins	1407	North Bank v. Abbot	1521, 1531
v. Haynes	1560	v. People	1817	North Brookfield v.	
v. Holgate	529	v. R. Co.	283	Warren	1496, 1503
v. Hotchkiss	1082	Nobles v. State	851	North Cheshire & M. B. Co.	
v. Howe	1236	Noblesville & E. G. R. Co.	569	v. Manchester B. Co.	1921
v. Jones	1066	v. Gause	1779	North Chicago R. M. Co.	
v. Kingdom Co.	1278	Noblitt v. Durbin	1284	v. Monka	1696
v. Nichols	147 Mo. 2 Phillim.	Nodin v. Murray	1779	North Chicago St. R. Co.	
	2840	Nodle v. Hawthorne	922, 923	v. Anderson	961
v. Ore Co.	1971	Noel v. Dickey	759	v. Dudgeon	966
v. R. Co.	682	Noel, Motion of	1644	v. Kaspers	461
v. Ridley	1664	Nokes v. Milward	1195	v. Louis	2507
v. Rosenfeld	2410	Nolan v. Pelham	455	v. Zeiger	2203
v. Stewart	1126	v. R. Co.	2235, 2336, 2341	North Durham Case	2215
v. Suncook Mfg. Co.	2355	Noland v. R. Co.	821	North Pacific L. Co. v. W.	
Nichols & S. Co. v. Char-		Nolen v. Harden	660, 791	S. M. L. & M. Co.	1078
lebois	1205		1536	North Pennsylvania R. Co.	
Nicholson v. Burkholder	2529	v. State	716, 1943	v. Bank	2494
v. Desobry	1391, 1890	Nolin v. Farmer	18	North Stonington v. Ston-	
v. Horton	1239	Nolley v. Holmes	1776	ington	1777
v. Snyder	530, 1058, 1352	Noonan v. Ilsley	1976	Northampton Co. v. Innes	2203
v. State		v. Mining Co.	1078	Northeastern Nebr. R.	
117 Ala.	2497	v. State	2319	Co. v. Frazier	714, 1943
88 Md.	826, 832	1 Sm. & M.	1750	Northern Line P. Co. v.	
v. Tarpey	1205	55 Wis.	1225, 1651	Shearer	614
v. Withers	735, 753	Norberg v. Plummer	2276, 2279	Northern Mo. R. Co. v.	
Nickerson v. Buck	1511	Nordon v. Defries	398	Akers	1951
v. Gould	39, 377	Norfleet v. Com.	932, 1982	Northern Pac. R. Co.	
v. Morin	1557	Norflet v. Nelson	v. Charless	v. Charles	785
v. Spindell	1236	Norfolk v. Gaylord	v. Hayes	v. Hayes	21, 660
Nickle v. Baldwin	1541, 1544	v. Germaine	v. Keyes	v. Keyes	1230, 1530, 2203
Nicks v. Rector	1312, 2166	Norfolk's Divorce Suit	v. Peterson	v. Peterson	2552
Nickson v. Thomas	527	Norfolk R. & L. Co. v.	v. Rogers	v. Rogers	456
Nicolay v. Mallery	1079	Corletto	v. Urlin	v. Urlin	770, 1719, 1951
v. Unger	1960	Norfolk & C. R. Co. v.	Northern Trust Co.		
Nieman v. Schnitker	229, 233	Lumber Co.	v. Hiltgen	v. Hiltgen	2444
Nies v. Broadhead	792, 794	Norfolk & W. R. Co.	Northfield v. Plymouth	Northfield v. Plymouth	19, 2159
Nightingale v. Scannell	18	v. Hoover	v. Vershire	v. Vershire	2083
v. State	784	v. Prindle	Northington v. State	Northington v. State	1807
Niland v. Kalish	2245	v. Reeves	Northrop v. Hale	Northrop v. Hale	1492
Nile v. State	1800	Norma, The	v. Hatch	v. Hatch	987, 2223, 2256, 2279
		Norman v. Beaumont	v. Knowles	v. Knowles	1603, 1645, 2083, 2159, 2167
		v. Kentucky Board			
		v. Morrell			
		v. Norman			

TABLE OF CASES.

NOR

	Section	O.	Section		Section
Northrop v. Wright	1311, 1321, 1513, 2137, 2141			Odiorne v. Winkley	586, 991
Northrup v. Jackson	1257	Oakes v. Finley	1351	O'Donnell v. Johns	2144
Northumberland Coal Co. v. Clement	1956	v. Hill	1678	v. Pollock	1960
Northwestern M. L. I. Co. v. Sun Ins. Office	1164, 1168	v. U. S.	1633	v. Segar	782, 1871, 1890
Northwestern R. Co. v. Hack	1029	v. Weston	1951	O'Driscoll v. R. Co.	1576
Northwood v. Keating	2525	Oakey v. Bank	530	Offutt v. Expos. Co.	2494
Norton v. Moore	1938, 1975	Oakland P. Co. v. Hilton	1350	O'Gara v. Eisenlohr	2033
v. Parsons	779, 1969, 2097	Oakley v. State	1138	Ogden v. Dodge Co.	1085, 1778
v. Pettibone	1082	Oaks v. Weller	95, 1258	v. Gibbons	2201
v. Warner	53, 75	Oatis v. Brown	1086, 2354	v. Illinois	660, 1977
v. Willis	463	Oats v. U. S.	987	v. Parsons	1955
Norwell v. Oury	1389	O'Barr v. Alexander	2354	v. State	1819
Norwalk v. Ireland	747	Ober v. Carson	1871	Ogle v. Cook	1304
Norway, The	803	Oberg v. Breen	1539	v. Pelaski	586
Norwegian Plow Co. v. Hanthorn	1044	Obermann Brewing Co. v. Adams	2155	O'Hagan v. Dillon	655, 777
v. Munger	2153	Obermier v. Core	1664	O'Hagan's Will	1512
Norwood v. Green	1651	Obernalt v. Edgar	770	O'Hara v. State	1350
v. Kenfield	1712	O'Blenis v. State	62	v. Wells	682
v. Marrow	233, 1740, 1938	O'Boyle v. Com.	397, 1442, 1722	O'Hare v. Dackworth	1082
Norwood & B. Co. v. Andrews	928	v. State	2061	Ohio v. Hinchman	1681, 2573
Nossaman v. Nossaman	1244, 2505	O'Brian v. Com.	1375	Ohio Ins. Co. v. Nune- macher	1245
Nostrum v. Halliday	1280	O'Brien, re	2245	Ohio & I. T. Co. v. Fish- burn	1951
Nourie v. Theobald	1951	O'Brien v. Com.	363	Ohio & M. R. Co. v. Dunn	2494
Nourse v. Finch	2475	v. Flynn	2054	v. Heaton	688
v. Nourse	1777	v. Keefe	1270, 1871	v. Stein	728
v. State	2059	v. La Crosse	2220	Ohio, etc. R. Co. v. Ridge	2572
Noverre v. Noverre	2067	v. Look	1951	Ohlsen v. Terrero	770, 774
Novotny v. Danforth	1890	v. O'Brien	2118	O'Keefe v. U. S.	1684
Nowack v. R. Co.	280	v. People	1938	Okuu v. Kaiaikawaha	2437
Nowell v. Chipman	1078	v. Spalding	2303, 2314, 2315	Old Colony R. Co. v. Robinson Co.	463
v. Wright	1951	v. Stambach	736	Olden v. Field	1681
Nowlan's Case	1712	v. State	125 Ind. Nebr. 96 N. W.	Oldenburg v. Oregon Sugar Co.	1003
Nowlin v. Burwell	2141	O'Bryan v. Allen	1842	Oldenburg's Goods	1674
Noyes v. Belding	1890	95 Mo.	7	Oldham v. Com.	1873
v. Brown	1623, 1959	108 Mo.		Olds v. Congor	1195
v. Gardner	252	Ocean S. S. Co. v. Ætna Ins. Co.	2463	v. Powell	1777
v. Marston	2337	v. Wilder	2110	O'Leary v. Mankato	283
v. Merrill	1082	Och v. R. Co.	2509	Oleson v. State	1135, 1136, 1138, 2061
v. State	580	Ochsenreiter v. Elev. Co.	571	v. Tolford	1961, 1976
v. Tootle	1013	O'Connell v. Cox	1565, 1777	Oliphant v. Ferrant	1219, 1680
Nueva Anna, The	2566	v. Dow	582, 987, 1304, 1352, 1890, 2421	v. Liversedge	2066
Nugent v. State	133, 923, 987	v. Walker	1675	v. Taggart	1312
Nunes v. Perry	702	O'Connor v. Ins. Co.	616	Olive v. Adams	1203, 2218
Nurse v. Bunn	2122	O'Connor, re	2475	v. Gwin	1681, 2164
Nussbaum v. R. Co.	1018	O'Connor v. American I. M. Co.	1389	v. Olive	1876
Nusscar v. Arnold	64	v. Dunn	1524, 1567, 1665	v. State	194, 195, 290, 738, 949, 988
Nutall v. Brannin	1195, 1253	v. Madison	689, 1938	Oliver v. Gray	2117
Nute v. Nute	728, 1037, 1040, 1041, 1043	v. Malone	1644	v. Haywood	2257
Nutter v. O'Donnell	1051, 1133, 1873, 1874	v. Marjoribanks	2228, 2232, 2237	v. Morawetz	377
v. Railroad	571	v. Traction Co.	2509	v. Pate	258, 988, 2296, 2327
v. Ricketts	1163	O'Connor's Estate	1067	v. Persons	1188, 1651, 1676
Nutzmann v. Ins. Co.	1984	O'Connor M. & M. Co. v. Dickson	2498	v. R. Co.	
Nye v. Daniels	2375	Odell v. Culbert	1561	Ky., 32 S. W.	1388
v. Dibley	461	v. Koppee	935, 1817, 1818, 1820	170 Mass.	681, 682
v. Gribble	1225	Oden v. State	247, 1807	65 S. C.	1387, 1719
v. Lowry	1648	v. Stubblefield	261, 1778, 1779	v. State	17 Ala. 293, 1442 38 Fla. 363
v. Merriam	1042	Odiorne v. Bacon	782, 1186	106 Ga.	93
v. Otis	2097				
v. Spencer	1064				
v. Thompson	74				

	Section		Section		Section
Olleman v. Kilgore	1225	Ordway v. Haynes	791, 794,	Osterhout v. Shoemaker	1671,
Olmstead v. Miller	2097		1700		2341
v. Webb	1873, 2312,	Oregon Pottery Co. v. Kern	716,	O'Sullivan v. Overton	1304
	2314		994	Oswald v. King	1205
v. Winsted Bank	900, 907	Oregon S. S. Co. v. Otis	95,	v. Leigh	2517
Olmsted v. Gere	569, 681,		1236, 1281	Otey v. Hoyt	
	1951	Orient Ins. Co. v. Daggs	1354	2 Jones L.	451, 570
Olsen v. Andrews	199, 221	O'Riley v. Clampet	1066, 1263	3 Jones L.	2008, 2016
v. Lantalum	258, 2554	Orland v. Farrell	2103	Otis v. Spencer	614, 615
v. N. P. Lumber Co.	1163	Orme v. Crockford	2281	Ottawa v. Gilliland	2220
v. R. Co.	1976	Ormond v. Hutchinson	2121,	v. Perkins	1850
v. Rogers	378		2122	Ottawa Gaslight Co. v.	
Olson v. Peterson	1062, 2061	Ormsby v. Ihmsen	1956	Graham	451, 1943
v. R. Co.	1976	O'Rourke v. O'Rourke	1010	Ottawa O. C. & C. G. R.	
v. Swenson	1779	Orpen, re	1442	Co. v. Adolph	1943
Olson Co. v. Brady	2579	Orr v. Cox	2336	Ottawa Univ. v. Parkinson	715
Omaha v. Jensen	1404	v. F. A. W. & C. Co.	747,	Otto v. Trump	1213,
Omaha Bridge Cases	1876		748		1269, 1273
Omaha L. & T. Co. v.		v. Hadley	1873, 1388	Ougier v. Jennings	2440
Douglas Co.	561, 1263	v. Lacey	529	Ouidas v. State	390
Omaha Nat'l Bank v.		v. Morice	1297, 1298	Outlaw v. Hurdle	2016
Thompson	944	v. R. Co.	728	Outram v. Morewood	1585
Omaha South. R. Co. v.		v. State		Ouversen v. Grafton	1951, 2507
Beeson	792, 796		1021	Ovenston v. Wilson	702,
Omaha St. R. Co. v.		107 Ala.	1021		1994, 2153
Elkins	1404	117 Ala.	1951, 1974	Over v. Schiffing	17, 581
v. Emminger	1158	Orser v. Orser	1302	Overall v. Overall	1304
Omaha & R. V. R. Co. v.		v. Vernon	1311	Overend v. Superior Court	2271,
Krayenbuhl	1013	Ort v. Fowler	2012, 2016		2276
v. Walker	1168	Orthwein v. Thomas	2527	Overstreet v. State	1620
O'Mara v. Com.	1975	Ortiz v. Jewett	1021	Overton v. State	2239
O'Malley v. Com.	655	Ortiz v. State	852, 792,	v. Tyler	2443
Omberg v. U. S. Mut.			794	Overton's Heirs v. Davis-	
Ass'n	1722	Orton v. McCord	2303	son	378
O'Mellia v. R. Co.	1698	Orton's Trial; see R. v.		Overtoom v. R. Co.	736,
Omichund v. Barker	29, 1174,	Castro.			1013, 1327,
	1193, 1268, 1306, 1309,	Osborn v. Bell	1387		1329, 1977
	1481, 1645, 1674, 1676,	v. Black	603	Owen v. Barksdale	1664
	1817, 1818, 1882, 2138	v. Guy's Hospital	2414	v. Boyle	1271, 1678,
Onbie's Case	2290	v. Herron	1911		1684
Onderdonk's Trial	2032	v. London Dock Co.	2268,	v. Brockschmidt	613
O'Neal v. McKinna	1195		2271	v. Henderson	2463
Oneale v. Com.	2066, 2088	v. Robbins	581	v. Mining Co.	797, 2024
O'Neale v. Walton	745, 748,	v. Simerson	451	v. Owen	2067
	759	v. Vickers	2220	v. Palmour	1404, 1668,
O'Neil v. Attorney-General	6	Osborne, re	2568		2594
v. Hanscom	1974	v. Bell	451	v. State	2336, 2341
v. Mining Co.	382	v. Detroit	283, 438, 457,	v. Thomas	1195, 2105
v. R. Co.	1951		458, 1156, 1158,	v. Warburton	2352, 2353
v. Vanderburg	1085		1160, 1824	Owens v. Dawson	1065
v. West Branch	252	v. Hargreaves	986	v. Frank	2286
O'Neill v. Lowell	950	v. O'Reilly	1896	v. Gentry	1890
v. Read	1053	v. State	1339	v. Lancaster	1960
Onondaga Co. Bank v.		v. Tunis	2141, 2144	v. Owens	
Bates	1635	Osbourne v. Hosier	2018	81 Md.	2364
Outcalt v. Ludlow	1778	Osburn v. Staley	1350	14 W. Va.	578
Opinion of the Justices	1350	Oscanyon v. Arms Co.	2590,	v. R. Co.	2220
Oppenheimer v. R. Co.	1195		2594	v. State	
Orange Belt R. Co. v.		Osgood v. Chicago	487, 1164	67 Md.	747, 748
Craver	714	v. Coates	1257, 1778	63 Miss.	1398, 1404
Orange Co. F. E. v.		v. Dewey	2016, 2024	Miss., 33 So.	967
Hubbell	944	v. Manhattan Co.	1081,	Owings v. Hull	1225, 2573
Orchard v. Collier	1225		1086	v. Low	736, 747,
Orcutt v. Cook	616	O'Shea v. R. Co.	2446		1536, 2222
Ord v. McKee	1225	v. Wood	1859, 2294,	v. Speed	1074, 1661
v. Nash	1387, 1404		2311	v. Utery	1275
v. Ord	1085	Oskamp v. Gadsden	669	v. Wyant	1244
Ordinary v. Thatcher	2420	Osmun v. Winters		Owsley v. Greenwood	2184
Ordway v. Conroe	1681	25 Or.	1770	Oxford Co. v. Spradley	1966
		30 Or.	401, 2008, 2016		

TABLE OF CASES.

OXI

	Section		Section		Section
Oxier v. U. S.	979, 987, 2513	Paine v. Trask	1225, 1318, 1657	Parker v. G. P. R. Co.	770
Oxsheer v. Watt	1225	v. Woods	791	v. Goldsmith	1779
Oyler v. Dantoff	748	Painter v. Hall	1640, 1677	v. Haworth	1225
		v. Ledyard	1188	v. Hoskins	1313
		v. People	105, 216, 397, 460, 1157	v. Lovejoy	529
P.		Paisley v. Snipes	1290	v. Marston	1084
Pabst Brewing Co.		Palermo, The	2319	v. Morrill	2433
v. Lueders	1073	Palethorp v. Furnish	2232	v. Orr	1699
Paca v. Dutton	1680	Palmer v. Aylesbury	1406, 2111	v. Publishing Co.	458
Pace v. Com.	2277, 2595	v. Crowle	2356	v. State	
Pacey v. R. Co.	2319	v. Culbertson	2475	77 Ala.	2086
Pacheco v. Mfg. Co.	199	v. Dann	2054	136 Ind.	106, 987, 1750
Pacific Coast B. Co. v.		v. Gilbert	2118	67 Md.	1842
Dugger	2446	v. Hartford D. Co.	763, 1124	61 N. J.	2272, 2512
Pacific Coast S. Co. v.		v. Ins. Co.	2416	40 Tex. Cr.	857
Bancroft-Whitney Co.	748	v. Logan	1195	v. Steamboat Co.	1974
Pacific Express Co. v.		v. Love	1674	v. Thornton	2355
Lothrop	1706	v. McCafferty	1871	v. U. S.	152, 1839
Pacific Gold Co. v. Skillicorn	1013, 1014	v. McDonald	1141	v. Walden	1062
Pacific R. Co.		v. McLearn	762	v. Way	2063
v. Governor	1350	v. Palmer		v. Waycross & F. R. Co.	2146
v. Seifert	1350	22 N. J. Eq.	2046	v. W. William	1842
Pack v. Barton	1350	162 N. Y.	2506	Parkerson v. Burke	2169
Packard v. Dunsmore	1292	v. R. Co.	987	Parkhurst v. Berdell	2336
v. Hill	1684, 2110, 2164	v. State	2354	v. Hosford	1938
v. Richardson	529, 1625	v. Stevens	1652	v. Ketchum	73, 209, 928
Packer v. Gonsalus	1085, 1126	v. Trower	1003	v. Lowten	2255, 2311
v. U. S.	341, 1073	v. White	784	v. Masteller	1978
Packet Co. v. Clough	6	Palmore v. State	63, 246, 247	Parkin v. Moon	773, 774
Paddock v. Forrester	1062	Pancoast v. Graham	1738	Parkins v. Hawkshaw	1063, 1513, 2306
v. Salisbury	73	Pangborn v. Ins. Co.	1199	Parkinson v. Atkinson	2203
Padgett v. Lawrence	1082	v. Young	1350	v. Francis	1644
Paducah v. Allen	463	Pannell v. Com.	678	v. People	357
Page, re	1304, 1736, 2052, 2523	Panton v. Williams	2554	Parkison v. Parkison	2050
v. Beach	1958	Pape v. Wright	928	Parks v. Boston	1168, 1800, 2570
v. Burnstine	6	Papendick v. Bridgewater	1456, 1473, 1476	v. Caudle	2098
v. Humans	1997, 2004, 2015, 2026	Papot v. R. Co.	1652	v. Hazelrigg	2456
v. Kankey	1890, 1893	Paquete Habana, The	1697	v. Johnson	2281
v. Knights & Ladies	1223	Paradise v. Ins. Co.	1985	v. State	
v. Mann	1513	Parcell v. McReynolds	2237	105 Ga.	1442
v. Page		Pardee v. Lindley	1195, 1225	20 Nebr.	1853
51 Mich.	2220	Pardoe v. Merritt	2536	59 N. J. L.	367
15 Pick.	1192	Parent v. Nashua Mfg. Co.	1976	Parlin & Orendorff Co. v.	
v. Parker	571, 769, 772	v. Walmsly's Adm'rs	2572	Hutson	530, 1352
v. State	681	Parish v. Baird	1976	Parmelee v. Thompson	1662
v. Stephens	291	v. Fite	1878, 1880	Parnell v. Wood	1223
v. Wheeler	2349	v. Gates	2812	Parnell Commission's	
Paget v. Birkbeck	1075	v. Pearsons	1681	Proceedings	654, 753, 780, 782, 787, 905, 991, 1079, 1214, 1260, 1368, 1390, 1757, 1807, 1871, 1884, 1917, 2024, 2094, 2099, 2119, 2125, 2286, 2374
Pagett v. Curtis	2579	Park v. Cochran	1225	Parr v. Gibbons	1195
Paige v. Cagwin	1080, 1083	v. R. Co.	208, 249, 1616	v. Seames	2352
v. Carter	745, 748, 761	Park Bros. & Co. v.		Parret v. Craig	1777
v. Kelley	1943	Blodgett & C. Co.	2417	Parrish v. Thurston	581
v. Loring	1243	Parke v. Blackiston	66, 73, 76	Parrot S. & C. Co. v. District Court	1862
v. O'Neal	1086	v. Smith	529	Parrott v. Com.	1157
v. Willet	2590	v. State	2100	v. Thacher	2053, 2349
Pain v. Beeston	1087	v. Williams	1680	Parry v. Libbey	1779
v. Parson	614	Parker v. Bond	1078	v. May	1200
Paine v. Aldrich	1934, 1938	v. Brown	770	v. Walser	1195, 1273
v. Boston	463, 1971	v. Carter	2294, 2297, 2317		
v. R. Co.	1684	v. Chambers	728		
v. Schenectady Ins. Co.	2573	v. Cleaveland	1651, 1678		
v. Tilden	1106, 1108	v. Coburn	392		
		v. Com.	987, 1842		
		v. Donaldson	1556		
		v. Dudley	15		
		v. Enslow	2220		

	Section		Section		Section
Parsons v. Copeland	1066	Patterson v. Patterson	229	Peaden v. State	1890
v. Huff		v. St. Clair	1404	Peak v. State	1440
38 Me.	770, 774, 777	v. State	194, 988	Peake v. Stout	1966
41 Me.	1010	Patteson v. R. Co.	464, 2509	Pearce v. Foster	2319, 2323
v. Ins. Co.	736, 747, 1976	Pattillo v. Alexander	2536	v. Furr	1829
v. Parsons		Pattison v. Norris	1062	v. Hooper	1298
66 Ia.	1738, 1974	Pattle v. Hornibrook	2410	v. Lansdowne	21
45 Mo.	1388	Patton v. Allison	1739	v. Ornsby	406
1 Ves. Jr.	2463	v. Coates	1640, 1712	v. Whale	2535
v. People	607, 617	v. Dyke	1779	Pearcy v. Dicker	693
v. Phipps	529	v. Goldsborough	1085, 1133	Pearl v. Allen	1312, 2593
v. Purcell	1256	v. Hamilton	1890	v. Howard	1651
v. State	2058	v. Ryan	1558	v. R. Co.	1698
Parsons City v. Lindsay	1951	v. Southern R. Co.	458, 2552	Pearre v. Folb	1828
Parsons Water Co. v.		v. State	413, 660, 1157	Pearse v. Pearse	2291, 2294
Knapp	1943	v. Wilson	2336	Pearson v. Fletcher	2307
Partee v. Silliman	529	Patton's Adm'rs v. Ash	1521	v. Hardin	318
Parton v. Cole	2447	Paty v. Martin	663, 728	v. Lemaitre	406
Partridge v. Coates	1200	Patzwald v. U. S.	2497	v. McDaniel	702
v. Forsyth	2053	Paul v. Leavitt	2240	v. Spartanburg Co.	458
v. Strange	2569	v. Meek	1256	v. Wheeler	654
Paschal v. Perez	1239, 1651, 2159, 2167	v. Paul	987	v. Wightman	735, 747, 1302, 1306, 1511
Pasley v. Richardson	1640, 1778	v. State	2071	Pearl v. Taylor	1256, 2105
Passaic Co. v. Stevenson	1350, 2592	Paulette v. Brown	1010	Pease v. Peck	1350
Passmore v. Passmore's Estate	1978, 2327	Paulk v. State	166, 1154	v. Sanderson	2105
Patch v. Boston	463	Paulsen v. Hall	616	v. Smith	290, 1010, 1013
v. White	2471, 2477	Paulson v. State	194, 363, 792, 987, 1270, 2081, 2115	Pease Piano Co. v. Cameron	763
Patchin v. Ins. Co.	1029, 1040, 1041	Paulson Mercantile Co. v. Seaver	1072, 1086	Peaslee v. R. Co.	221
Pate v. Joe	1511	Pavey v. Pavey	2008	v. Robbins	233
v. McConnell	1951	Pavier v. Snow	1225, 1651	Peavy v. State	579
v. People	702, 2008, 2016, 2027	Pawashick, The	1684, 1697, 1703, 2573	Peay v. Capps	2141
Patek v. Waples	2442	Pawling v. U. S.	2408	v. Picket	1194, 1196, 1224, 1225
Patent Type Founding Co. v. Lloyd	1862	Paxton v. Douglas	2260, 2268, 2269	Peazler v. State	2497
Patillo v. Alexander	2536	v. Dye	1108	Peck v. Abbe	1544
Patman v. State	951	v. Price	1573	v. Brewer	2354
Paton v. Ormerod	2470	v. State	1066	v. Callaghan	2016
Patrick v. Crowe	1062, 1073	Paxton's Case	2264	v. Clark	1567
v. Gibbs	1681	Payne v. Com.	246	v. Farrington	1239
v. Graham	18	v. Ibbotson	754, 763	v. Hutchinson	1693
v. Jack	1552	v. Long	1373	v. Lake	762
v. Nance	1680	v. McCormick Har-vesting M. Co.	2581	v. Parchen	1263, 1532, 1558
Patriotic Bank v. Coote	1245	v. McKinney	1651	v. Pierce	1539, 1556
Patten v. Cilley	2500	v. Ormond	2141	v. R. Co.	1978
v. Ferguson	1382, 1773	v. State		v. Ritchey	1018, 1037
v. Glover	2303	60 Ala.	247, 1037	v. Ryan	1072, 1073
v. Ins. Ass'n	2384	66 Ark.	1667	v. Small	1978
v. Moor	2317	57 Miss.	1781	v. State	
v. People	1021	61 Miss.	1435, 1447	2 Humph.	318
v. Poulton	1736	v. Treadwell	2572	86 Tenn.	1476, 2277
v. Rambo	287	v. Trezevant	529	v. Tingley	1960
v. U. S.	658	Paynes v. Coles	2123	v. Valentine	750, 753, 754
Patterson v. Cole	2382	Payson v. Everett	1690, 1698, 1706, 2012	Pecker v. Sawyer	529
v. Colebrook	1976	v. Good	1049, 1058, 1082	Peckham v. Potter	1084
v. Collier	2143, 2534	Peabody v. Denton	1676	Peddy v. State	1405
v. Com.	2071	v. Hewett	1082	Pedigo v. Com.	177
v. Dallas	1186, 1225	v. Norfolk	2212	v. Grimes	2215
v. Fagan	1383, 1384	Peace v. Head	1225	Pedley v. Paige	1316
v. Gaines	2088	Peaceable v. Watson	1458, 1778	Pedley v. Wellesley	2230, 2242
v. Hansel	7, 1651	Peacock v. Cooper	456	Peek v. Boone	2304
v. Hickey	1736, 1737	Peacock's Case	785	Peele v. Ins. Co.	1072
v. Jones	1651			Peeples v. State	692
v. Linder	1205			Peer v. Ryan	568
v. Mining Co.	2447			Peerless, The	576, 1709
				Peerless Mfg. Co. v. Gates	1969

TABLE OF CASES.

PEE

	Section		Section		Section
Peery v. Peery	1738	Pennsylvania Ins. Co. v.		People v. Arrighini	959, 1938,
Peet v. Dougherty	530	Murphy	2596		2251, 2276
Pefferling v. State	1135, 1136,	Pennsylvania R. Co.		v. Ashmead	276, 821,
	1138	v. Books	96		2497
Pegg v. Warford	13, 18	v. Bruner	1943	v. Atkinson	2311
Pegram v. Isabell	1605	v. Connell	1955	v. Austin	958, 1022,
Peiffer v. Lytle	2336	v. Henderson	283, 1943,		1028, 1029
Peirce v. Kile	2509		1976	v. Azoff	2349, 2354
Pelamourges v. Clark	772, 1389,	v. Lyons	1750	v. Badgley	2071
	1938, 1958,	v. Page	456	v. Baker	
	1963	v. Stranahan	455, 456	1 Cal.	2354
Pelican Ins. Co. v. Wil-		Pennsylvania & N. Y. R.		112 Mich.	1853, 2079
kerson	1339	Co. v. Bunnell	1943	96 N. Y.	581
Pell v. Daubeny	2201, 2202	Penny v. Pindell	1195	v. Baldwin	507, 1976
Pelletreau v. Jackson	1313,	Pennypacker v. Ins. Co.	95	v. Barberi	390, 782, 1908
	1321	Penobscot B. Co. v.		v. Barker	
Pelton v. Schmidt	1062	Lamson	2125	114 Cal.	2059
Peltz v. Clarke	1225, 1651	Penobscot & K. R. Co. v.		56 Ill.	2304
Pelzer v. Cranston	1542	Bartlett	1703	60 Mich.	1890, 1893,
Pelzer Mfg. Co. v. Ham-		Penrice v. Parker	2250		2302
burg-Bremen F. I.		Penrose v. Griffith	1257	153 N. Y.	2497
Co.	2355	Penruddock v. Hammond	2294	v. Barney	568
v. Sun Fire Office	1947	Pensacola R. Co. v.		v. Barone	15
Pember v. Mathers	2047	Schaffer	1213, 1236	v. Barrie	832, 2060
Pemberton v. Pemberton	21	Pentecost v. State	821, 1196,	v. Barthleman	397, 689,
Pemberton's Case	1738		2427		2501
Penarth Harbour D. & R.		Pentz v. Ins. Co.	1061, 1062	v. Beck	2277
Co. v. Cardiff W. Co.	1859	People v. Abell	1808	v. Beckwith	2081
Pence v. Com.	389	v. Abbot	62, 200, 398,	v. Beech	507
v. Dozier	987		664, 923, 928,	v. Bell	21, 1003
v. Waugh	1041, 2315		987, 1985, 2268	v. Bemerly	2501
Pendleton v. Weed	2118	v. Abbott	62, 200, 359, 398	v. Benc	200
Pendock v. Mackinder	520	v. Adams		v. Benham	390, 397,
Pendrell v. Pendrell	68, 1026,	137 Cal.	246, 1614		569, 2073
	2063	176 N. Y.	2183, 2264	v. Bennett	2072, 2081
Peney v. Gilliland	2373	v. Ah Choy	276	v. Benson	62, 200
Penn v. Hartman	2159	v. Ah Fat	1106, 1108	v. Bernal	506, 1821
Penn M. L. Ins. Co.		v. Ah Fook	770, 1072	v. Bernor	1136
v. M. S. B. & T. Co.	302,	v. Ah Fung	118	v. Beverly	1440, 1912
	321, 1946,	v. Ah Ki	858	v. Bidleman	331
	1947, 2537	v. Ah Lee	1750	v. Bill	580
v. Wiler	1719, 2384, 2390,	v. Ah Len	1806, 1807	v. Bird	
	2391	v. Ah Wee	571, 2100	124 Cal.	318, 950
Penn Tobacco Co. v.		v. Ah Yute		132 Cal.	1398
Leman	2463	53 Cal.	1072	v. Bishop	1042, 1890
Pennel v. Weyant	1512, 1680,	56 Cal.	751, 1810	v. Blake	1082, 1257
Pennell v. Meyer	2111	60 Cal.	779	v. Blakeley	923, 987,
Penniman v. Hill	1840, 1841		2183		1432, 1461
v. Jones	1856	v. Alden	111	v. Bodine	290, 2260, 2270
Pennington v. Com.	987	v. Alivtre	2501	v. Boggs	1354
v. Schwartz	1226	v. Allender	1890	v. Bonney	1803
Pennsylvania v. M'Kee		v. Altmeyer	367	v. Boo Doo Hong	2486
Addis. 1, 5	2066	v. Alton	2081, 2230	v. Borgetto	1938
Addis. 35	1994	v. Alviso	987, 1106	v. Boscovitch	1842
v. Robertson	246	v. Amanacus	1033, 1072	v. Bosquet	1029
v. Stoops	2237, 2239	v. Amaya	2059	v. Bowen	357
Pennsylvania Coal Co.		v. Ames	736, 821	v. Bowers	784, 1807
v. Kelly	791	v. Ammerman		v. Braun	987
Pennsylvania Co.	437	v. Anderson	2083, 2230	v. Brennan	1398
v. Boylan	664	26 Cal.	246	v. Brewer	205, 1618, 2528
v. Bridge Co.	1078	39 Cal.	950	v. Brooks	950, 953
v. Conlan	1010	105 Cal.	682	v. Brotherton	88, 451
v. Files	1721	v. Angsbury	2059	v. Broughton	1021, 1644,
v. McCaffrey	1530	114 Cal.	994		2529
v. McCann	2509	Ill.		v. Brown	
v. Marion	2383	v. Armstrong		53 Cal.	2272
v. Newmeyer	944, 2220	v. Arnold		130 Cal.	390
v. R. Co.	318	15 Cal.	10, 110, 111, 247	53 Mich.	1761
v. Watson	454, 456	116 Cal.	2276, 2277	53 N. Y.	987
		43 Mich.	278		

	Section		Section		Section
People v. Brown		People v. Cloonan	2059	People v. Derbert	987
72 N. Y.	987, 2270, 2276	v. Coffman	1267	v. Detroit & S. P. R. Co.	1951
v. Buchanan	15, 390, 1896, 2311	v. Colburn	1073	v. Devine	44 Cal. 1021, 1029, 1035, 1040, 1263, 1329, 1667
v. Buddensieck	571, 792	v. Cole	113 Mich. 2383	46 Cal.	1404
v. Burch	1850	43 N. Y.	1390	v. Devlin	1350
v. Burgess	21, 568, 905, 1938	v. Collum	1040	v. De Wolf	1350
v. Burns		v. Columbia Common Pleas	2356	v. Diaz	2595
121 Cal.	988	v. Commissioners		v. Dice	1043, 2100
67 Mich.	1839	7 Colo.	1712	v. Dillwood	967, 1044, 1263, 1270
v. Burt	1350	54 N. Y.	1350	v. Dimick	321
v. Burwell	93, 357, 1853	v. Compton		v. Dobbins	1013, 1442, 2354
v. Bush		123 Cal.	1079, 2059	v. Doggett	59
65 Cal.	1108, 1168, 1803	132 Cal.	1032	v. Dohring	1909, 1910
71 Cal.	1802	v. Conklin	21, 1440, 1725	v. Dole	Cal., 51 Pac. 287, 2276
v. Bushton	905, 1040	v. Conkling	1802	122 Cal.	1072
v. Bussey	2276	v. Conroy		v. Donald	330
v. Butler	414	97 N. Y.	1938	v. Donovan	1041, 1263
v. Butler St. F. & I. Co.	2281	153 N. Y.	21, 2277	v. Doody	342, 2043
v. Cady	1398	v. Considine	786, 1029, 1669, 1839, 2079	v. Dorthy	987
v. Caldwell	276, 367, 774	v. Constantino	571, 1152	v. Doty	326
v. Callaghan	1445	v. Cook	2495	v. Douglass	100 Cal. 1398
v. Campbell	1350	v. Coombs	2259	4 Cow.	1010
v. Cannon	1354	v. Copsey	935	v. Dowd	363, 1974
v. Carey	792	v. Corbin	318	v. Dowling	254, 326
v. Carlton	111	v. Corey		v. Doyell	1126, 1128
v. Carolan	987	148 N. Y.	220, 694, 2016, 2132	v. Doyle	13
v. Carr	1669	157 N. Y.	1398, 1666	v. Driscoll	1072
v. Carrier	398	v. Costello	2056	v. Druse	63, 198, 770
v. Case	821, 905, 1398	v. Coughlin		v. Dubois	351
v. Casey		65 Mich.	1912	v. Duncan	1136, 1761
53 Cal.	59, 1983	13 Utah	363	v. Dunn	1350
124 Mich.	1853, 1938	v. Court		v. Dupounce	2276
72 N. Y.	987, 2276	83 N. Y.	915, 987	v. Durrant	118, 451, 682, 781, 789, 792, 905, 2286
v. Cassels	2195	101 N. Y.	1166	v. Dyckman	799, 2200, 2219
v. Castro	860	v. Craft	1438	v. Dye	194, 1003
v. Chappleau	852	v. Craig		v. Dyle	285, 2066, 2059
v. Chaves	397	111 Cal.	106, 216, 363, 507	v. E. L. & Y. Co.	2134
v. Chee Kee	1698	116 Mich.	133	v. Eastwood	1974
v. Chegaray	2239	v. Crandall	792, 987	v. Ebanks	117 Cal. 216, 414, 688, 1144
v. Chin Hane	278, 660, 789, 923, 969, 987, 1028, 1398, 1977	v. Crapo	987	120 Cal.	2578
v. Chin Mook Sow	1003, 1005, 2277	v. Creegan	318, 2059, 2060	v. Ecarius	2276
v. Ching Hing Chang	1006, 1263, 1963	v. Crespi	905	v. Eckert	2056
v. Chrisman	59, 852	v. Cronin	108	v. Edwards	41 Cal. 246
v. Christie	987	v. Cuff	238, 239, 2272	Cal., 73 Pac.	398
v. Christman	2498	v. Cunningham	216, 347	v. Egnor	851
v. Chung Ah Chue	1398	v. Curiale	2239	v. Elliott	222, 398, 918
v. Cicott	1351, 1712, 2215, 2464	v. Curlee	2060	119 Cal.	360
v. Clark		v. Curtis	1329, 1849	106 N. Y.	2059
33 Mich.	205, 398, 401, 1976	v. Daily	507	163 N. Y.	988
102 N. Y.	987	v. Daniels	2100	172 N. Y.	1398
v. Clarke		v. Davis		v. Elyea	736, 754
130 Cal.	987, 1977	56 N. Y.	1432, 1750	v. Eppinger	664, 1244, 1706
105 Mich.	889, 1219	15 Wend.	1010, 2204, 2205	v. Estrado	1072
v. Clausen	278	21 Wend.	1614, 1985, 2056	v. Etting	2575
v. Cleveland		v. Deacons	568, 2071		
49 Cal.	2059	v. Decker	106		
107 Mich.	2529	v. Deegan	2354		
v. Cline	2273	v. De France	1021, 2382		
v. Clingan	1195, 2427	v. Deitz	2079		
		v. Dennis			
		89 Cal.	1890, 2276		
		4 Mich.	1267		

TABLE OF CASES.

PEO

	Section		Section		Section
People v. Evans		People v. Gillespie	774, 905	People v. Hickman	821, 925,
Cal., 41 Pac.	238	v. Glaze	1037, 2210		2277
72 Mich.	963, 1853	v. Gleason	290	v. Hicks	
40 N. Y.	1010, 2056,	v. Glenn	1398, 1446, 1450	79 Mich.	2276
	2060	v. Glennon	204, 258, 969	98 Mich.	1135, 1136,
v. Everhardt	318, 2059	v. Glover	1761, 2265, 2382		1138, 1142, 1761
v. Ezzo	1135	v. Goldberg	2079	v. Higgins	260, 987
v. Fair	57, 69	v. Goldenson	681, 770, 951,	v. Hill	
v. Farley	1976		2265, 2349, 2354	116 Cal.	682, 689,
v. Farrell		v. Gonzales	832		1873, 1976
30 Cal.	318, 2060	v. Gonzalez	559, 568, 1157,	123 Cal.	460, 794
31 Cal.	16, 233, 581		2130	v. Hillhouse	1021
v. Faust	2575	v. Goodrode	1398	v. Hinchman	1329
v. Fehrenbach	347	v. Gordon		v. Hoagland	2059
v. Ferguson	581, 1351	99 Cal.	1398	v. Hoch	21, 233, 2272,
v. Fernandez	21	39 Mich.	1195		2382
v. Fielding	1807	40 Mich.	285, 950, 2079	v. Hodgdon	1440
v. Figueroa	794, 1135	100 Mich.	2241	v. Holbrook	1205
v. Fine	689	v. Gotshall	460, 987, 1977	v. Holden	1351
v. Finley	1938	v. Governor	2369	v. Holmes	
v. Finnegan	1129	v. Graham	789, 1135, 1136,	111 Mich.	105, 457,
v. Fire Ins. Co.	1482, 1483,		1138		1621, 1984
	1484, 1489	v. Grant	2079	166 N. Y.	1257
v. Fish	792, 1395, 1975	v. Gray		v. Hong Ah Duck	108,
v. Fitzgerald	354, 389,	61 Cal.	1440, 1442, 2354		568, 1263, 1841
	2272	66 Cal.	331	v. Hong Tong	2059
v. Fitzpatrick	612, 2079	25 Wend.	2450	v. Hooghkerk	2059, 2060
v. Flaherty	398, 1135	v. Green		v. Hope	153, 451,
v. Flannelly	276	53 Cal.	1802		1167, 1160
v. Fleming	2061	1 Denio	2239	v. Hopson	364
v. Flynn	2349	1 Park	1073	v. Horton	1887, 1888, 1890
v. Foglesong	682, 1722	v. Greenwall	194, 1005,	v. Hospital	494, 497
v. Foley	682		1983	v. Hovey	2243
v. Fong Ah Sing	1434	v. Gress	118, 390	v. Howard	
v. Foo	936	v. Griffin	233	112 Cal.	246
v. Foote	987, 2276	v. Griner	246	73 Mich.	2276
v. Forbes	2260, 2271, 2276,	v. Gross	106	v. Howes	1853
	2282	v. Grossman	326	v. Hoy Yen	836, 858
v. Foster	1398, 1639	v. Grundell	2059	v. Hubert	2497
v. Fowler	1072, 2235	v. Haas	367	v. Hughes	
v. Fox	861	v. Hagar	1219, 1225, 1352	29 Cal.	2349
v. Frank	216, 304, 318	v. Hall		116 Mich.	2079
v. Freeland	1852	94 Cal.	1476	11 Utah	581
v. Freshour	2276	48 Mich.	682, 1690,	v. Hughson	1913
v. Fuhrig	1442, 1445		1700, 1839, 1853	v. Hulbut	2363, 2364
v. Fultz	357, 952	v. Hamblin	987	v. Hull	1802, 1803
v. Gage	1136, 1761	v. Hammond	1852, 2154,	v. Hulse	1106, 1108,
v. Gaimari	198		2272	v. Humphrey	2086
v. Gallagher		v. Hare	1975, 1976	v. Hurley	343
100 Cal.	2276	v. Harlan	770, 987, 1350	v. Hurst	1223
75 Mich.	2327	v. Harris		v. Hust	1205
v. Gallo	1802, 1803	95 Mich.	248	v. Hyde	1807
v. Garbutt	56, 59, 63, 111,	136 N. Y.	390, 2385	v. Imes	1645, 2239
	228, 232, 246, 247	v. Harrison	987	v. Irving	
v. Gardner		v. Hart	2513	95 N. Y.	987
98 Cal.	1398	v. Hatch	1350	1 Wend.	2222
144 N. Y.	2263, 2265	v. Hawes	487, 1157	v. Isham	1645, 2086, 2239
v. Garnett	1841, 2059	v. Hawkins		v. Jacks	2089
v. Gates		106 Mich.	331	v. Jackson	
46 Cal.	77	109 N. Y.	233	111 N. Y.	792, 794
13 Wend.	2395	v. Hawley	1416	3 Park. Cr.	62, 200,
v. Gay	987, 1106	v. Hayes	2340		398, 979, 980,
v. Gelabert	571, 2100	v. Henderson	248		987, 1028, 1041
v. Genung	934, 958	v. Hennessey	2071	v. Jacobs	905
v. Germaine	2079	v. Henry	351	v. Jaehne	2071
v. Gibbons	852	v. Henshaw	2079	v. Jamieson	398
v. Gibbs	364	v. Henssler	216, 321	v. Jenness	398, 935,
v. Giblin	987	v. Herr	2538		1828, 2056
v. Gibson	568	v. Herrick	521, 987, 1270	v. Jocelyn	1852

	Section		Section		Section
People v. John	1810	People v. Lauder	852	People v. McQuaid	690, 1684
v. Johnson		v. Lavelle	689	v. Macard	216
41 Cal.	835	v. Lawrence	1033	v. Machen	347, 1839, 1853
57 Cal.	2277	v. Lee		v. Mahaney	1350
106 Cal.	62, 923, 952	119 Cal.	1135	v. Mahon	2298
110 N. Y.	1166, 1802	128 Cal.	1664	v. Main	2059
140 N. Y.	791	v. Lee Ah Chuck	950	v. Malaspina	239, 279
v. Jahr	2168	v. Lee Dick Lung	194, 276	v. Mallon	1071
v. Jones		v. Lee Fat	751, 1669, 1810	v. Malsch	2239
31 Cal.	516, 987, 2071	v. Lehr	1960	v. Manke	1978
123 Cal.	2072	v. Lem Deo	1442	v. Manning	987, 1270
124 Mich.	1978	v. Lem You	1387, 1669	v. Marble	216, 363, 2237
99 N. Y.	364	v. Levison	327	v. Marion	664
v. Josephs	56, 59	v. Levy	689	v. Markham	923, 1616
v. Josselyn	2062	v. Life Ins. Co.	1698	v. Marrs	1136
v. Joy	2513	v. Lilly	111, 247	v. Mason	278
v. Kahler	987	v. Loewenthal	1350	v. Mather	770, 772, 774, 775, 987, 1111, 1112, 1898, 1983, 2255, 2260, 2271
v. Keep	276	v. Lombard	246, 247	v. Mathews (Edwards)	1803
v. Kehoe	205	v. Long	2079	v. Matteson	1817
v. Keith		v. Lonsdale	1442	v. Mausauanau	987, 1270
50 Cal.	1036, 1899,	v. Lon Yeck	1013	v. Mayes	988, 2277, 2567, 2569, 2581
	2100	v. Lopez		v. Mayhew	2059
136 Cal.	1890	26 Cal.	1852	v. Mayne	736, 1481, 1503
v. Kelley	852	59 Cal.	347	v. Mead	56, 416, 2265
v. Kelly		v. Lovejoy	617	v. Melvane	2059
24 N. Y.	2252, 2282	v. Lovren	1977	v. Mercein	2239
113 N. Y.	779, 905	v. Luchetti	1013, 2513	v. Methvin	1985
v. Kemmler	2265, 2382	v. Luders	1853		
v. Kennedy		v. Lynch			
105 Mich.	1040	22 Cal.	194		
32 N. Y.	106, 354	29 Mich.	1135, 1761		
159 N. Y.	832, 851	v. Lyons	762		
164 N. Y.	1072	v. McArron	983, 987, 1853		
v. Kenyon	2079				
v. Kern	397	v. McCarthy			
v. Kerrigan	1835	115 Cal.	689		
v. Kessler	1072, 1750	102 N. Y.	463		
v. Kindra	1390, 2079	v. McCarty	1839		
v. Kinney	1159	v. McConnell	2578		
v. Knapp		v. McCormick	987		
28 Mich.	363, 1445	v. McCoy	2265		
42 Mich.	205, 987, 2232	v. McCrea	1072, 1142		
v. Koerner	21, 569, 1072, 1502, 1873, 1938, 2382, 2501	v. McCullough	2079		
		v. McCurdy	1157		
v. Krist	689	v. McDonald	1270		
v. Kruger	905, 1263	v. McElvaine	672, 673, 681		
v. Kuches	62, 200	v. McFarlane	751, 761		
v. Kunz	2059	v. McGee	498, 811, 1138, 1825		
v. Lagrille	1249				
v. Lake	681	v. McGilver	351		
v. Lamb	246	v. McGlade	318		
v. Lambert		v. McGloin	824, 839, 851, 852		
120 Cal.	352, 1044,	v. McGungill	1890, 2272		
	1135, 1136, 1263	v. McHenry	1511		
5 Mich.	564, 1271, 1645, 2086	v. McKane	2155		
		v. McKeller	1022		
v. Lander	2252	v. McKinney	1275, 2105		
v. Lane		v. McLaughlin			
101 Cal.	216, 231, 2385	44 Cal.	1452		
49 Mich.	2071	150 N. Y.	192, 216, 377, 738, 1963		
v. Lange	1198				
v. Langtree	609, 2234, 2236	v. McLean			
v. Lansing	363	84 Cal.	2059		
v. Lapique	89	71 Mich.	62, 200, 393, 987		
v. Larned	413, 1157				
v. Larsen	2277	v. McMahon	823, 852, 2266		
v. Larubia	363	v. McNair	1821		
		v. McNamara	1896		

TABLE OF CASES.

PEO

	Section		Section		Section
People v. Muller		People v. Peckens	216, 321,	People v. Rodley	1079, 2042
32 Hun	790, 796		1079	v. Rodrigo	1270
96 N. Y.	1978	v. Perriman	1853, 2088	v. Rodriguez	1890
v. Mullings	1808, 1890,	v. Petrea	1350	v. Roemer	1007
	2340, 2341	v. Pette	216	v. Rogers	
v. Murphy		v. Phelan	460, 792	71 Cal.	216
45 Cal.	1398, 2098,	v. Philbon	1072	18 N. Y.	851
	2232	v. Phillips	2394	v. Rolfe	728, 2059, 2529
101 N. Y.	688, 2385	v. Pico	689, 1621	v. Ross	987
135 N. Y.	354, 2015,	v. Piggott	218	v. Rozelle	1890, 2276
	2016	v. Pike	2110	v. Russell	1890, 2272
v. Murray		v. Pinkerton	2276	v. Ryland	2069
10 Cal.	63, 246	v. Piper	1842	v. Safford	900, 905, 906,
85 Cal.	2349	v. Pitcher	276		907
94 Cal.	2349, 2354	v. Place	363	v. Salsbury	280
52 Mich.	21	v. Plath	2062	v. Sam Lung	1841
89 Mich.	1835	v. Plyer	1384, 1669	v. Samonset	1983
v. Myers	463	v. Plyler		v. Sanchez	1438, 1445
v. Nairs	2100	121 Cal.	580, 1014	v. Sanders	216, 318, 664,
v. Newman	1404	126 Cal.	1669		2272, 2511
v. Niles	569, 987	v. Pope	1390, 2079	v. Sanford	1443, 1963
v. Nino	233, 770	v. Porter	2071	v. Sansome	153, 196
v. Noelke	987, 1270	v. Potter	238	v. Savant	2079
v. Northey	2363	v. Powell	111, 246, 248	v. Saxton	581
v. Oakland Water-		v. Prather	925, 959	v. Schmidt	1976
Front Co.	2566	v. Pratt	2303	v. Schmitt	689, 1124, 2530
v. O'Brien		v. Price	1853	v. Schoonmaker	2239
66 Cal.	2276	v. Priori	2271	v. Schuyler	2381, 2383
96 Cal.	1890, 2276	v. Purdy	1350	v. Schweitzer	347
130 Cal.	62	v. Pustolka	792	v. Scoggins	111, 247
176 N. Y.	2282	v. Putnam	987, 1407	v. Scott	238, 390
v. O'Farrell	2059	v. Quantstrom	2239	v. Seaman	359
v. O'Hare	923	v. Quick		v. Searcy	791
v. Oiler	1398	51 Mich.	581, 2079	v. Sears	2277
v. Oldham	1010, 1079, 2515	58 Mich.	1853	v. Sebring	2239
v. Oliver	2079	v. Quimby	363	v. Sehorn	246, 1974
v. Oliveria	2265	v. Quinn	1852	v. Session	359, 680,
v. Olmstead	568, 689, 1445	v. Qurise	1398		682, 1976
v. O'Loughlin	1730, 1839,	v. Rader	782	v. Sexton	852
	1841	v. Ramirez	499, 851, 1985	v. Sharp	
v. O'Neil	527, 2059	v. Rando	254, 326	53 Mich.	664, 1198
v. O'Neill	905, 2363	v. Rangod	398	107 N. Y.	57, 194, 286,
v. Onondaga	1350	v. Rathbun	276, 293		312, 329, 343,
v. Osmond	390	v. Ratz	667, 1496		1969, 2282
v. Ostrander	2511	v. Rector	247, 923, 979,	v. Shattuck	
v. O'Sullivan	357, 1135,		987, 994, 1106,	6 Abb. N. C.	2364
	1136		1108, 1109, 1112,	109 Cal.	940, 1722
v. Overseers	2063		1125, 1126, 1514,	v. Shaver	1044
v. Owens	987		1985	v. Shaw	293, 1036, 1447
v. Packenham	1938	v. Reed	1960, 2277	v. Shea	
v. Page	1072, 2061	v. Reeder	2056	8 Cal.	247
v. Palmer		v. Reggel	2363	125 Cal.	62
96 Mich.	111	v. Reinhart		147 N. Y.	57, 216, 363,
105 Mich.	111	39 Cal.	987, 1270, 2277		367
109 N. Y.	2072, 2081	26 Or.	821	v. Shulman	320, 321
v. Paquin	1335	v. Resh	968, 2079	v. Sickles	196
v. Parent	1828, 2042	v. Restell	1374	v. Sierp	1398, 1810
v. Parker	2016	v. Rice		v. Silva	925, 987
v. Parmelee	987, 2277	103 Mich.	969, 2582	v. Simonds	2232
v. Parsons	826	159 N. Y.	569	v. Simonsen	2072
v. Parton	821, 949, 1899	v. Ritchie	2354	v. Simpson	1142, 1442,
v. Patterson	398, 2060	v. Roat	770		1450
v. Payne	905	v. Roberts	2512	v. Skutt	398
v. Pease		v. Robinson		v. Slater	1496
3 Johns.	523	19 Cal.	500	v. Sligh	1395, 1667
27 N. Y.	1351, 1712,	6 Utah	2079	v. Sliney	2382
	1864, 2196,	v. Robles		v. Smiler	682
	2215, 2421	29 Cal.	1329	v. Smith	
v. Peck	1389	34 Cal.	347, 967	31 Cal.	232

	Section		Section		Section
People v. Smith		People v. Thompson		People v. Weiger	852
106 Cal.	363	84 Cal.	832	v. Wells	987, 1808
104 N. Y.	1451	122 Mich.	199, 451,	v. Wennerholm	1072
121 N. Y.	792		457, 2363	v. Wentz	839
162 N. Y.	1124	41 N. Y.	963	v. Westlake	
172 N. Y.	1072, 1073,	v. Thoms	318, 822	124 Cal.	944
	1434, 1974	v. Thomson	950	134 Cal.	1157
v. Snellie	987	v. Thorn	1803	v. West	2385
v. Soap	728	v. Thrall	2071	v. Wheatley	196
v. Solomon	2059	v. Tice	987, 2276	v. Wheeler	1690, 1693,
v. Southern	1452	v. Tiley	987, 1003		1700
v. Spiegel	2264	v. Tillman	247	v. Whipple	521, 580
v. Sprague	1010, 1013, 1841	v. Tobey	1680	v. White	
v. Squires	205	v. Tomlinson	216	116 Cal.	1164, 2497
v. Stackhouse	1041	v. Tracy	1450	53 Mich.	166, 960
v. Stanley	21, 276, 1350	v. Travis	111, 247	176 N. Y.	841, 861,
v. Sternberg	2059, 2060,	v. Treadwell	1013		2071
	2281	v. Truck	1938, 2016,	14 Wend.	57, 194, 202,
v. Stevens			2265, 2339		1326, 1827
52 Cal.	1861	v. Tucker	348	24 Wend.	57, 290,
47 Mich.	784, 1466	v. Tuczkewitz	2498		1329, 1667
v. Stewart		v. Turner	1043	v. Whiteman	318
28 Cal.	56, 59	v. Turney	987, 1983	v. Whitson	987
97 Cal.	1136	v. Tyler	579, 1985, 2272	v. Wilder	1010
v. Stock	246	v. Un Dong	987	v. Willett	1072
v. Stokes		v. Vail	1858	v. Williams	
71 Cal.	1644, 2085	v. Valliere		18 Cal.	140, 1040
103 Cal.	2349, 2354	123 Cal.	390, 1976	64 Cal.	1219, 2577
v. Storke	2016	127 Cal.	1807	133 Cal.	1072
v. Stout	194, 216, 304,	v. Van Dam	56	19 Wend.	580
	390	v. Vanderhoof	682, 1696,	v. Wilmot	62, 1136
v. Strait			1700	v. Wilson	
148 N. Y.	231, 688,	v. Vane	290, 1124, 1125,	117 Cal.	216, 364
	1938		1126, 1127, 1128,	135 Cal.	2513
154 N. Y.	21, 1873		1131	55 Mich.	1873
v. Streuber	2273	v. Van Eman	988	3 Park. Cr.	2081
v. Strong		v. Van Horn	131	v. Winters	
30 Cal.	821, 1013	v. Vann	762	29 Cal.	153
46 Cal.	276	v. Van Slyck	1351	125 Cal.	1079, 2512
v. Stubenvoll	2497	v. Van Tassel	342, 1007,	v. Winthrop	216, 276, 1157,
v. Sullivan	1157		1010		2511
v. Supervisors	1350	v. Van Wormer	580, 2265	v. Wirth	1042
v. Sutherland		v. Vasalo	1208	v. Witty	1035, 1405
104 Mich.	987, 1158,	v. Vedder	2060	v. Wolcott	273, 822, 830,
	2277	v. Vermilyea	2595		836, 1005, 2079
154 N. Y.	106, 390	v. Vernon	1450, 1750	v. Wolf	2511
v. Sutton	684, 1890	v. Vidal	276	v. Wong Ah Ngow	276
v. Swafford	1835	v. Wade	1028, 1983, 2061	v. Wong Chuey	960, 1022,
v. Swartz	2497	v. Wakely	321		1434
v. Sweetland	1205, 1225,	v. Walker		v. Wood	
	2079	140 Cal.	851, 2276	126 N. Y.	231, 233,
v. Swist	507, 1135	113 Mich.	507		2340
v. Symonds	1852	v. Wallace	905	3 Park. Cr.	216, 363
v. Taing	247	v. Walters	216, 363	v. Woon Tuck Wo	460
v. Taylor		v. Ward		v. Worden	1976
59 Cal.	852, 1434, 1440	134 Cal.	987, 2073	v. Wreden	657, 1938
136 Cal.	414	15 Wend.	838	v. Wright	
93 Mich.	826	v. Warner		90 Mich.	2079
138 N. Y.	233, 1938	117 Cal.	2334	136 N. Y.	852
v. Teixeira	364	104 Mich.	851	v. Wyman	2349
v. Thacker	363, 569	v. Warren		v. Yeager	1835
v. Thiede	412, 568, 811,	134 Cal.	987	v. Yee Fook Din	413
	944, 1850, 1852,	122 Mich.	2495	v. Yokum	1442
	1899, 1910	v. Weaver	1440	v. Young	
v. Thomas		v. Webb	1003	31 Cal.	2363
110 Cal.	196	v. Webster		108 Cal.	811, 1072
9 Mich.	579	68 Hun	792	v. Youngs	675, 1938
v. Thompson		139 N. Y.	792, 934,	v. Yslas	923
50 Cal.	2059		987, 1005, 2276	v. Zigouras	861, 952

TABLE OF CASES.

PEO

	Section		Section		Section
People's Bank v. Brown	2210, 2322	Perry v. Graham	1779	Peugh v. Mitchell	2525
People's Building L. & S.		v. Lawless	1294	Peverly v. Boston	458
Ass'n v. Backus	2536	v. Lovejoy	1730, 2085	Peycke v. Shinn	2153
People's Nat'l Bank		v. Machine Co.	451	Peyroux v. Howard	2575
v. Geisthardt	2153	v. Mays	2158	Peyton v. Hallett	1206, 1248
v. Mulkey	1387	v. People		v. Morgan Park	1261, 1263, 2534
People's P. R. Co. v. Green	792	14 Ill.	1852	v. State	136, 2512
Peoples v. Com.	1434, 1441, 2060	86 N. Y.	1270	Pfau v. State	2513
Peoria A. & D. R. Co. v.		v. Porter	581	Pfefferkorn v. Seefield	916
Sawyer	1168	v. R. Co.	2572	Pfeifferle v. State	616
Peoria, D. & E. R. Co. v.		v. Randall	2337, 2340, 2341	Pfeifer v. Ins. Co.	2465
Rice	2220	v. Roberts	1188	Pfial v. Vanbatenberg	156, 2130
Peoria, G. & C. Co. v.		v. Ruby	613	Pfister v. Wade	1067
R. Co.	463, 1168	v. Simpson W. M. Co.	2593	Plueger v. State	689, 1671, 1988, 1958
Peoria & F. R. Co. v.		v. Smith	1086	Pfotzer v. Mullaney	1665
Barnum	1168	v. State		Phares v. Barber	1669
Pepon v. Jenkins	1681	87 Ala.	1404	Pharis v. Lambert	1195
Pepper v. Barnett	694	102 Ga.	1434, 1445, 1446	Pharr v. Bachelor	1339
Peppercorn v. Black		110 Ga.	1976	Phelan v. Bonham	1267
River Falls	1166, 2354	113 Ga.	2575	v. Slattery	2473
Peppinger v. Low	1770	Ida., 38 Pac.	2325, 2326	Phelin v. Kenderdine	2270, 2272
Percival v. Hickey	1392	44 Nebr.	2089	Phelps v. Abbott	2444
v. Nanson	1465, 1466, 1471	v. Weyman	1909	v. Com.	569, 1938, 2501
Perdue v. C. C. C. Co.	1877	Person v. Bowe	1062	v. Conant	377
Pergason v. Etcherson	1842	Perteel v. People	1852	v. Foot	1225
Perham v. Raynal	1077	Perth Peerage Case	1496, 1633, 1644, 1697	v. Hunt	15
Perigal v. Nicholson	586, 1460	Petapasco Co. v. South-		v. Mankato	283, 458
Perit v. Cohen	1890	gate	1414, 1417	v. Mayer	20
Perkins v. Adams	944, 950, 2103	Petch v. Lyon	1063	v. Prew	1212, 2183, 2196, 2211
v. Augusta Co.	1523	v. State	833, 855	v. R. Co.	458
v. Bank	2271	v. Thickstun	994, 1704	v. Riley	583
v. Blood	1778	Peterboro v. Jaffrey	1943	v. Tilton	1081, 2110
v. Brinkley	1778	Peterborough v. Mordaunt	1278	v. Town	565
v. Concord R. Co.	1062	v. Norfolk	1388	Phene's Trusts	2531
v. Guy	1807	Petermans v. Laws	1225, 1651	Phenix v. Baldwin	1415
v. Hayward	15	Peters v. Fogarty	2354, 2355	Phenix Fire Ins. Co. v.	
v. Hersey	2414	v. Irish	2276	Philip	1943
v. Humes	89	v. Reichenbach	2105	Phenix Ins. Co. v. Hart	747
v. Ins. Co.	736, 747	v. U. S.	770, 907	v. Sullivan	748
v. Knisely	1013	Petersfield Case	1712	Phettipiece v. Sayles	913, 1898
v. Perkins	2067	Peterson, ex p.	2578	Phifer v. Erwin	581
v. R. Co.	1718	v. Albach	1382	v. R. Co.	1951
v. Railroad	682	v. Ankrom	1481, 1487, 1651	Philadelphia v. Gowan	1640
v. Roberge	1003	v. Gresham	1244	v. Miller	2529
v. Scott	1354	v. Johnson-Went-		v. Reeder	950
v. Spaulding	258, 331, 1416	worth Co.	1951	v. Rule	290
v. State	959, 1126, 2363	v. Morgen	73, 74	Philadelphia C. P. R. Co.	
v. Stickney	561	v. R. Co.	663, 682	v. Henrice	41
v. Towle	1458	v. State		Philadelphia W. & B. R. Co.	
Perkins' Est.	1738	47 Ga.	507, 1821, 1969	v. Howard	1388
Perley v. Perley	2520	50 Ga.	111	v. Lehman	2581
Perlstein v. Express Co.	93	83 Md.	1028, 1029	Philadelphia & N. Y. R.	
Perret v. Perret	1738	63 Nebr.	661, 2582	Co. v. Bunnell	714
Perrill v. Nichols	1873	v. Taylor	1852	Philadelphia & R. R. Co.	
Perrin v. Wells	1406	Peterson Co. v. Steiner	2504	v. Hendrickson	454
Perrine v. Striker	2256, 2282	Petit v. Teal	1543	v. Speares	2098
Perry v. Archard	1202	Petite v. People	2272	v. Schultz	456
v. Bailey	2349, 2353, 2354	Petrick v. Ashcroft	2245	v. Yeager	2494
v. Bank	95, 770	Petrie v. Rose	261	Philadelphia & T. R. Co.	
v. Block	1335	Pettibone v. Derringer	1405	v. Stimpson	15, 1007, 1770, 1856, 1867, 1876, 1885, 1890
v. Breed	1042	v. Phelps	1082	Philamalee v. State	968
v. Burton	657, 2105	v. Smith	451	Philbin v. Patrick	738
v. Clift	2143	Pettigru v. Sanders	1257	Philips v. Com.	247
v. Com.	1820, 1828	Pettit v. State	390, 1730, 2581	v. Fowler	2352
v. Dicken	1911	Petty v. Anderson	2232		
v. Gibson	1894	v. Grisard	1347		

	Section		Section		Section
Philips v. Stewart	2354	Pickering v. Dowson	2425, 2434	Pingree v. Johnson	616, 747
Philipson v. Bates	1651, 2110	v. Meyers	1205	Pingry v. Washburn	1873
v. Chase	1206, 1232,	v. Noyes	1858	Pinkard v. State	293
	1234	v. Reynolds	1133	Pinkham v. Benton	754, 1560
Phillips v. Cole	1084, 1456	v. Townsend	1384	v. Cockell	702
v. Crawly	1311, 1312	Pickert v. Hair	1063	Pinney v. Andrus	745, 761
v. Eamer	1893	Pickett v. Boyd	1681	v. Cahill	457, 1700
v. Gregg	564, 1271	Pickton v. Fargo	1350	v. Jones	1773
v. Hoyle	17	Pickup v. Thames Ins. Co.	2533	v. Pinney	2047
v. Kelly	1718	Pico v. Cuyas	1387	Pinney's Will	233, 1938, 1958
v. Kingfield	923, 987, 1111,	Pictorial League v. Nelson	377,	Pinschower v. Hanks	736
	1920, 1982,		2442	Pioneer Cooperage Co. v.	
	1985, 1986	Pidcock v. Potter	233, 1938	Romanowicz	2416
v. Lindsey	1194, 1207, 1208	Pidgeon v. Williams	749	Piper v. Spokane	252
v. Mahan	1466	Piedmont Bank v. Hatcher	334	Pipestone Co. Bank v.	
v. Marblehead	1021, 1040,	Pier v. Duff	1086	Ward	916
	2346, 2358	Pierce v. Boston	463, 677, 1021	Pipher v. Lodge	1244, 1278,
		v. Bradford	616		1406
v. Meagher	1346	v. Brennan	1166, 2354	Pipkin v. Bond	953, 1028
v. Meily	2047, 2431	v. Carleton	1248	Pirie v. Anderson	1647, 1650
v. Phillips	2526	v. Chase	585	v. Wyld	1062
v. Poindexter	1240, 1675,	v. Gilson	949, 950, 951,	Pitcairn v. Hiss Co.	2400
	1680		953, 1028	v. Ogbourne	2423
v. Robbins	1680	v. Gray	1225	Pitcher v. King	1681
v. Scott	95	v. Goldsberry	1072	Pitman v. Maddox	1518
v. Smith	1064	v. Insdeth	1271	v. State	111, 247
v. Starr	1951	v. Kimball	2572	Pitt v. Emmons	1208
v. State		v. Myrick	63, 1983	v. State	111, 1404
62 Ark.	107	v. Newton	923	Pitton v. Walter	1670
29 Ga.	1072, 2081	v. Northey	2015, 2016	Pitts v. State	2071, 2073
33 Ga.	142	v. R. Co.	749, 760	v. Wilder	1257
9 Humph.	1125, 1138,	v. Rehfuß	1219	Pittsburg v. O'Neill	571
	1362	v. State	1009, 1012, 1013	Pittsburg C. C. & St. L. R.	
22 Tex. App.	2079	v. U. S.	851	Co. v. Indiana H.	
v. Stewart	2240	v. Wallace	1195, 1225	Co.	456
v. U. S. Benef. Soc'y	1062,	v. Woodward	2349	v. Lewis	905
	1213	Piers v. Piers	1645, 2505	v. McGrath	1374, 1671
v. U. S. Benevo-		Pierson v. Doe	1225	v. Martin	20
lent Soc'y	1213, 1268	v. Hutchinson	1197	v. Noel	1873
v. Willow	443, 458	v. People	216, 390, 2385	v. Noftsgcr	1777
v. Wimburn	1327	v. R. Co.	632	v. Sheppard	1706, 1976
Philps v. Trueman	1085	v. Steortz	2296	Pittsburg Coal Co. v.	
Phipps v. Martin	620	v. Wallace	1944	Withers	2354
v. Parker	1303	Pigg v. Carroll	615	Pittsburg F. W. & C. R.	
Phoenix v. Dey	1086	v. State		Co. v. Ruby	65, 199,
Phoenix Assur. Co. v.		145 Ind.	1896		249, 250
McArthur	907, 1195	43 Tex.	21, 675	Pittsburg V. & C. R.	
Phoenix Ins. Co. v. Amuse-		Piggot v. R. Co.	455	Co. v. Rose	463, 1943
ment Co.	754	Pigot's Case	2405	v. Vance	463, 720,
v. Gray	1058	Pigott v. Holloway	786, 747		728, 1943
v. Moog	779, 1263, 1898	Piipilani v. Houghtailing	1890	Pittsburg W. & K. R.	
v. Philip	379	Pike v. Badmring	907	Co. v. Applegate	1074
v. Shoemaker	2336	v. Bradbury	1302	Pittsburg & C. R. Co.	
Phoenix Nat'l Bank v.		v. Chicago	714, 1164, 1943	v. Andrews	1029, 1040
Taylor	2018	v. Crehore	347, 1476, 1677	Pittsburg & L. E. R.	
Pichler v. Reese	1960	v. Dyke	2116	Co. v. Robinson	714
Pick v. Rubicon H. Co.	1164	v. Hayes	1458, 2336	Pittsburg & W. R. Co. v.	
Pickard v. Bailey	564, 1194,	v. State	149, 153	Patterson	463
	1195, 1279,	v. Street	2445	v. Thompson	18, 492, 497,
	1676, 2164, 2558	Pike's Will	1736		2509
v. Bryant	907, 1037	Pile v. State	1842	Pittsfield & F. P. R. Co.	
Pickens v. Davis	1737, 1782	Pillow v. Impr. Co.	586	v. Harrison	7, 1354
v. State		v. Roberts	1354, 2456	Pittsford v. Chittenden	2527
115 Ala.	2497, 2512	Pillsbury v. Locke	748, 1558	Pizarro, The	291
61 Miss.	52, 691, 1111,	Pim v. Curell	1593	Place v. Alcock	379
	1612, 1613, 1614	Pinch v. Willard	2437	v. Baugher	1555
Pickens' Estate	1489	Pincus v. Reynolds	344	v. Minster	1013
Pickering, re	1859	Pine Tree L. Co. v. Fargo	2534	Plainfield F. N. Bank v.	
v. Barkley	1364, 1947	Pingery v. R. Co.	720, 1947	Dunn	2446
v. Cambridge	1784				

TABLE OF CASES.

PLA

	Section		Section		Section
Planing-Machine Co. v. Keith	1856	Poling v. R. Co.	791	Porter v. Hawkins	716
Plank v. Grimm	581, 661	Polini v. Gray	1487, 1524, 1527, 1662, 1670	v. Judson	1675
Plank-Road Co. v. Thomas	1910	Polite v. Jefferson	1267	v. Mfg. Co.	571, 1951
Plano Mfg. Co. v. Frawley	2304	Polk v. Butterfield	2573	v. Rich	682
v. Kautenberger	1969, 1974	v. Coffin	716	v. Seiler	64
v. McCoid	1230	v. State		v. State	55 Ala. 279, 836, 855
Plant v. McEwen	1076	62 Ala.	247	135 Ala.	681
v. Taylor	1484, 1491	36 Ark.	681, 2060	76 Ga.	2068
Planters' Bank v. Bass	2535	40 Ark.	75 205, 987, 2062	2 Ind.	276, 1839, 1842
v. George	2223			1 Tex. App.	2079
v. Massey	2098	Poll v. Hicks	2536	v. Throop	338, 1808
Planters' Mut. Ins. Co. v. Rowland	1947	Pollak v. Harmon	288	v. Waring	2572
Planters' & M. Bank v. Borland	1245, 1966	Pollard v. Lively		v. Warner	1566
Plass v. Plass	1029	2 Gratt.	1225, 1651, 2168	v. Wilson	697, 706, 707, 1188, 1192, 1196
Plaster v. Rigney	2143	4 Gratt.	132, 1225, 2529	Portland v. Kamm	1943
Platner v. Platner	2115	v. Meloin	1225, 1651	Portuguese Consul's Case	2372
Plato v. Reynolds	1021	v. People	1010, 1013	Portwood v. Com.	2501
Platt v. Buck	2319	v. Wybourn	1922	Posey v. Buckner	1681
v. Haner	1269	Polleys v. Ins. Co.	1389	v. Hanson	1058, 1487, 2341, 2531
Plattsouth v. Mitchell	252	Pollock v. Glassell	1302, 1304, 1511, 2049, 2408, 2456	Post v. Kenerson	1548
Platz v. McKean	1951	v. Morrison	581	v. R. Co.	1856
Plaxton v. Dare	1471, 1592	v. Pollock	898, 907	v. Rich	1677
Pleasant v. State		v. Wilcox	1198, 1253	v. School District	1195
13 Ark.	964, 987	Polson v. State	1136, 2337	v. Schooner Lady Jane	1647
15 Ark.	62, 200, 398, 923, 987, 1135, 1136, 1138, 1611, 1842, 1985, 2282	Pomeroy v. Baddeley	1841	v. Supervisors	1350, 1684
Pleasanton v. Nutt	2235	v. Benton	291, 1416	Postal Tel. Cable Co. v. Brantley	1078, 1651, 1778
Pleasants v. Heard	2354	Pomfrey v. Saratoga Springs	458	v. Hulsey	949
v. Meng	1354	Ponca v. Crawford	1248, 1362	v. Le Noir	1078
v. Pemberton	529	Ponce v. McElvy	1067	Postal v. Palmer	1195
Pledger v. R. Co.	1750	Poncin v. Furth	696	Posten v. Rasette	2105
Plicque v. La Branche	1054, 2008, 2016	Pond v. Lockwood	1196	Postlethwaite v. Rickman	2298
Plimpton v. Chamberlain	1459	Ponder v. Shumans	2166	Poston v. Jones	2518
v. Somers	1354	Pontius v. People	89, 224	Poteete v. State	1433
Plumb v. Curtis	94, 392, 1560	Pool v. Bridges	1757	Potier v. Barclay	1225
Plummer v. Com.	276	v. Devens	664, 1034	Potter v. Baldwin	233
v. Currier	1062	v. White	1669	v. Bank	6
v. Mercantile Co.	1558, 1877	Poole v. Dean	1921, 1938, 1958	v. Clapp	2506
v. Ossipee	199, 438, 785, 963, 1718, 1908	v. Dicas	1522, 1523, 1527	v. Easton	2431
v. Ricker	1722	v. Fleeger	20	v. Natural Gas Co.	252, 437, 461
v. State	1350	v. Gerrard	1250	v. Ware	1911
Plunket v. Bowman	1513	v. Mitchell	1890	v. Washburn	1573
Plunkett v. Cobbett	406, 2375	v. People	2505	v. Webb	64
v. Dillon	1248, 1256	v. Perritt	2260, 2271	Potts v. Cogdell	1267
v. Hauschka	2184	v. Richardson	1933, 1938	v. Coleman	1188, 2105
Plympton v. Preston	1208	v. State	1732	v. House	689, 1292, 1938
Poague v. Spriggs	2105	v. Warren	1298	Poulet v. Johnson	1195, 1651
Pocock v. Billing	1084	Pooler v. State	1375	Poulett Peerage	2063
v. Hendricks	93, 736, 747	Poor v. Robinson	1521	Poulson v. Stanley	2337
v. Lincoln	2462	Poorman v. Miller	1256	Poultney v. Fairhaven	2083
v. Thornicroft	2239	Pope v. Allis	1066	v. Rass	1540
Poconoket, The	2442	v. Askew	693, 700, 2008	Pound v. State	111, 246, 248, 396, 2098
Poff v. N. E. Tel. & Teleg. Co.	2581	v. Dodson	1013	v. Wilson	905
Poignand v. Smith	1225, 1233, 1269, 1709	v. Filley	571	Povall, ex p.	1658, 1681, 2163
Pointdexter's Case	363	v. Hanke	581	Powel v. Cleaver	1304
Pointer v. U. S.	118	v. State	1398	Powell v. Biddle	2463
Poler v. Poler	64	Popkin v. Popkin	168	v. Blackett	1300
Polhill v. Brown	1665	Porath v. State	398, 770, 949, 2056, 2060	v. Edmunds	2434
Polin v. State	451	Forell v. Cavanaugh	2024	v. Ford	694, 696
		Porter v. Allen	1085	v. Harper	66, 73, 1476
		v. Buckingham	1651	v. Hendrick	1313, 1651, 1674
		v. Com.	1072, 2059	v. Lea	2047
		v. Ferguson	1189		
		v. Hale	1213		

	Section		Section		Section
Powell v. Olds	112, 1777	Pratte v. Coffman	2354	Primrose v. Browing	1247
v. Pearlstine	1210	Preeper v. R.	561, 687	Prince v. Blackburn	1312
v. Powell		Preferred Acc. Ins. Co.		v. Samo	1045, 2113
114 Ill.	616	v. Gray	949	v. Smith	1540, 1548
L. R. 1 P. D.	1782	Prell v. McDonald	2572	v. Swett	1558
v. R. Co.	2206	Prentiss v. Bates		Prince's Case, The	1850
v. State		88 Mich.	2500	Princess of Wales v. Lord	
19 Ala.	111, 247, 1029,	93 Mich.	1938, 2500	Liverpool	1858
	1035	Prentiss v. Roberts	1105	Prindle v. Glover	239
25 Ala.	689, 1938	Presbrey v. R. Co.	463	Prine v. State	111
52 Ala.	247	Presbyterian Church v.		Pringle v. Miller	1037, 1807
58 Ala.	2236	Emerson	1519	v. Pringle	607, 1085, 1086,
101 Ga.	248, 821,	Prescott v. Board	1350		1390, 2228
	1614, 1722	v. Ward	987, 1021	Printing Tel. & C. Co.	
61 Miss.	1157	Prescott Bank v. Caverly	2445	v. Drucker	1388
Miss., 23 So.	852, 1349	Prescott Irrig. Co. v.		Printz v. Cheney	2261, 2271
18 Tex. App.	1841	Flathers	2580	v. People	716
v. Wark	2065	President, etc. of Mendota		Prior v. Powers	2352
v. Waters	529	v. Thompson	2535	v. State	987
v. Wathen	1458	Preslar v. Stallworth	1195	v. White	1082
v. Watts	1086	Presnell v. Garrison	18	Priou v. Adams	1186
v. Young	1681	Press Publishing Co. v.		Pritchard v. Austin	233, 792,
Power v. Ellis	2258, 2268	Lefferts	2322		794
v. Frick	702	Presser v. State	1109	v. Bagshawe	1075, 1256,
v. Kitching	1350	Pressley v. State	857		2105
Powers v. Armstrong	64	Preston v. Bowers	1730	v. Henderson	1908, 1911,
v. Charnsbury	1603	v. Carr	1845, 1856,		1988
v. Com.			2290, 2294,	Pritchett v. Davis	2450
Ky., 61 S. W.	1005,		2318	v. Munroe	2124
	1079	v. Cedar Rapids	1908	v. Smart	1858
Ky., 63 S. W.	1005	v. Dills	949	v. State	246, 247
Ky., 70 S. W.	2463	v. Merceau	2442	Pritt v. Fairclough	1518, 1561,
v. Leach	52, 1002,	v. Robinson	1651, 1655		1616
	1013, 1985	v. State	987	Probasco v. Cook	276
v. M'Ferran	1313, 1513	Prestwood v. Watson	2588,	Probst v. Bravenlich	2349
v. McKenzie	561, 1908,		2590, 2593,	Procter v. Lamson	1389
	2016		2594	Proctor v. Bigelow	2083
v. Mitchell	682, 1976	Prettyman v. Watson	1225	v. De Camp	1807
v. Presgroves	73, 74, 691,	Prewitt v. Martin	1045, 1263	v. Houghtaling	73, 74, 209,
	1612, 1615	Pribble v. Hall	1347		406
v. R. Co.	437	Price v. Garland	1521, 1560	v. Irvin	457
v. Russell	1318	v. Harrison	1858, 1859	Profile & F. H. Co. v.	
v. Silsby	1566, 1567, 1568	v. Hudson	2408	Bickford	1416
v. State		v. Hunt	1249	Proper v. State	357, 398, 770
80 Ind.	2595	v. Jenkins	1877, 1890	Proprietor v. Keith	1364, 2032
74 Miss.	1447, 2497	v. Littlewood	1661	Proprietors v. Bullard	1082,
Poyner v. State		v. Lord Torrington	1518		1257
Tex. Cr., 48 S. W.	59	v. Lyon	1219	Propsom v. Leatham	252
40 Tex. Cr.	1141	v. M'Gee	1312	Propst v. Mathis	1278, 1362,
Prader v. Accident Ass'n	2384	v. M'Ilvain	2354		1633
Pralus v. Pacific G. & S.		v. Mazange	253, 1623	Prosser v. Wapello Co.	1943
M. Co.	785	v. Page	2473	Protection Ins Co. v.	
Prater v. State	106, 928	v. Powell	1961	Harner	1946, 1947
Prather v. Palmer	382	v. Price	2530	Protection L. I. Co. v.	
v. Pritchard	736	v. R. Co.	1250	Dill	1195
v. Wilkins	1236	v. Standard L. & A.		Protector, The, v. Lord	
Pratt v. Andrews	64, 66, 75,	Ins. Co.	1530, 2384	Lumley	2250
	76	v. State		Prothro v. Minden Sem-	
v. Barker	1388	114 Ga.	851, 861	inary	1195
v. Battles	786, 1225, 1651	18 Oh. St.	824, 841	Providence G. M. Co. v.	12
v. Delavan	2237	v. U. S.	1163, 1803,	Burke	17
v. Ducey	1672		2273	Providence Tool Co. v.	60
v. Fowler	2115	v. Wolfer	1247	Mfg. Co.	1937
v. King	1681	Pridgen v. Green	2138, 2141	Provis v. Reed	1106, 1514, 1771
v. Patterson	1409	Priest v. State	1828, 2071	Provost v. Brueck	1950
v. Rawson	1874	v. Union Canal Co.	1873	Pruden v. Alden	1267, 24
v. White	1537, 1549,	v. Way	1416	Prudential Assurance	
	1551	Prime v. Eastwood	406	Co. v. Edmonds	2531
v. Wickham	1270	Primm v. Stewart	1503, 1605	Pruitt v. Cox	1109

TABLE OF CASES.

PRU

	Section		Section		Section
Pruitt v. State	1404	Queen's (Caroline)		R. v. Anstruther	2036
Prussel v. Knowles	2354, 2355, 2356	Case, The	995, 1025, 1028, 1036, 1043, 1045, 1259, 1260, 1261, 1262, 1263, 1816, 1818, 1819, 1820, 1850, 1861, 1884, 1917, 1963, 2094, 2113	v. Antrobus	1586
Pruyn v. Young	285	Queen's Proctor v. Fry	1644	v. Appleby	1072
Pryor v. Portsmouth C. Co.	150	Queenan v. Oklahoma	689, 1938	v. Apuna	1040
v. State	861	v. Terr.	233, 1938	v. Aram	266
Psyche v. Paradol	1878	Queener v. Morrow	1072, 1126, 1128, 1129, 2232, 2336	v. Armitage	2061
Publishing Co. v. Keller	371	Quesenberry v. State	246	v. Arnold	
Puckley v. Bridges	1364	Quick v. Johnison	2099	8 C. & P.	837, 848, 1375
Puett v. Beard	1072	v. Quick	1736, 1738	16 How. St. Tr.	1933
Puffer v. Smith	2415	Quilter v. Jorss	1194, 1195	v. Arundel	
Pugh v. McRae	1456	Quimby v. Ayers	657, 1460	4 Cox Cr.	580
Pugsley v. Ring	2522	v. Buzzell	1302	Hob. 109	291, 1350
Puleston v. Warburton	1658	v. Morrill	581	1 How. St. Tr.	1364
Pulford's Appeal	2311, 2319	v. N. A. C. & T. Co.	1195	v. Ashton & Thorne-ley	1438, 1440
Pullen v. Hutchinson	1291, 2134	Quin v. Assurance Co.	1946, 1947	v. Atkin	1821
v. People	609	v. Sexton	2444	v. Atterbury	560, 992, 1364, 1825, 1981, 1991, 1992, 2015, 2026, 2183, 2281, 2375
v. Pullen	1005	Quincy Horse R. & C. Co.		v. Attwood	837
Pulley v. Hilton	2139	v. Gunse	1750	v. Attwood & Robbins	2056
Pulliam v. Cantrell	987, 988, 1108	Quinlan v. R. Co.	1951	v. Audley	516, 1364, 2227
Pullman P. C. Co. v. Harkins	1951	v. Utica	458	v. Austen	1404
Purcell v. M'Namara	896, 1103	Quinn v. Champagne	2575	v. Avery	2298, 2312
v. Purcell	2086	v. Com.	106	v. Aymer	2059
v. R. Co.	2349	v. Eagleston	1777, 2138	v. Azir	2239
Purdee v. State	949, 1005	v. Halbert	498, 934, 1393	v. Babington	819, 1364
Purdy v. Hall	1215	v. Higgins	132, 681, 682, 1951	v. Backler	1244
v. People		v. Moss	2434	v. Bacon	2032
4 Hill N. Y.	1350	v. People	2272	v. Bailey	303, 363
40 Ill.	274, 946, 1018	v. State	905	v. Baillie	744, 963, 2312, 2327
Purnell v. R. Co.	664, 2496	Quinsigamond Bank v. Hobbs	561, 923, 967, 1618	v. Baker	1433
Purvis v. Robinson	1224, 1225, 1651	Quint v. Merrill	1684	v. Baldry	822, 824, 852, 837, 843, 865, 866, 867
Puryear v. Reese	1938	Quintal v. Chalmers	1674	v. Ball	
v. State		Quintana v. State	821, 2276	1 Camp.	88, 318
63 Ga.	2098	Quock Ting v. U. S.	2498	8 C. & P.	774, 905, 907
28 Tex. App.	2081	Quong Sue v. U. S.	2066	1 Moo. Cr. C.	318
Pusch v. Brady	1240			R. & R.	21, 318
Puth v. Zimbleman	1730			v. Balls	330
Putnam v. Goodall	1246, 1560			v. Baltimore	782
v. U. S.	774, 761			v. Barber	704, 2006
v. Wadley	701, 2008, 2016			v. Barker	62, 986, 1022, 1209
Pye v. Butterfield	2252, 2256			v. Barley	2079
Pyeke v. Crouch	1364			v. Barnard	
Pyle v. Clark	2552			1 C. & P.	986
v. Oustatt	614			19 How. St. Tr.	298, 352, 1981
v. Piercy	987			v. Barnett	761, 1262
v. Pyle	603, 681, 1671			v. Bartlett	
Pym v. Campbell	2410			7 C. & P.	848, 1072
v. Pym	1082			1 Cox Cr.	609
Pyroleum Appliance Co.				v. Basingstoke	
v. W. H. & S. Co.	2054			19 L. J. M. C.	1257
Pytt v. Griffith	1313			14 Q. B.	1256
				v. Bastwick	1177
				v. Bate	832, 855
				v. Bathwick	2145, 2234, 2235
				v. Bayard	2364
				v. Baylis	1821
				v. Baynton	2250

	Section		Section		Section
R. v. Beard	1807	R. v. Brewer		R. v. Carty	855, 1982
v. Bedel	2063	6 C. & P.	2317	v. Casey	2056
v. Bedfordshire	1582, 1583,	9 Cox Cr.	1262	v. Cass	825, 836
	1586, 1587	v. Brice	1911	v. Cassidy	918, 2079, 2080
v. Bedingfield	1576, 1756	v. Bridgeman	1858	v. Castle Morton	1246
v. Beeston	1375, 1387	v. Briggs	361	v. Castlemaine	523, 980,
v. Beezley	2079	v. Britton			1002, 1847, 2036,
v. Bell		17 Cox Cr.	1666		2038, 2250
5 C. & P.	848, 1328	1 F. & F.	2529	v. Castleton	1212, 1223
McNally	855	1 Moo. & R.	843, 850	v. Castro	87, 158, 270, 278,
v. Bellingham	1933	v. Bromwich	1364		413, 660, 792, 982,
v. Bembridge	1610, 1981,	v. Brooke	1894		983, 986, 1154, 1387,
	2239	v. Broughton	2040		1736, 1977, 2298, 2394
v. Bennet	848	v. Brown		v. Cator	1993, 2026
v. Benson	747, 1676	10 Cox Cr.	1982	v. Cellier	735
v. Bentley	1349	3 Haw.	949, 2056	v. Chadwick	952
v. Berger	1587	McNally	56	v. Chambers	357
v. Berigan	834, 855	21 U. C. Q. B.	1002,	v. Champney	2042
v. Bernadotti	1441		1005, 1006	v. Chapman	774, 918, 2079
v. Bernard	782, 1073	1 Ventr.	2239	v. Chappel	1667
v. Berriman	848, 858	v. Brunt	1836	v. Chappell	1278
v. Berwick	818, 847	v. Bryan	855	v. Charlesworth	2281
v. Bickley	1670	v. Buckley	1528, 1725	v. Charnock	526, 580, 657,
v. Birkett	2059	v. Buckworth			1177, 1364,
v. Birkett & Brady	2059	2 Keb.	1364, 2236		1857
v. Birmingham	10, 1457,	1 Sid.	1154	v. Chasson	1732
	1458, 1465,	v. Budge	657	v. Cheverton	838, 847, 855,
	1469	v. Bull			2081
v. Bispham	1982, 1985	9 C. & P.	2079	v. Child	1666
v. Bittle	6	12 Cox Cr.	1406	v. Christopher	1326, 1349
v. Blackburn	744, 835	v. Bullivant	2298, 2319	v. Clancey	520
v. Blandy	238, 950	v. Burdett	4, 41, 285, 437,	v. Clapham	1646
v. Bleasdale	216, 347		2081, 2491, 2494	v. Clare	1128
v. Bliss	1584, 1585	v. Burke		v. Clarendon	2372
v. Blunt	819	2 Cox Cr.	744	v. Clark	850
v. Bodkin	847	8 Cox Cr.	811, 1005	v. Clarke	62, 200, 986,
v. Bodle	918, 2079	v. Burley	834		1106, 1117, 1760,
v. Bond		v. Burt	58		1982
4 Cox Cr.	848, 855	v. Burton	152, 153, 2070,	v. Clay	62
27 How. St. Tr.	285,		2081, 2513	v. Clement	1836
	986, 1982	v. Busby	1364	v. Clewes	390, 855, 2100
v. Bonner	1441	v. Bushel	657, 1168, 1364,	v. Cliviger	607, 2228,
v. Boulter	2042		1800, 1864		2234, 2235
v. Bourdon	1674	v. Bushnell	657, 922	v. Cobbett	
v. Bowes	2239	v. Butcher	856	29 How. St. Tr.	1981
v. Bowler		v. Butler	1981	2 State Tr. n. s.	367,
Annual Register	1933	v. Byrne			1981
Phillipps' Ev.	1671	27 How. St. Tr.	1981	v. Cobden	218
v. Boyes	2056, 2258,	28 How. St. Tr.	1981	v. Cockburn	1408
	2271, 2280	v. Byron	1430, 1440, 1450	v. Cockcroft	200, 398
v. Boyle		v. Cain	839, 858	v. Cockin	2513
1 Lew. Cr. C.	1842	v. Calder	363	v. Cole	1364
1 Moo. & Rob.	905	v. Caldwell	2015	v. Coleman	
v. Braddon	1111, 1364,	v. Callaghan	1430	6 Cox Cr.	2026
	1821, 2201,	v. Campbell	1005	7 How. St. Tr.	575,
	2202	v. Campion	157, 260		1042, 1991
v. Bradshaw	1933	v. Candy	2374	v. Coley	838
v. Braintree	1196	v. Canning	25, 285, 527,	v. Colledge	575, 896, 950,
v. Braithwaite	2042		735, 991, 1044, 1123,		1005, 1364, 1864,
v. Bramley	2063, 2230		1259, 1364, 1718, 1837,		2038
v. Brandreth	1079, 1836		1864, 1981, 1982, 2098,	v. Colley	1842
v. Brannan	664, 1244		2152, 2349	v. Collier	838, 855
v. Brasier		v. Canterbury	1177	v. Collins	1981
East Pl. Cr.	1760,	v. Carew	1991, 2250	v. Colton	1588
	1821, 1825	v. Carpenter	918, 2079	v. Coningsmark	761, 774,
Leach Cr. L.	505,	v. Carstairs	818		782, 811, 1326
	506, 608	v. Castell Careinion	521,	v. Cook	986, 1732, 1837, 1839
v. Brecknock	195		1270	v. Cooke	1872, 2201
v. Brett	327	v. Carter	326	v. Cooley	2243

TABLE OF CASES.

R.

	Section		Section		Section
R. v. Cooper		R. v. Denew	1981	R. v. Edwards	
5 C. & P.	836, 855	v. Denio	1195, 1196	12 Cox Cr.	1753
3 Cox Cr.	301, 352	v. Dennis		4 T. R.	986, 1270
v. Coote	850	3 F. & F.	1005	v. Egerton	352
v. Cope	1523	2 Lew. Cr. C.	2104	v. Eldridge	2070
v. Coppull	1244	v. Denslow	609	v. Ellicombe	1208
v. Corby	2272	v. Dent	564	v. Ellis	
v. Corder	579	v. Derby	2250	6 B. & C.	347
v. Cornelius	2259	v. Derrington	841, 2183	1 M. & S.	380
v. Cornish	1834, 1909, 2081, 2098	v. Despard	1980, 2056, 2059, 2060	Ry. & Moo.	848
v. Cornwallis	575	v. Devlin	847	v. Elwes	1364
v. Coroner	1165	v. Dewhurst		v. Elworthy	1199, 1205, 1244
v. Cotton	363	1 Lew. Cr. C.	1328	v. Emden	1352
v. Court	824, 832, 848	1 State Tr. n. s.	658,	v. Enoch	825, 832
v. Courtenay	860		1182, 1243	v. Entrehman	1818
v. Coveney		v. Dillon	1329	v. Erdheim	850, 1349, 2260
7 C. & P.	1327, 1349	v. Dilmore	737	v. Eriswell	1364, 1374, 1375, 1377, 1408, 1482, 1486
8 C. & P.	1262, 1327, 1349	v. Dingle	1430	v. Erith	1501, 1503
v. Cowper	143, 144, 891, 457, 460, 1018, 1690, 1697, 1730, 1782, 1981	v. Dixon		v. Errington	1875, 1440
		3 Burr.	2307	v. Essex	
v. Cox and Railton	2298	11 Cox Cr.	1732	1 How. St. Tr.	1364
v. Cranburne	986	v. Doaks	57	Jardine	1837
v. Craven	1440	v. Dogherty	832	v. Evans	1781
v. Creamer	2086	v. Doherty	2239	v. Exall	152, 1781, 2513
v. Crickmer	363	v. Donellan	26, 87	v. Exeter	1465
v. Crockett	1440	v. Donnelly	1981	v. Eyre	1138, 1760
v. Crook	2250	v. Doran	1981	v. Fagant	1445
v. Crosby		v. Dosset	216, 301, 354	v. Fagg	848
12 How. St. Tr.	523,	v. Douglas		v. Fairie	382, 451
	980, 986	11 Man.	6, 850	v. Falkner	2070
12 Mod.	1991	13 Q. B.	1824	v. Fanshaw	2040
v. Crossfield	276, 821, 896	v. Dover	59	v. Farler	2057, 2059
v. Crouch		v. Dowlin	2098	v. Farley	2298
1 Cox Cr.	1696, 1697, 1700	v. Dowling		v. Farr	
4 Cox Cr.	701	3 Cox Cr.	2060	4 F. & F.	1182, 1196
v. Crowhurst	1781	7 St. Tr. n. s.	1981	8 C. & P.	905
v. Croydon	829, 838	v. Downer	1078, 2325	v. Farrell	
v. Cuffey	1079	v. Downes	735	3 Cox Cr.	2079
v. Culpepper	1189, 1193, 1991	v. Doyle		12 Cox Cr.	1406
v. Dalmas	2529	1 Cr. & D.	847	v. Farrington	1311, 2138
v. Dammaree	1732	12 Ont.	822, 858, 2183	v. Faulconer	194, 575, 986, 1177, 1274, 1275
v. Dane	2043	v. Drage	326	v. Fearshire	1329
v. D'Aoust	2276	v. Drain	1072	v. Feilding	986, 1182, 1644, 1992
v. Davidson	1982	v. Drake	2529	v. Felton	2250
v. Davis		v. Draper	56, 1981	v. Fennell	826, 832
6 C. & P.	326, 850	v. Dredge	2081, 2513	v. Fenwick	1364, 1395, 1837, 1909, 1991, 2098, 2228,
5 Mod.	520	v. Drew	825, 837		2569
v. Davison	56, 195, 1981	v. Drummond	1431, 1445	v. Ferguson	1781
v. Davlin	1362	v. Duffy	367, 461, 986, 1248, 1981, 1982	v. Fernley	523, 1177, 1330, 1703, 1981
v. Dawber	2056	v. Dunn		v. Ferrers	105, 232, 672, 681, 1430, 1621, 1671, 1933, 2239
v. Day	1393	4 C. & P.	829	v. Ferryfrystone	1364, 1875
v. Dean	1003	1 Moo. Cr. C.	326	v. Fiennes	575, 1364
v. Dean of St. Asaph's	1981,	v. Dunne	2056	v. Fisher	1836
	2356, 2557	v. Durham & Crowder	2056	v. Fitzgerald	1641
v. Debenham	1661, 1633	v. Dyer		v. Fitzharris	896
v. De Berenger		1 Cox Cr.	579	v. Fitzpatrick	1364, 2250
Gurney	719, 1073	6 Mod.	1698	v. Flaherty	2070
4 M. & S.	2574	v. Dyke	2059	v. Flannagan	363, 390
v. Deer	327	v. Dytche	142, 907		
v. Delamere	986, 1364, 1982	v. East Farleigh	1195		
v. De la Motte	694, 957, 1982, 1991, 1992	v. Eaton	2102		
		v. Edgar	2070		
		v. Edge	1182, 1214		
		v. Edmonds	760, 2097		
		v. Edwards			
		8 C. & P.	761, 1262		
		3 Cox Cr.	2079		

	Section		Section		Section
R. v. Fletcher		R. v. Gibney	825, 840, 847	R. v. Hamp	1208
4 C. & P.	2100	v. Gibson		v. Hampden	
18 How. St. Tr.	1182	Car. & M.	2363	3 How. St. Tr.	1350
1 Stra.	580	L. R. 18 Q. B. D.	21,	9 How. St. Tr.	194,
v. Folson	792		1755		1009, 1364
v. Forbes		v. Giles	1821	v. Hankins	1208, 2307
7 C. & P.	318, 1256	v. Gilham	840, 847, 848,	v. Hanson	1732
Holt N. P.	1375, 1393		2394	v. Harcourt	1005
v. Ford		v. Gillis	824, 834, 850	v. Hardwick	829
5 Cox Cr.	761, 764, 1262	v. Gisburn	1258	v. Hardwicke	1076, 1079
2 Salk.	520, 523	v. Gleed	2235	v. Hardy	9, 59, 753, 762,
v. Forderingbridge	272	v. Gloster	1440, 1441, 1722		773, 780, 995,
v. Forester	1442	v. Goldshede	850		1048, 1079, 1610,
v. Forster	318	v. Goode	1160, 1933		1732, 1981, 2105,
v. Forsyth	2151	v. Goodere	819, 848, 1830,		2374
v. Forsythe	150, 1404		1933, 1981	v. Hargrave	2060
v. Foster		v. Goodwin	318	v. Harney	1406
7 C. & P.	1667, 1676,	v. Gordon		v. Harringworth	1288,
	1747	11 How. St. Tr.	818		1299, 1302
1 Lew.	1328	21 How. St. Tr.	1182,	v. Harris	
v. Fowke	932, 1981		1219, 1732,	5 B. & Ald.	2043
v. Fox	583		1851, 2214, 2535	1 Cox Cr.	837
v. Francia	818, 834, 986,	v. Gould	858	4 Cox Cr.	1406
	1073, 1177, 1605,	v. Grahme	367, 1991	8 Cox Cr.	2513
	1732, 2264	v. Gray	354	4 F. & F.	246, 363
v. Francis		v. Granatelli	2183, 2259	Mood. Cr. C.	1349
3 Esp.	76	v. Grant	392	v. Harrison	
L. R. 2 C. C. R.	302,	v. Green		5 How. St. Tr.	1991
	321, 1181	5 C. & P.	848, 865	12 How. St. Tr.	194,
v. Frederick	609	6 C. & P.	835		660, 986, 1364, 1374,
v. Freind	735, 935, 1123,	7 How. St. Tr.	293,		1405, 2250
	1732, 1981,		1326	v. Hart	6
	2038, 2214	14 How. St. Tr.	517,	v. Harvey	1666, 2372
v. Frith	1933		1826, 2032,	v. Harwood	326
v. Frost			2072, 2081	v. Hassall	2085
4 St. Tr. n. s.	367,	v. Greenwich	1503	v. Hassett	847
	1079, 1854,	v. Greepe	523	v. Hastings	8, 10, 28, 43,
	1898, 1981, 2572	v. Grey	785, 1177,		784, 896, 905, 1043,
22 How. St. Tr.	1933		1364, 2286		1329, 1867, 1871,
v. Fridge	321	v. Griffiths	1375		1873, 1880,
v. Fuller	153	v. Griffin	2394		2032, 2066
v. Furley		v. Griggs	2231, 2239	v. Hathaway	9, 266, 321,
1 Cox Cr.	837	v. Grimwood	1639		1731, 1917
3 State Tr. n. s.	1842	v. Gunnell	266	. Hawkins	194, 575,
v. Fursey	414, 786, 1182,	v. Guthrie	2143		1364
	1214, 1268, 1280	v. Guttridge	1136, 1138	v. Haworth	849, 850, 1205,
v. Fussell	1981	v. Gwyn	1219		1208, 1278
v. Gahagan	2036	v. Hadwen	916	v. Hay	2394, 2395
v. Gallagher	580	v. Hadfield	1933	v. Hayes	1991, 1992
v. Gandfield	394, 1142	v. Hagan		v. Hayman	1327
v. Garbett	823, 850, 856,	8 C. & P.	1405	v. Hayward	2298
	2271, 2276	12 Cox Cr.	106	v. Hazy	276, 2089
v. Gardiner	2040	1 Jebb Cr. C.	1390	v. Hearn	832
v. Gardner	1684	v. Hailey	1676	v. Hearne	2100
v. Garner		v. Haines	1238	v. Heath	278, 667, 994,
1 Den. Cr. C.	824,	v. Hains	194, 1215, 1218		1018, 1605,
	829, 832	v. Hake	1393		1910, 1917
2 F. & F.	363	v. Hale	2024	v. Hedge	59, 763, 1981
v. Garnet	2250, 2394	v. Hales	89, 1992	v. Heesom	363, 1406
v. Gascoigne	1364	v. Hall		v. Helelilili	1877
v. Gavin		1 Cox Cr.	2513	v. Hemp	1982
15 Cox Cr.	844, 847	12 Cox Cr.	1195	v. Hensley	1991
7 How. St. Tr.	9	2 Leach Cr.	834, 848	v. Heseltine	451
v. Gay	1450	v. Halliday		v. Hewett	832, 855
v. Gaynor	786, 2043	Bell Cr. C.	2235	v. Higgins	2100
v. Gazard	2372	8 Cox Cr.	2236	v. Higginson	1933
v. Geering	216, 363	v. Hamilton		v. Hilditch	
v. George	580	4 How. St. Tr.	575, 1605	5 C. & P.	1873
v. Gibbons	829	12 Man.	1387	12 Cox Cr.	2338

TABLE OF CASES.

R.

	Section		Section		Section
R. v. Hill		R. v. Hunter		R. v. Kiddy	
2 Den. & P. C. C.	492,	3 C. & P.	2211	v. Killen	1819
	495, 496,	4 C. & P.	1200	v. Kimber	848
	1822	v. Hurly	2529	v. King	
20 How. St. Tr.	2286	v. Hutchinson	1432	5 C. & P.	664
v. Hind	1432	v. Hyde	1390	1 Q. B.	581
v. Hindmarsh	2081	v. Ings	781, 1157	2 T. R.	1219, 2373
v. Hinks	521, 580	v. Ireland	935, 1364, 1991	v. Kinglake	2270, 2280
v. Hinley	326, 1182, 1196	v. Ivy	318, 415, 785, 1224,	v. Kingston	
v. Hodgkiss	988		1598, 1650, 2227,	4 C. & P.	838
v. Hodgson			2235, 2333	20 How. St. Tr.	759,
1 Lew. Cr. C.	318	v. Jackson			760, 1487, 2286,
1 Mood. Cr. C.	840	1 Lew. Cr. C.	1013,		2309, 2313, 2380
R. & R.	62, 200, 986		2043	v. Kinloch	735, 745
v. Holden	1262, 2079	6 Cox Cr.	580	v. Kirkwood	318
v. Holland	1850, 1858	25 How. St. Tr.	2036	v. Kitson	1205, 1208
v. Hollingsberry	1850, 2079	Ridgeway's Rep.	1117,	v. Knightley	575, 2250
v. Hollingshead	1072, 1327		2105	v. Knill	2043
v. Holmes		v. Jacobs	854	v. Knowles	2372
9 Br. C.	1851	v. James		v. Knox	735, 1128, 1329,
1 C. & K.	824, 837	1 C. & P.	986		1364
12 Cox Cr.	62, 200,	4 Cox Cr.	2131	v. Labouchere	207, 285,
	898, 1006, 1023	6 How. St. Tr.	575		1672
2 F. & F.	1821	1 Show.	2158	v. Lafone	580
L. R. 1 C. C. R.	1005	v. Jankowski	1072	v. Lake	2250
v. Holt		v. Jarvis		v. Lambe	
8 Cox Cr.	321	7 Cox Cr.	238, 318	2 Leach Cr. L.	847,
6 T. R.	1684	10 Cox Cr.	832, 2266		848, 866
v. Holy Trinity		v. Jellyman	2060, 2239	Peake N. P.	88
7 B. & C.	1246	v. Jenkes	2250	v. Lambert	2119
Settl. Cas.	1503	v. Jenkin	986	v. Langhorn	935, 995, 1018,
v. Hone	461	v. Jenkins			1349, 1667, 2250
v. Hood	609	1 Cox Cr.	2059	v. Langmead	2513
v. Hooper	2081	L. R. 1 Cr. C. R.	1362,	v. Langton	748
v. Hope	1278		1440, 1441	v. Laud	575, 1177, 1364,
v. Hopes	1667	R. & R.	858		2250
v. Hopkins		v. John		v. Laughter	832
8 C. & P.	2081	7 C. & P.	1075	v. Layer	580, 979, 1177,
10 Cox Cr.	248	East Cr. L.	1442		1327, 1328, 1981,
v. Hornbrook	824, 837, 855	v. Johns	2239		1982, 1991, 2018,
v. Horner	835, 855	v. Johnson	21, 1182,		2286
v. Horton	782		1195, 1198, 1994,	v. Leary	1614
v. Hostmen	1858		2148, 2152	v. Leatham	1212, 2282
v. Hough	318	v. Johnston	843, 844, 845,	v. Ledbetter	1387
v. Howard	2168		846, 847, 848	v. Lee	1387
v. Howe	1667	v. Jolliffe	2098	v. Lenehan	1208
v. Howell		v. Jones		v. Leverson	2325
1 Denison Cr. C.	1440	2 Camp.	2056, 2576	v. Levy	2529
3 State Tr. n. s.	354,	2 C. & P.	2100	v. Lewis	
	2073	1 Den. Cr.	2298	6 C. & P.	849, 850,
v. Howes	855	5 How. St. Tr.	1991		1349
v. Hubbard	1439	31 How. St. Tr.	195,	7 How. St. Tr.	950
v. Hubert	867		1981, 1982	4 Esp.	986
v. Hucks	1451	Peake N. P.	2098	v. Lilburne	575, 1364,
v. Hudson	1837	R. & R.	836		1684, 1834, 2038,
v. Huggins	1981	v. Jordan	2514		2250, 2251
v. Hughes		v. Kahalewai	2346, 2349	v. Lillyman	1135, 1136,
1 C. & K.	2043, 2363	v. Kalabeen	848		1138, 1760
14 Cox Cr.	2513	v. Kamakaua	830	v. Lincoln	519, 788, 1141,
1 Cr. & D.	847, 1279	v. Kea	2063		1177, 1864, 2032
1 Leach Cr. L.	1339	v. Kearney	1981	v. Lindsay	1605
v. Hulet	575, 660, 1476, 2070	v. Keenan	1981	v. Lisle	1816
v. Hulme	2281	v. Kelsey	2059	v. Little	905
v. Hunt		v. Kenilworth	1194, 1195,	v. Llanfaethly	1212
1 State Tr. n. s.	367,		1196	v. Lloyd	
	986, 1040, 1079,	v. Kennedy	782	4 C. & P.	1432
	1182, 1243,	v. Kerne	1838	6 C. & P.	839
	1963, 2097	v. Kerr	847	7 C. & P.	357
2 Cox Cr.	1442	v. Kidd	59, 351, 1364	v. Locker	609

	Section		Section		Section
R. v. Lockhart	859	R. v. Mawbey	1674	R. Murphy	
v. Londonderry	1933	v. May	347	A. M. & O.	2015
v. Long		v. Mayhew	2042	8 C. & P.	4, 440, 770,
6 C. & P.	847	v. Mead			774, 786, 1249,
Old Bailey	221, 1984	2 B. & C.	1432		1258, 1259,
v. Long Buckby	160	1 Burr.	2239		1280, 1839
v. Louie	1442, 1445, 1448	2 Ld. Raym.	2259	19 How. St. Tr.	195,
v. Lovat	25, 585, 986, 1882	v. Megson	1136, 1138,		1106, 1981
v. Love	2036		1760	v. Muscot	2032, 2040
v. Lovett	1981, 2520	v. Melville	4, 877, 672, 735,	v. Nan-e-quis-a-ka	605
v. Lowick	195, 1981		1078, 1219, 1362,	v. Nattrass	354
v. Luce	2264		2223	v. Nayler	2250
v. Luckhurst	829, 836	v. Merceron	850	v. Neal	2059
v. Luffe		v. Merthyr Tidvil	1246	v. Netherthong	1894, 2145
8 East	2063	v. Metheringham	1193	v. Neville	382, 1056
8 T. R.	612	v. Mick	847, 848	v. Newman	1271, 1839
v. Lundy	1142, 1750	v. Middlesex	1350	v. Newton	
v. Lydeard St. Law-		v. Middlezoy	1298	1 C. & K.	2168
rence	1486	v. Mill	825, 839	Dyer	2032
v. Lyons	580	v. Millard	318	15 L. T.	1262
v. McBerty	347	v. Millhouse	579	2 Moo. & Rob.	2086
v. McCafferty		v. Millen	829	v. Nicholas	
25 N. Br.	836, 858	v. Miller	1667	2 C. & K.	1760, 1821
10 Cox Cr.	2038	v. Millis	2082, 2083	6 Cox Cr.	1442
v. M'Douall	995	v. Mills	1666	v. Nichols	1982
v. McDonnell	352	v. Milne	1911	v. Nicholson	1873
v. M'Donough	1982	v. Milton	1582, 1592, 1684	v. Noakes	2059
v. Macfarlane	1981	v. Minton	1430	v. Noble	247
v. McGovern	1327	v. Mitchel	302, 367, 818	v. Noel	986, 1117
v. M'Guire		v. Mitchell		v. Norfolk	
2 East Pl. Cr.	2024	6 Cox Cr.	794	1 How. St. Tr.	516,
1 Leach Cr. L.	1339	17 Cox Cr.	1072, 1890,		575, 819,
v. Macguire	575, 702,		1445		1364, 2250
	819, 1364, 1991	v. Mobbs	363	Jardine's Cr. Tr.	1818,
v. McHugh	850	v. Mockford	2081		1837, 2032
v. McIntosh	1981	v. Moders	575, 1364	v. Norwood	2084, 2085,
v. Mackay	1442	v. Mogg	363		2086, 2088
v. McKenna	952, 1005	v. Mohun	811, 896, 1430	v. Nundocomar	960, 1223,
v. Maclane	2574	v. Moir	1262		1837, 2193,
v. McLean	850	v. Mompesson	2250		2212, 2265, 2375
v. M'Naghten	672	v. Moody	838	v. Nunez	2032, 2040
v. M'Naughton	1933	v. Mooney	1440, 1442	v. Nutley	1503
v. Macclesfield	1350, 1364,	v. Moore		v. Oakhampton	600
	1825, 1877,	2 C. & P.	216, 318	v. Oates	518, 527,
	1982, 2260, 2261,	2 Den. Cr. C.	825, 829,		1364, 1405, 1838,
	2269, 2281		832, 837		1909, 2250
v. Magill	848	v. Moores	2059	v. O'Brien	157, 367,
v. Maguire	993	v. Mordant	1364		461, 1841, 2374
v. Mailloux	367, 1029	v. More	1911, 2250	v. O'Coigly	986
v. Malings	579	v. Morgan		v. O'Connell	367, 461, 789,
v. Mallory	4, 1070	14 Cox Cr.	1442		1079, 1182, 1368,
v. Maloney	1262	1 Leach Cr. L.	1818		1669, 2097, 2119,
v. Mansfield		1 Moo. & Rob.	1994,		2150, 2374, 2529
14 Cox Cr.	822, 836		1999	v. O'Connor	
1 Q. B.	2063	v. Morley	1364, 1667	27 How. St. Tr.	195,
v. Marshall	1408	v. Morris			1980, 1982
v. Martin		4 How. St. Tr.	1177	4 St. Tr. n. s.	157,
2 Camp.	1634, 1661	1 Leach	2529		367, 1981
6 C. & P.	200, 986	v. Morse	1349	v. Oddy	194, 326
12 Cox Cr.	1163, 1802	v. Morton		v. O'Doherty	367, 667,
1 Lew. Cr. C.	318	4 M. & S.	1194, 1195,		1346, 2494
2 M. & Rob.	986		1196	v. O'Donnell	580, 1981
6 State Tr. n. s.	1327,	2 Moo. & Rob.	837	v. Offord	1933
	2119	v. Mosey	858, 859	v. Oldroyd	905
v. Maskall	664, 986, 1612,	v. Motherwell	1346, 1661	v. Ollis	321
	1732, 1981	v. Mudie	2040	v. Onbie	986
v. Matthews		v. Mullins	761, 969, 2056,	v. Osborne	1760
4 Cox Cr.	1262		2060	v. Osman	1440, 1441
15 How. St. Tr.	1991	v. Murlis	1894	v. Overton	1005

TABLE OF CASES.

R.

	Section		Section		Section
R. v. Owen	850	R. v. Primelt	328	R. v. Roden	863
v. Oxford	232, 681, 1933	v. Pritchard	1160	v. Roebuck	321
v. Paakaula	852, 860	v. Proud	331	v. Rogan	988
v. Padstow	2447	v. Prunty	1406, 1828	v. Rogers	2039
v. Page		v. Purnell	2259, 2264	v. Romp	832
4 B. & Ad.	318	v. Quelch	1684	v. Rook	612, 2063
2 Cox Cr.	200	v. Quin	761	v. Rookwood	523, 979,
v. Pah-Mah-Gay	1818	v. Radford	840, 2394		986, 1177,
v. Pain	818	v. Raleigh	575, 1864, 1430,		1982
v. Paine	1364, 1375, 2100		1837, 2036	v. Rooney	216, 414
v. Palmer		v. Ramsden	762, 2125	v. Rorke	1021
Annual Register	457,	v. Rankin	367	v. Rosewell	367, 769, 1732,
	1159	v. Rastrick	1195		1837, 1982, 2250
6 C. & P.	1899	v. Raudnitz	1684	v. Rosser	2570
v. Parker		v. Rawden		v. Row	829
Car. & M.	2040, 2042	2 A. & E.	1195, 1196	v. Rowan	285, 986, 1982
1 Cox Cr.	986	8 B. & C.	2447	v. Rowland	580
8 Cox Cr.	829	v. Read	2061	v. Rowley	2098
3 Dougl.	1124	v. Reading		v. Rowton	55, 57, 58, 59,
Leigh & C.	832	7 C. & P.	1667		194, 195, 216, 1609,
v. Parmenter	2339	7 How. St. Tr.	523,		1614, 1981, 1982,
v. Parratt	836		575, 986,		1983, 1985, 1986
v. Parris	607		1910, 2250,	v. Rudd	
v. Partridge	836		2280	1 Cowp.	2056
v. Patch	26	Lee t. Hardw.	607, 612,	1 Leach Cr. C.	818, 819,
v. Payne	580		2063, 2239		834
v. Peacock	803	v. Reaney	1441	1 Leach Cr. L.	2236
v. Pearce	367	v. Reardon	216, 331, 347,	v. Rudge	1003, 1982
v. Pedley	728		357, 363, 1135	v. Russell	367, 1364, 1732,
v. Peel	1440	v. Reason			2032, 2094, 2375
v. Pegler	2260	12 Cox Cr.	824, 839	v. Ruston	498, 811, 1818
v. Peltier	1375, 1442	16 How. St. Tr.	1157,	v. Ryan	62
v. Pembroke	1364, 1430,		1326, 1327,	v. Ryle	1709
	1718		1329, 1430, 1450	v. Ryton	2188
v. Penn and Mead	2250	v. Redman	1163	v. Sadler	2199
v. Perkins	508, 1440,	v. Redmond	1981	v. Saffron Hill	1195, 1196
	1443, 1821	v. Reed	1352	v. Salisbury	218
v. Perry		v. Rees	848, 1667	v. Salmon	457
2 Cox Cr.	359	v. Reeve	832	v. Sandys	850
14 How. St. Tr.	867,	v. Regan		v. Sansome	848, 855
	2081	4 Cox Cr.	354	v. Saunders	321, 2153
v. Petcherini	1732, 1850	16 Cox Cr.	1236, 2154	v. Savage	1406
v. Peters	195, 811	v. Regicides; see		v. Scaife	
v. Petherton	1646	Regicides' Trial.		5 Cox Cr.	1405
v. Petrie	1803, 1909, 1910	v. Renwick	818	1 Moo. & Rob.	1452
v. Pettit	848	v. Rhodes		v. Scammonden	2433
v. Phillips	2514	1 Leach Cr. L.	1641	v. Schlesinger	728
v. Phillips	318, 1021	1 Q. B.	321, 2272	v. Scot	
v. Philpotts	745, 748	v. Richards		5 How. St. Tr.	1991
v. Picton	660, 1157, 1271,	5 C. & P.	836, 847, 855	v. Scott	
	1674, 1697,	1 Moo. & R.	1278, 1667	1 D. & B.	822, 842,
	1981, 1982	v. Richardson			843, 846, 849,
v. Piercy	166	2 Cox Cr.	416		850, 852, 2260,
v. Pike		2 F. & F.	216, 331		2266, 2270
3 C. & P.	1439, 1443	3 F. & F.	2374	v. Scroop	735, 1991, 2250
1 K. B.	860, 2281	v. Richmond	1177	v. Searle	681
v. Pikesley	1349, 1667	v. Rigg	1874	v. Semple	818
v. Pinney	2119	v. Riley	62, 200, 398	v. Serjeant	2239
v. Pitcher	986	v. Rivers	848, 849	v. Serva	1817
v. Plumer	1073, 2152	v. Roberts		v. Seven Bishops	773, 1364,
v. Plunket	896, 1177,	2 C. & K.	2042		1991, 1992
	1364, 2250	1 Camp.	203, 321	v. Sewel	529
v. Pook	1726	v. Robins	200, 1022	v. Sexton	804, 839
v. Pountney	829	v. Robinson		v. Shaftesbury	1840, 2360
v. Povey	690	Annual Register	460	v. Sharpe	867
v. Powell	2380	5 Cox Cr.	1205,	v. Shaw	
v. Pressley	1328		1208	6 C. & P.	829, 839,
v. Preston	1825	L. R. 1 Cr. C. R.	850		2286
v. Priddle	520, 1270	v. Robotham	1350	10 Cox Cr.	2042

	Section		Section		Section
R. v. Shaw		R. v. St. Giles	1814, 1321	R. v. Thistlewood	526, 1836, 1982, 2427
16 Cox Cr.	950, 1022	v. St. Martin's	735, 747, 749, 753, 754, 762	v. Thomas	
1 Lew. Cr. C.	660	v. St. Peter	2063	2 Leach Cr. L.	848, 1823
v. Sheares	1981, 1991, 2036	v. Stafford	894, 960, 986, 1177, 1399, 1667, 1909, 1982, 2036, 2038, 2250	6 C. & P.	838
v. Sheehan	2056, 2059			7 C. & P.	824, 2286
v. Shellard	1262	v. Standsfield	9, 105, 818	Dyer	1364
v. Shepherd		v. Stannard	55	v. Thompson	
7 C. & P.	838	v. Stapleton	960	12 Cox Cr.	609
1 Cox Cr.	1993, 1994, 2007, 2026	v. Stayley	575, 735	13 Cox Cr.	1406, 2079
v. Sherfield	1177, 1364, 2032	v. Steel		1 Leach Cr. L.	836, 860
v. Sheridan	1179	13 Just. P.	848	2 Q. B.	825, 826, 832, 838, 847, 860
v. Sheriff of Chester	1858	1 Leach Cr. C.	1160	v. Thornton	838, 847
v. Sherman	580	v. Steele	1439, 1445	v. Throckmorton	575, 1364, 2250
v. Sherrington	855	v. Stenson	321	v. Tidd	2059
v. Shimmmin	579	v. Stephens		v. Tinkler	21
v. Shrewsbury	2190	16 Cox Cr.	331	v. Tippet	2070
v. Shrimpton	55, 58, 193, 196	3 State Tr. n. s.	1182	v. Tissington	62, 200, 216, 1982, 2529
v. Sidney	1807, 1837, 1991, 1992, 2033, 2094	v. Stephenson	1406	v. Tolson	790
v. Silverlock	2012	v. Steptoe	2100	v. Tong	523, 526, 575, 580, 818, 1076, 1477, 2032, 2036
v. Simmonds	2079	v. Stimpson	1873	v. Tooke	59, 195, 728, 1073, 1732, 1795, 1871, 1963, 2130
v. Simpson		v. Stockdale	2094	v. Toole	667, 825, 847
1 Lew. Cr. C.	1440	v. Stockland	2083	v. Tower	1263, 1641, 2016, 2056
1 Moody Cr. C.	829, 836, 838	v. Stoke-upon-Trent	2440	v. Towey	4, 2042
v. Simmonsto	2086	v. Stokes	761	v. Townshend	1851
v. Simons		v. Stone		v. Trant	1430
6 C. & P.	2339	1 East	2089	v. Travers	1821
19 How. St. Tr.	2355	25 How. St. Tr.	4, 1079, 1174, 1339	v. Treble	21
v. Skeen		v. Stourbridge	1195, 1196	v. Triganzie	194, 196
Bell Cr. C.	850	v. Strafford	575, 1177, 1364, 1880, 2032, 2375	v. Troop	1327
8 Cox Cr.	2281	v. Streater	1350	v. Truman	2088
v. Slaney	703, 2261	v. Stripp	848	v. Tubby	848, 849, 850
v. Slaughter	829	v. Stroner	918, 2079	v. Tucket	232
v. Sleeman	829, 840, 847	v. Stroud	2250	v. Tufts	2070
v. Slingsby	1177	v. Stubbs	2056, 2059	v. Turberfield	258
v. Sloggett	823, 850, 2260	v. Sullivan	2070	v. Turner	
v. Smith		v. Sunderland	318	2 C. & K.	2158
3 Burr.	291, 2273	v. Sutton	1662, 1800, 2570	6 How. St. Tr.	575, 1023, 1616, 1982
2 C. & K.	1781	v. Swatkins	847, 860	32 How. St. Tr.	59, 1836, 1981
2 C. & P.	318	v. Swendsen	1177, 1981, 2239, 2250	1 Lew. Cr. C.	1477
4 C. & P.	318	v. Tandy	1963, 1991, 1992	1 Mood. Cr. C.	1388
10 Cox Cr.	1442	v. Tarbot	986	v. Tutchin	1177
16 Cox Cr.	1442	v. Tarrant	1328	v. Twelve Bishops	2250
Holt N. P.	1375	v. Taverner	318	v. Twyn	575, 1991, 2250
Mood. Cr. C.	609	v. Tawell	392	v. Tyler	829, 855
Old Bailey	26	v. Taylor		v. Tynney	2298
R. & R.	1387, 1393	1 C. & P.	2079	v. Udall	575, 1364, 2217, 2250
1 Stark.	860, 1349	8 C. & P.	825, 829, 1259, 1329	v. Ulmer	1406
23 U. C. C. P.	1442	5 Cox Cr.	854	v. United Kingdom	
Williams	1130	6 Cox Cr.	1994	El. T. Co.	792
v. Smith & Davis	2056	13 Cox Cr.	1829, 1691, 1696, 1700	v. Unkles	2070
v. Somerset	519, 819, 1364	McNally	1932	v. Upchurch	829, 836
v. Souci	848	Peake N. P.	1820	v. Upper Boddington	2211, 2308
v. Sourton	2063	Pelham	579	v. Upton	2086
v. Southey	689	Skinner	1364, 1384		
v. Southwood	347	v. Teal			
v. Sparkes	2394	2 Camp.	986		
v. Spencer		9 East	527		
1 C. & P.	1676	11 East	21, 1010, 1015		
7 C. & P.	829	v. Telicote	1328		
v. Spilsbury	499, 1349, 1439, 1442	v. Thanet	1963		
v. Spollen	811, 1812, 2079	v. Thelwall	1986		
v. Squires	1123				
v. St. George	952				

TABLE OF CASES.

R.

	Section		Section		Section
R. v. Upton St. Leonards	1380	R. v. Wealand	1828	R. v. Winslow	363
v. Van Butchell	1441	v. Weaver	1219, 1646, 2529	v. Winsor	580
v. Vandercomb	351	v. Webb		v. Wintoun	811, 1364
v. Vane	735, 1219, 1991	4 C. & P.	849	v. Witches	445
v. Vaughan		6 C. & P.	2059	v. Withers	2321
13 How. St. Tr.	351,	11 Cox Cr.	524	v. Woburn	2218, 2223
499, 986, 1177,		1 Moo. & Rob.	457,	v. Wood	
1605, 1839, 2032,			2212	14 Cox Cr.	1138, 1760
2038, 2265		3 Stark.	1842	Dears. & B.	2089
Salk.	367	v. Webster	2042	1 F. & F.	254
v. Verelst	2168	v. Weeks	216, 318	5 Jur.	988
v. Vernon	829, 839	v. Weightman	1981	Romilly	867
v. Vice-Chancellor	1351,	v. Weller	1349	v. Woodburne	818, 847
	2215	v. Wellings	1408	v. Woodcock	1364, 1438,
v. Vickery	2222	v. Wells	2059		1442, 1451, 2239
v. Vincent		v. Welton	1406	v. Woodfall	2356
119 C. & P.	1730	v. Westbeer	1364	v. Woodhead	918, 2079
3 State Tr. n. s.	2079	v. Weston	575, 1364	v. Woodley	2200
v. Virrier	2040	v. Whalley	1163, 1802	v. Woods	
v. Voke	364	v. Wheat	846, 849, 850	5 Br. C.	21, 1442
v. Wainwright	1726	v. Wheatland	2043	1 Cr. & Dix	1044
v. Wakefield	2082, 2239	v. Wheelley	848, 849, 850	v. Worsenham	1858, 2259
v. Wakeman	1018, 1329,	v. Wheeling	2070	v. Worth	1461, 1464,
	1667	v. Whelan	1046		1524
v. Walker		v. Whitbread	2079	v. Wo Sow	2056
6 C. & P.	850	v. White		v. Wrangle	2429
23 How. St. Tr.	499,	2 Cox Cr.	1021	v. Wright	
	938, 1154,	17 How. St. Tr.	819,	1 Lew. Cr. C.	839, 848
	1732, 2210		848, 1981	17 N. Br.	1066, 1677
1 Leach Cr. L.	1818	Leach Cr. C.	492, 1816,	R. & R.	681, 1921
2 Moo. & Rob.	1136,		1817	v. Yllie	318
	1138, 1760	R. & R.	2070	v. Wyse	2061
v. Walkley	838, 2100	v. Whitebread	518, 935,	v. Yates	2042
v. Walking	579		986, 1002, 1177,	v. Yewin	986
v. Wall			1991, 2036, 2250	v. Yore	2239
28 How. St. Tr.	1983,	v. Whitehead		v. Young	2230
	1981, 1982	3 C. & K.	221, 1984	v. Zeigert	223
Russell	1374	1 C. & P.	254, 321	v. Zulneta	260
v. Wallace	1684	L. R. 1 C. C. R.	497,	R. Co. v. Yeiser	456
v. Walter	1349		811, 1819, 1822	v. Yerger	456
v. Ward	1981	v. Whyley	216, 305	Rabeke v. Baer	2063, 2527
v. Warden of the Fleet	980,	v. Widdup	850	Rachal v. Rachal	1513
	1270, 2298	v. Wiggins	761	Rachfield v. Careless	2475
v. Warickshall	819, 822,	v. Wilbain	2004	Rackemann v. Impr. Co.	2442
	823, 825, 834,	v. Wild	833, 840, 847	Radam v. Microbe De-	
	858, 859	v. Wilkes		stroyer Co.	1978
v. Waring	73, 76	7 C. & P.	2056, 2059	Radcliff v. Ins. Co.	1684
v. Warringham	829, 838,	19 How. St. Tr.	2264	Radcliffe v. Fursman	2294
	860	v. Wilkins	1789	Radford v. McDonald	2065
v. Warner	2016	v. Wilkinson	1327	v. R. Co.	1387
v. Warwick	523	v. Williams		v. Rice	1021, 1040
v. Wason	6	7 C. & P.	1821	v. State	1438
v. Wasson	2239	8 C. & P.	2025, 2236	Raeffie v. Moore	2309
v. Watkins	1667	1 Cox Cr.	579	Rafe v. State	832
v. Watkinson	2313	8 Cox Cr.	760, 761,	Rafferty v. State	321
v. Watson			905	Raffles v. Wichelhaus	2466
1 Camp.	2152	1 Lew. Cr. C.	2018	Ragan v. Smith	2153
3 C. & K.	761, 1328	v. Williamson	221, 1984	Ragland v. Green	1304
32 How. St. Tr.,		v. Willis	818, 986, 1981	v. State	679
and 2 Stark.	4, 260,	v. Willshire	2506	v. Wickware	2210
	382, 786,	v. Wilson		Ragsdale v. State	247
	791, 979, 986,	Ber. N. Br.	2139	Raiford v. State	2060
	1073, 1079, 1234,	8 Cox Cr.	1408	Railing v. Com.	1362, 1431,
	1235, 1270, 1280,	2 F. & F.	152, 1781		1432
	1836, 1854, 1963,	2 Green (Sc.)	773	Railroad v. Atkins	1408
	1981, 1982, 2272,	Holt N. P.	848, 849	v. J. M.	1141
	2360, 2374, 2375	1 Lew. Cr. C.	238	Railroad Bank v. Evans	1681
2 T. R.	1199	v. Wink	1142	Railroad Co. v. Ayres	1694,
v. Watt	2269	v. Winkworth	352		1698

	Section		Section		Section
Railroad Co. v. Bixby	719	Randall v. Northwestern		Rawlins v. State	396, 791
v. Burke	736	Tel. Co.	438, 1236	Rawles v. Ford	133, 923,
v. Foreman	1943	v. State	923, 988		928, 1615
v. Kenney	2507	v. Van Rensselaer	5	v. State	133, 923,
v. Schultz	1922, 1926,	v. Venable	1381		928, 1615
	1951	v. Wadsworth	1909	Rawls v. Ins. Co.	1081, 1947
v. Tax Case	1350	Randegger v. Ehrhardt	1083,	Ravenscroft v. Giboney	1267
Railroad & Tel. Cos.			1085	Rawson v. Curtiss	1249
v. Board	2580	Randel, re	2257	v. Haigh	1783
Railway v. Pool	782	v. Chesapeake & D. C.		v. Ins. Co.	266, 1081
Railway Co. v. Amos	613	Co.	787, 2125	Rawstone v. Preston Co.	2319
v. Crowder	1750	Randle v. Blackburn	2117	Ray v. Bell	1037
v. Jones	455, 456	Randolf v. Bloomfield	1876	v. Camp	288
v. Richardson	455	Randolph v. Adams	1956	v. Castle	1526
Railway P. & F. C. Ass.		v. Doss	1247	v. Coffin	1141
v. Robinson	1770	v. Easton	2527, 2540	v. Com.	2236
Raines v. Perryman	1247	v. Gordon	704, 2139	v. State,	
v. Philip	1320	v. Loughlin	2016	50 Ala.	1144, 1966
v. State	397	v. McCain	1841	1 Greene Ia.	1850,
Raines' Adm'r v. Raines'		v. Woodstock	18, 20, 1263		2056, 2059
Cred'rs	1463, 1464	Rands v. Thomas	527	35 Tex. Cr.	2354
Rainey v. Hines	2110	Rank v. Shewey	1250	Rayburn v. Lumber Co.	1301
v. Potter	770	Rankin v. Crow	2105	Raymond v. Cummings	1058
Rainnie v. St. John C. R.		v. Fidelity Ins. T. & S.		v. Day	392
Co.	1750	D. Co.	2556	v. Lowell	1951
Rains v. State		v. McKenzie	2065	v. R. Co.	2381, 2383
88 Ala.	2276	v. Maxwell	1065	Rayner v. Ritson	1858
152 Ind.	1976	Rankine v. Clarke	406	Raynes v. Bennett	2336
7 Tex. App.	2089	Ranney v. Donovan	1248	v. Towgood	2257
Rainwater v. Elmore	1839	v. R. Co.	461, 1872	Raynham v. Canton	1271, 1684
Raisler v. Springer	1974	Ransbottom v. State	1873	Raynor v. Lee	1651
Raleigh Hosiery Co. v.		Ransome v. Christian	2042	v. Norton	736, 763,
R. Co.	2509	Raper v. R. Co.	458, 461		1293, 1314
Raleigh & G. R. Co. v.		Raphael v. Bank of		v. R. Co.	235, 1951
Bradshaw	1031	England	2356	Razor v. Razor	1073
Ralph v. Brown	1213, 2196,	Rapley v. Klugh	791	Rea v. Missouri	944, 1890
	2222, 2223,	Rapp v. Le Blanc	905, 907	Rea's Assignment	1225
	2269	Rarden v. Cunningham	571	Read v. Bailey	2124
v. Hensler	1067	Raridan v. R. Co.	718, 1067	v. Barker	1976
v. R. Co.	664	Rash v. Purnel	917, 1018,	v. Bertrand	1414
Ralston v. Lothain	7		1035, 1302, 1304,	v. Brookman	1193
v. Miller	1586		1387, 1738	v. Com.	2349
Ralston's Case	818	v. State	569	v. Gamble	1205
Ralya v. Atkins	2463	Rash's Estate	2506	v. Hide	1179, 1224,
Ramadge v. Ryan	1984, 2349	Rass v. Sebastian	2027		1650, 2094
Rambert v. Cohen	735	Rastetter v. Reynolds	2464	v. Passer	
Rambler v. Tryon	233, 1738,	Ratcliff v. Courier-Journal	73,	1 Esp.	1208, 1644
	1917, 1938		207	Peake N. P.	2083
Rambousek v. Su-		v. Ratcliffe	1644	v. Randel	2125
preme Council	2525	v. Trimble	1633	v. Rice	1083
Ramey v. State	898	v. Wales	610, 2063,	v. Staton	1267
Ramsay's Estate	1676		2386, 2341	v. Sutton	2450
Ransbottom v. Buck-		Ratcliffe v. Bleasey	1858	v. Valley L. & C. Co.	1943
hurst	2450	Ratigan v. Judge	1938	Reading v. Metcalf	1299
v. Phelps	1081, 1082,	Ratliff v. Ratliff	697, 1082,	v. Mullen	1225
	1084		1225, 2016	v. Weston	1778
v. Tunbridge	2429	Ratteree v. Chapman	987	Reading & C. R. Co. v.	
Ramsdell v. Clark	2432, 2518	v. Nelson	1225	Lathaw	456
Ramsey v. Smith	1620	Raub v. Blairstown C.		Readman v. Conway	283
Rancliffe v. Parkyns	1311,	Ass'n	2169	Real v. People	987, 1270
	2141, 2145	v. Carpenter	1938	v. State	784
Rand v. Dodge	1291, 1458	v. Nisbett	1073	Ream v. State	1873
v. Huff	1778	v. Van Horn	1859	Reavis v. State	1476
Randall v. Atkinson	1890	Rauch v. Scholl	392	Reber v. Herring	682
v. Chase	792, 1573	Rauh, re	2210	Record v. Saratoga Springs	2390
v. Glover	2349	Raulhac v. White	1718	Rector v. Bernaschina	2442
v. Holsenbake	73, 74, 209,	Rawley v. Brown	2515	v. Rector	291, 894,
	406	v. Doe	1239, 1273, 1651		933, 2105
v. News Ass.	406	Rawlins v. Rickards	1523	v. Welch	1680

TABLE OF CASES.

RED

	Section		Section		Section
Red v. State	987, 1038, 1126, 1732	Reed v. State		Renard v. Levinstein	2212
Redd v. State		Nebr., 92 N. W.	1116	Renaud v. Bay City	2180
63 Ark.	568	15 Oh.	318, 1213, 1249, 1625	v. Pageot	1738
65 Ark.	700, 1269, 1410	v. Tacoma Ass'n	2463	Renfro v. State	1108, 1618
68 Ala.	106, 107, 108, 851	v. Taylor	1938	Reniger v. Fogossa	2032
69 Ala.	826, 832, 833, 855, 861	v. Thompson	2354	Reniham v. Dennin	2380, 2381, 2384
99 Ga.	1446	v. Williams	75, 210, 987	Rennell v. Kimball	392
Redden v. Spruce	736, 747	v. Wilson	2581	Renner v. Bank	1198, 1273
Reddick v. State	2272	Reeder v. Holcomb	581, 1784	v. Thornburg	2020
Reddin v. Gates	770, 792	Reel v. Reel	1736, 1738	Rennick v. Chloe	1680
Redding v. Redding's Est.	318, 702, 2018	Rees v. Bowen	1053, 1215, 2158	Reno M. & L. Co. v.	
Redding's Lessee v.		v. Lawless	1065, 1299, 1651	Westerfield	1909
M'Cubbin	1564	v. Walters	2139	Rens v. Relief Ass'n	1725
Redfern v. Redfern	2218, 2257	v. Williams	1316	Rensch v. Cold Stor-	
v. Smith	1163	Reese v. Hershey	461	age Co.	1078
Redfield v. R. Co.	1951	v. Mining Co.	661	Renshaw v. First	
Redfield's Estate	2383	v. Reese	697	National Bank	695
Redford v. Birley	259, 367, 658, 1079, 1729, 1730, 1978	v. State	363	Repass v. Richmond	377, 1124
v. R. Co.	1669	v. Strickland	2433	Reppard v. Warren	1677, 2163
Redford's Adm'r v.		Reeside, The	2440	Republic v. Ah Wong	507
Peggy	2007, 2048	Reeve v. Dennett	442, 443, 457	v. Edwards	2056
Redgrave v. Redgrave	2083	v. Wood	2239	v. Hang Cheong	831
Redington v. Cable Co.	1007	Reeves v. Brayton	529	v. Kahakanila	2236
Redlich v. Bauerlee	1550, 1558	v. Herr	610, 2336	v. Kuhia	2085
Redman v. Gould	1681	v. Reeves	1267	v. Luning	987
Redmond v. Com.	1434	v. State	1219, 1398	v. Parsons	222, 2060, 2269
Reece v. Trye	2294	Reffell v. Reffell	2410	v. Tokuji	987, 2071
Reed v. Anderson	2125	Reformed Church v. Ten		v. Toyotaro	754
v. Brashers	1871	Eyck	1033	v. Tsunikichi	218, 1841
v. Clark	987, 1770, 2494	Reformed Presb. Church		v. Waipa	398, 1644, 2085
v. Com.	1873, 1912	v. McMillan	2467	v. Yamane	218, 1393
v. Deere	2447, 2456	Regan v. McCormick	1681	Republican Publ. Co. v.	
v. Dick	451, 1747, 1978	Regicides' Trial	367, 1909, 2036, 2038	Miner	1971
v. Dickey	1082	Regier v. Shreck	1195	Republican Val. R. Co. v.	
v. Dodson	1651	Regnier v. Cabot	1028, 1612	Arnold	1943
v. Gold	1387	Rehden v. Wesley	1377	Resolutions of the Judges	1262, 1349
v. Haskins	1141	Reid v. Batte	2447	Respublica v. Gibbs	987, 2255, 2256
v. Ins. Co.		v. Colcock	1911	v. M'Carty	2038
117 Ga.	2103	v. Diamond P. G. Co.	2442	Retan v. R. Co.	458
95 U. S.	2465	v. Dodson	1269	Reusens v. Lawson	378, 1082, 1267, 1566, 2105, 2427
v. Jackson	1593	v. Ins. Co.	1975	Reuter v. Stuckart	2138, 2141, 2144
v. James	1894, 2211	v. Ladue	341	Revel v. Fox	2083
v. King	905	v. Langlois	2317	v. State	276
v. Lamb		v. Linck	252	Reyburn v. Belotti	703
6 H. & N.	18	v. Margison	1279	Reynell v. Sprye	2298, 2312
6 Jur. n. s.	1219, 1640	v. Reid		Reynolds, ex p.	2251, 2271
v. Loney	916	17 N. J. Eq.	692, 1618	v. Adams	233, 1738
v. McCord	1053	21 N. J. Eq.	2046	v. Boston Rubber Co.	2463
v. Madison	1750, 1755	v. Warner	1058, 2020	v. Burgess S. F. Co.	1862
v. Moseley	2505	Reifsnider v. R. Co.	1951	v. Dechaums	1974
v. New	716	Reilly v. Fitzgerald	1483, 1484	v. Fitzpatrick	1404
v. Peck	616	v. Reilly's Succession	610	v. Greenbaum	1010
v. R. Co.		Reily v. Loudon	2220	v. Hinrichs	2154
45 N. Y.	283, 438, 1719	Reiner v. Crawford	2410	v. Ins. Co.	379, 1871
71 Wis.	1678	Reinhard v. Keenbartz	335	c. Kingsbury	1635
v. Rice	1456	Reinhart v. Miller	1302	v. Manning	1062
v. Smith	2303	Reinhaus v. Merchant's		v. Powers	1404, 1668
v. Spaulding	1126, 1128, 1129, 2016	L. Ass'n	1974	v. Quattlebum	1187, 1196, 1204
v. State		Reinoehl v. State	357, 851	v. R. Co.	1106
147 Ind.	1835	Reins v. People	2354	v. Reynolds	2048
62 Miss.	569, 683, 689, 1938	Reitan v. Goebel	406	v. Robinson	681
		Reitz v. State	166, 1154	v. Rowley	2322
		Rema v. State	2089		
		Rembert v. Brown	1938, 1978		
		Remick v. Rumery	1547		
		Remsen v. Brinckerhoff	1511		
		Remy v. Olds	457		

	Section		Section		Section
Reynolds v. Shanks	1951	Rich v. Flanders	7	Richmond v. Richmond	913,
v. State		v. Minneapolis	1066		1028, 1109
68 Ala.	1434, 1435	v. Trimble	1312, 2016	v. State	1141
61 Ind.	1240	Richard v. Brehm	2083	v. Sundburg	1028
147 Ind.	392, 1003,	v. State	1442	v. Thomaston	1784
	1126, 2336, 2497	Richards v. Bassett	1588	Richmond's Appeal	2503
1 Kelly	111, 247	v. Burden	2245	Richmond L. & M. W.	
58 Nebr.	1244, 2506	v. Foulke	1416	v. Ford	461, 561
v. Stille	1651	v. Gellatly	1062, 1073	Richmond P. & P. Co. v.	
v. Tompkins	2349	v. Hicks	1680	Racks	460
v. Whelan	2463	v. Jackson	2294	Richmond U. P. R. Co. v.	
Reynolds v. State	2079	v. Lewis	1195	R. Co.	1540
Rhea v. Deaver	1028, 1034	v. Morgan	1075	Richmond & D. R. Co.	
v. State		v. Pearl	2110	v. Childress	2220
100 Ala.	923	v. Richards	74	v. Garner	1698
10 Yerg.	1476	v. Skiff	1312, 1513	v. Hammond	1750
Rheinhardt v. State	1873, 1877	v. State		v. Hissong	2464
Rhind v. Wilkinson	1268	91 Tenn.	580, 1841	v. Jones	1296, 1300,
Rhinehart v. Whitehead	1976	82 Wis.	905, 911		1301, 1861
Rhoades v. Fuller	233, 1671	v. Stewart	1212	v. Vance	1036
v. Selin	1204, 1297, 1298,	Richards Co. v. Hildebeitel	2440	Richmond & O. R. Co. v.	
	2105, 2307	Richards Iron Works v.		Powers	2552
Rhoads v. Gaul	1538, 1556	Glennon	1234	Rickards v. Murdock	1947
Rhode v. Louthain	728	Richardson, re	2065	Rickerson v. Ins. Co.	2464, 2466
v. McLean	1195, 2105	v. Allan	907, 917	v. State	1043
Rhode Island H. T. Co.		v. Anderson	564, 1271, 1684	Rickerstricker v. State	605
v. Thorndike	1644, 2088,	v. Babcock	1014	Ricketts v. Rogers	2556
	2505	v. Bank	2465	Rickey v. Zeppenfeldt	1951
Rhodes v. Bunch	64	v. Bly	2500	Rickman v. Carstairs	2459
v. Com.		v. Debuys	1876	Riddle v. Germanton	791
Ky., 54 S. W.	1807	v. Disborow	2032	v. Hudgins	2432
48 Pa.	1781	v. Dorman's Ex'x	1547	Ridenhour v. R. Co.	506, 507
v. Riggs	1812	v. Emery	1548, 1549	Rideout v. Newton	1062
v. U. S.	664	v. Foster	2445	Rideout's Trusts	2063
Rhodes Furn. Co. v.		v. Golden	787, 1391	Rider v. Miller	1938
Weedon	944	v. Green	2008	v. People	274, 968
Ricard v. Williams	1778, 2522	v. Hitchcock	1959	Ridgeway v. Darwin	2122
Ricards v. Safe Deposit		v. International Pot-		Ridgway v. Philip	783, 1058
& T. Co.	2528	tery Co.	1062	Ridler v. Ridler	1951
Rice, re	1290	v. Kelly	1029	Ridley v. Gyde	
v. Com.		v. Learned	607	9 Bing.	1783
100 Pa.	2061	v. McGoldrick	715	1 M. & Rob.	1262
102 Pa.	285, 2079	v. McLemore	2349	v. R. Co.	1640
v. Coolidge	2042	v. Milburn	1339	Rie v. Rie	2067
v. Cunningham	1028, 2109,	v. Newcomb	2016	Riegel v. Wilson	1407
	2159	v. Richardson		Rieger's Succession	1391
v. Gunn	1697	4 Port.	2069	Riehl v. Evansville Foun-	
v. Howard	905	50 Vt.	2067, 2069	dry Ass'n	1086
v. Keith	619	v. Robbins	112	Rigby v. Logan	1521, 1532
v. Mfg. Co.	2415	v. Roberts		Rigden v. Wolcott	406
v. Oatfield	896, 907, 1302	23 Ga.	1012, 1605	Rigg v. Cook	1777, 1778
v. Rice		195 Ill.	2184	v. Curgenvin	2086
50 Mich.	1938	v. State		v. Wilton	1304, 1417
104 Mich.	2239	90 Md.	460, 1005	Riggins v. Brown	1668, 2098
47 N. J. Eq.	2220	34 Tex.	398	Riggs v. Com.	390
N. J. Eq., 25 Atl.	1278,	44 Tex. Cr.	2243	v. Myers	2477
	1279	v. Stewart	1877	v. Powell	693, 797, 1725,
v. State		v. Stringfellow	693		2008
35 Fla.	62, 200	v. Turnpike Co.	38	v. State	1750
3 Heisk.	836, 858	v. W. & R. T. Co.	283	v. Tayloe	
7 Humph.	1644	v. Watson	2472, 2473	2 Cr. C. C.	1195
v. Waddill	18, 2338	v. Whitworth	1186	1 Pet.	2105
v. Ward	787	Richelieu & O. N. Co. v.		9 Wheat.	728, 1195,
v. Withers	2113	Boston M. Ins. Co.	1073		1198, 1268
Rice's Succession	1680	Richerson v. Sternburg	1777	v. Weise	748, 1560
Rich v. Eldredge	657, 1539	Richley v. Farrell	1225, 1705	Rigney v. Plaster	2143
v. Jackson	2417	Richman v. State	2261, 2271	Riley v. Bank	2437
v. Jones	660	Richmond v. Patterson	1188,	v. Boehm	1548, 1556
			1644	v. Com.	246

TABLE OF CASES.

RIL

	Section		Section		Section
Riley v. Hall	2016	Robb's Appeal	2237, 2336	Roberts' Case	2032
v. Iowa Falls	438	Robb's Estate	1491, 2463, 2527	Roberts' Will	1271
v. Johnston	1911	Robbins v. Butler	1065	Robertson v. Allen	1258, 1316
v. State		v. Fletcher	406	v. Archer	2118
88 Ala.	1841, 1898	v. R. Co.		v. Baldwin	1398
132 Ala.	406	165 Mass.	1898	v. Blair	1062
Rindskopf, re	1893	180 Mass.	1856, 2218	v. Brost	616
v. Malone	2165	v. Robbins	2046	v. Com.	1021
Riney v. Vanlandingham	1127	v. Smith	1141	v. Knapp	714, 1943
Ring v. Grout	2535	v. Spencer		v. Lucas	1195
v. Lawless	1958	121 Ind.	1111	v. Lynch	1275
Ringgold v. Galloway	1195,	140 Ind.	1085	v. People	1350, 1354
	1346, 2427	v. State	1398	v. Rowell	2409
v. Ringgold	2123	v. Townsend	1678	v. Showler	2556
v. Tyson	529, 531	v. Willmar	1943	v. Stark	1943, 2026
Ringhouse v. Keener	1605	v. Windover	2349, 2354	v. State	
Rio Grande W. R.		Roberson v. State		42 Ala.	2230
Co. v. Utah N. Co.	20, 770	40 Fla.	216, 218, 278, 987,	130 Ala.	1350
Rio Grande & E. P. R.		1977, 2513		Robichaux v. Bouillet	2232
Co. v. Bank	1215	Tex. Cr., 49 S. W.	811, 1135,	Robin v. King	2235, 2336
Riordan v. Guggerty	93, 1236,		1157	Robinet v. Preston	1664
	1890, 2008,	Roberts, re	1350	Robinus v. State	222, 1168
	2016	v. Allatt	2279	Robins v. Wolseley	1374, 1487
Rios v. State	2236	v. Austin	2445	Robinson v. Adams	233, 1938
Ripley v. Hebron	2530	v. Bank	2169	v. B. & W. R. Co.	1391
v. Warren	2578	v. Boston	1021	v. Blakely	1018, 1362,
Ripon v. Bittel	18, 252, 1693,	v. Bradshaw	1206		1487
	1700	v. Brown Co.	1943	v. Blen	1072
v. Davies	2312	v. Com.		v. Burton	75, 210, 987,
Ripon College v. Brown	1674,	Ky., 20 S. W.	958, 987		1985
	2465	94 Ky.	1164	v. Cahalan	1651, 1680, 2169
Rippe v. R. Co.	794	v. Dixon	377, 1195	v. Clifford	1271
Rippetoe v. People	987	v. Dover	451, 1245	v. Craig	2188, 2141, 2144
Ripple v. Ripple	2110	v. Doxon	1244	v. Cutter	2116
Rippy v. State	247	v. Eddington	1672	v. Dana	497
Rishton v. Nesbitt	1501, 1502	v. Garen	2210	v. Davis	1193
Risk v. State	166, 1154	v. Haskell	1225	v. Devone	1779
Rissler v. Ins. Co.	1339	v. Hughes	2355	v. Dewhurst	1566, 1567,
Ritchey v. People	498	v. Johnson			1568, 1586
Ritchie v. Holbrooke	2354	Ky., 64 S. W.	987	v. Dibble's Adm'r	1551
v. Kinney	1230	58 N. Y.	687	v. F. & W. R. Co.	65, 199
v. Richards	1350	v. Machine Co.	2442	v. Ferry	2119
v. Stenius	2276	v. Medberry	1086, 1779	v. Fire Co.	568
Rither's Case	2250	v. Miles	908	v. Gilman	
Rittenhouse v. R. Co.	1124	v. Phillips	1512	43 N. H.	1408
Ritter v. Daniels	715	v. Port Blakeley		7 Shepl.	2163
v. People	1018	Mill Co.	1750	v. Gillman	1677, 2109
v. State	1213, 1230	v. Porter	620	v. Hoyt	1551
Rivard v. Rivard	682	v. R. Co.		v. Hutchinson	
River Steamer Co., re	1061, 1062	29 Hun	2220	26 Vt.	233, 1738
Rivereau v. St. Ament	2098	128 N. Y.	463, 1943	31 Vt.	1035, 1041
Rivers' Case	2463	v. Rice	1523	v. Markis	1404
Rivers v. State	2236	v. Roberts	1131	v. Johnson	1675
Rives v. Lamar	1729	v. Simpson	2211	v. May	2375
v. Parmley	1675	v. Spencer	1203	v. Morino	1976
Rixey v. Bayse	948, 987	v. Stanton	2141	v. N. B. R. Co.	456, 461
Rixford v. Miller	2530	v. State		v. N. Y. El. R. Co.	19, 463
Roach v. Martin	1651	68 Ala.	63, 111, 246,	v. Neal	2222, 2223
v. State			247, 1329	v. Philadelphia & R.	
4 Tex. App.	2060	122 Ala.	1841	R. Co.	2212
41 Tex.	1840	55 Ga.	2059	v. Prescott	1681
Roanoke v. Shull	1951	94 Ga.	2201	v. R. Co.	1867, 1976
Roark v. Greeno	682	44 Tex.	2059, 2060	v. Reynolds	907
Robards v. McLean	1213	v. Tennell	1291, 1295,	v. Robinson	
Robb v. Hackley	1124, 1125,		1301, 2121	22 Ia.	1458
	1126, 1127,	v. Trawick		16 Mich.	2067
	1128, 1131	13 Ala.	1938	203 Pa.	1081, 1738
v. Hewitt	2061	17 Ala.	1738	22 R. I.	2340, 2341
v. Starkey	1200	v. Unger	1225	1 Sw. & Tr.	2045, 2067

	Section		Section		Section
Robinson v. Scotney	2122	Roe v. Jeffery	379	Rollins v. Board	1230, 1674
v. Smith	1560	v. Jerome	1084	v. Henry	1267, 1651, 1664
v. State		v. Jones	1404	v. Humphrey	2525
16 Fla.	923, 1111,	v. Philippi	1678	Rollofson v. Nash	1779
	1613, 1985	v. Rawlings	1476, 1994,	Roman v. Smith	1239
68 Ga.	1329, 1375		2006, 2017, 2137	Romans v. Hay	2337
114 Ga.	390, 1476	v. Reade	2522	Romberg v. Hughes	2303
66 Ind.	318	v. Strong	1598	Romer v. Conter	1676
84 Ind.	7	v. Taylor	229, 1738	Romertze v. Bank	1261, 1263
1 Lea	17	Roe & McDowell v.		Ronan v. Dugan	133
53 Md.	391	Doe & Irwin	1195, 1267,	Roney v. Moss	1651
57 Md.	1730		2105	Ronkendorff v. Taylor	1219,
12 Mo.	2071	Roebke v. Andrews	1777, 1779		1640, 2535
Tex. Cr., 57 S. W.	2079	Roebuck v. Curry	1247	Roof v. Pulley Co.	2446
v. Talmadge	610	Roehl v. Haumesser	1195	Rook v. Wilson	2477
v. U. S.	2053	v. Porteous	2536	Rooks v. State	1842
v. Vaughton	1849	Roelker, re	2203	Rooney v. S. & D. C. Co.	461
v. Woodford	285, 288	Roesel v. State	837, 862	Roop v. Clark	1681
Robison v. Robison	619	Roesner v. Darrah	1730, 2235	v. State	367, 987
Robson v. Alexander	850	Rogero v. Zippel	1684	Roosa v. Loan Co.	1719, 1722
v. Doyle	2257, 2281	Rogers, re	2210, 2271	Roosevelt Hospital v.	
v. Hamilton	1082	Rogers v. Allen	157	R. Co.	792, 794
v. Kemp		v. Barnett	1275, 1389	Root v. Boston El. R. Co.	1010
4 Esp.	1783, 1795, 2309	v. Brent	1871	v. Hamilton	2277
5 Esp.	2306, 2309,	v. Burton	736, 749, 753	v. King	209, 406, 987,
	2312, 2315	v. Cady	2575		1684
v. Locke	1993	v. Crain	1722	v. Lowndes	405, 406
v. Worswick	2319	v. Custance	1208	v. Wood	1029
Roby v. Title Co.	1215	v. Dare	2317	v. Wright	2294, 2297,
Rocco v. Parczyk	1003	v. De Bardeleben Co.	1481		2312
v. State	2364	v. Diamond	1302	Roots v. Merriwether	1684
Roche v. Coleman	321	v. Dibble	586	Roper v. State	2312
v. R. Co.	1719	v. Ins. Co.	1725	v. Terr.	21, 363
v. Ware	1554, 1560	v. Lamb	64	Ropes v. Kemps	1680
Rochester v. Chester	1918, 1941,	v. Lewis	928	Rosamond v. M'Ilwain	1225
	1943	v. Moore	1104, 1106,	Rose v. Allen	1302
Rocky's Estate	2008, 2016		1108, 1109	v. Blakemore	2272
Rockford v. Hildebrand	2159	v. Old	1540	v. Brown	613
v. Russell	792	v. Pell	2584	v. Bryant	1466
Rockford C. R. Co. v.		v. People	284	v. First Nat'l Bank	2008,
Blake	437	v. Raborg	1404, 1406		2015
Rock Island & E. I.		v. Ritter	704, 2008, 2016	v. Himely	2566
R. Co. v. Gordon	2570	v. Rogers	613	v. Lewis	1205
Rock Island & P. R. Co.		v. State		v. Mitchell	398, 1730, 2340
v. Brewing Co.	1168	60 Ark.	1909	v. Otis	1051
v. Potter	2155	99 Ind.	1230	v. Rose	1062
Rockland v. Farnsworth	1066	89 Md.	851	v. St. Louis	438
Rockville & W. Turnpike		40 Tex. Cr.	398	v. State	2056
Co. v. Van Ness	1074	44 Tex. Cr.	2273	v. Supreme Court	2384
Rockwell v. Taylor	1766	v. Stevenson	1352, 1677	v. Williams	2444
Rockwood v. Poundstone	664,	v. Stokes	64	Roseboom v. Billington	1466
	907	v. Tillman	1186	Rosecrance v. Rosecrance	2046
Roddy v. Finnegan	581, 2276	v. Tyley	2008, 2016	Rosekrans v. Antwerp	2569
Rode v. Phelps	1350	v. Venis	2579	Rosenbaum v. Shoffner	437
Roden v. Brown	1244	v. Walker	1671	v. State	1003, 1797,
v. State	2512	v. Wood	1594		2594
Rodgers v. Crook	1198, 1254	Rogers, Trial of	520	Rosenberg v. Jett	2525
v. Rodgers	1671, 2530	Rohr v. Alexander	2520	Rosendale v. McNulty	2271
v. State	2578	Rohrer v. Morningstar	529	Rosendorf v. Hirschberg	1192
Rodimon v. Reding	1141	Roland v. District	2451	Rosenthal v. Bilger	774
Rodriguez v. State	2276	Roles v. Mintzer	377	v. Bishop	89
v. Tadmire	258	Rolf v. Dart	1279	v. Ehrlicher	1669
Rodriguez' Estate	1233	Rolfe v. Hampden	657, 1292,	v. Walker	95, 1201
Roe v. Bank	2444		1364	Rosevelt v. Gardner	529
v. Davis	1256	v. Rolfe	1072, 2115	Rosine v. Bonnabel	1271, 1272,
v. Day	2120	v. Rumford	1806		1680
v. Ferrars	1053	Roller v. Bachman	2349	Roskee v. Pulp Co.	451
v. Harvey	291, 1204, 1210,	v. Kling	1029, 1081, 2500	Ross, re	1934, 1938
	2219, 2264	Rollings v. State	1977	v. Anstill	2578

TABLE OF CASES.

ROS

	Section		Section		Section
Ross v. Bank	1750	Rowe v. Hibernia S. & L.		Rude v. Whitechurch	2122
v. Boswell	2581	Soc.	2498	Rudolph v. Lane	1198
v. Bruce	1205	v. Howden	1858	v. R. Co.	1164
v. Brussie	1770	v. Polkinghorne	89	Rudsill v. Slingerland	923,
v. Buhler	1909	v. Smith	1388		1985
v. Campbell	1676	v. Such	1671	Rufer v. State	826, 860, 861
v. Clare	1651, 2141	v. U. S.	56	Rufus v. State	246
v. Com.	1041	Rowell v. Fuller's Estate	797,	Ruggles v. Bucknor	2168
v. Demoss	1911		2016, 2020	v. Coffin	1878
v. Espy	2445	v. Lowell	688	v. Gattion	1538, 1539, 1552
v. Gibbs	2312, 2319	Rowland v. Ashby	1349	v. Nevada	252
v. Goodwin	1239, 1587	v. Blaksley	2118	Ruiz v. Dow	2311
v. Hayne	911, 1779, 1899	v. M'Gee	2166	v. Terr.	1398
v. Knight	1084	v. Miller	2580	Rule v. State	2110
v. Kornrumpf	1225	v. Plummer	619, 2245,	Ruloff v. People	
v. Lapham	78		2327	18 N. Y.	2081
v. Loomis	1481, 2105	v. R. Co.	1576, 1722	45 N. Y.	413, 792, 2272
v. McQuiston	228, 232,	v. State	2239	Rumpel v. R. Co.	199
	233, 1461, 1740	v. Walker	1718, 1722	Rumrill v. Ash	290
v. Miner	321	Rowletts v. Daniel	1225, 1651	Rumsey v. R. Co.	1350
v. R. Co.		Rowley v. Ball	1300	v. Telephone Co.	1550,
6 All.	454, 455	v. Berrian	2165, 2168		1558, 1560
58 Ga.	1974	v. Bigelow	321	Rundle v. Beaumont	1858
v. Reddick	2575	v. Horne	255	v. Foster	2309
v. Ross	607	v. Hughes	1777	Runkle v. Burnham	291
v. State		v. McHugh	2235	v. Gates	1738
62 Ala.	364	v. R. Co.	1694, 1698,	Runnells v. State	862
74 Ala.	276, 2060		1923	Runyan v. Price	1031, 1033,
116 Ind.	581	Rowt's Adm'r v. Kile's			1958
Tex. Cr., 45		Adm'r		Rupert v. Penner	1225, 2529
S. W.	905	Gilmer	68, 142	Rupp v. Howard	1719
8 Wyo.	1976, 2079	1 Leigh	238, 699, 702, 2002,	Ruppe v. Steinbach	285
v. White	1777		2008, 2016, 2017	Ruschenberg v. So. Elec-	
v. Williamson	2105	Roy v. Goings	2354	tric Co.	1750
Ross' Ex'r v. Kiger	2477	Royal v. Chandler		Rush v. French	18, 20, 773,
Rousseau v. Bleau	2311	79 Me.	1133		915, 1195, 1884,
Rosser, re	2282	81 Me.	1567		1885, 1889, 1890
Rossignol v. Tricke	2054	83 Me.	1567	v. Landers	2047, 2573
Rosted v. R. Co.	2580	Royal Ins. Co. v. Duffus	17	v. Magee	681, 1938
Roten v. State	246	Royal Soc'y of Good Fel-		v. R. Co.	1166, 2354
Roth v. Smith	1830, 1668	lows v. McDonald	1644,	v. Smith	1894
Rothwell v. Jamison	1486		1646	Rusher v. State	2183, 2264
Rothrock v. Gallagher	1028,	Royalton v. R. & W. T.		Rushing v. Rushing	620
	1408	Co.	1195, 1651	Rushton v. Hallett	2477
v. Perkinson	1684	Royce v. Gazan	1339	Rushworth v. Pembroke	1388
Rothwell v. King	2298	Rozek v. Redzinski	2201	Rusk v. Hill	770
Rouch v. R. Co.	1783	Ruan v. Gardner	1954	v. Sowerwine	1195
v. Zehring	228, 688, 1938	v. Perry	64	Rusling v. Rusling	1738
Rounds v. State	736, 754, 770,	Rubino v. Scott	392	v. R. Co.	682
	779, 786, 1330,	Ruble v. McDonald	2354	v. Steamboat War	
	1669, 2098	Ruby v. Van Valkenburg	1195	Eagle	604, 2241,
Roupell v. Haws	318	Ruch v. Rock Island	736, 754,		2242
Rouse v. Whited	2115		2098	Russell, re	1160
Roush v. Roush	1878	Rucker, ex p.	2195	v. Baptist Theol.	
Roussin v. Parks	1651	v. Beaty	928, 1041	Union	2066
Routh v. Bank	1219, 1676, 1680	v. Bolles	661	v. Brosseau	570, 1278
v. Helen	529	v. Eddings	1867, 1877	v. Buckley	95
Rovena, The	1641	v. M'Neely	1212, 1225,	v. Burlington	1943
Rowan v. Chenoweth	1549, 2118		1651	v. Coffin	736, 1106,
Rowe, ex p.	987, 2255,	v. Reid	1389		1108, 1109,
	2282	v. State	966		1302, 1304
v. Barnes	1681	Ruckman v. Lumber Co.	561	v. Cowles	1760
v. Brenton		Rucks v. Renfrow	1712	v. Cowley	1872
8 B. & C.	380, 1224,	Rudd v. Dewey	1062	v. Cruttenden	963
	1674, 2111, 2139	v. Frank	2303	v. Edwards	1681
3 M. & Ry.	1464, 1873	v. Robinson	1074	v. Farrell	406
v. Canney	2354	v. Rounds	1730	v. Fraser	1194
v. Hasland	158, 2531	Ruddock, ex p.	1676	v. Frisbie	1777
v. Henderson	2573	Ruddock Co. v. Johnson	1067	v. Hayden	717, 720

	Section		Section		Section
Russell v. Jackson	2285, 2298, 2314, 2317, 2329, 2380, 2394	Ryerson v. Abington	905, 1021, 1028, 1060, 1951	Sampson v. Grimes	1299
v. Mandell	1705	v. Grover	736, 749	v. Marr	1225, 1664
v. R.	6	Ryman v. Crawford	1938	v. Noble	1647
v. R. Co.				v. Overton	1633
4 Gray	714, 720			v. Sampson	1779
17 N. Y.	736, 738, 745, 747, 754	S.		v. State	826, 851, 852
v. Rider	1861	Sabine v. Strong	1409	v. White	1306, 2048
v. Russell	986	Sabins v. Jones	133	Sams A. C. Co. v. League	2498
v. Southard	2437	Saccharin Co. v. Chemicals & D. Co.	2212	Samson v. Yardly	1364
v. State		Sachra v. Manilla	1976	Samuel v. Borrowscale	1225, 1226, 1318, 1651
53 Miss.	689	Sackman v. Thomas	2336	v. People	2270, 2276
62 Nebr.	1977, 2595	Sackrider v. Supervisors	1350	v. Withers	1856
Nebr., 92 N. W.	1977, 2264	Sacrider v. Brown	1635	Samuels v. Griffith	1029, 1035, 1873, 1879
v. Stocking	1588	Safe Deposit & T. Co. v. Berry	682, 1938	San Antonio & A. P. R. Co. v. Gray	1750
v. Tunno	1513	v. Turner	289, 1074, 1203	San Diego Land Co. v. Neale	714
v. Walker	1299, 1300	Saffold v. Horne	620, 2245, 2336	San Fernando C. M. & R. Co. v. Humphrey	1859
Russian Steam-Nav. T. Co. v. Silva	2464	Safford v. Grant	581	San Joaquin Co. v. Budd	2578
Rust v. B. M. Co.	2145	v. People	205	San Pedro L. Co. v. Reynolds	1074, 1230
v. Mansfield	1086	Safter v. U. S.	367, 1003	Sanborn v. Gerald	2498
Rustell v. Macquister	406	Sagar v. Hogmire	1938	v. Ins. Co.	1531
Ruth v. Ford	607	Sage v. Ins. Co.	1858	v. Neilson	1061, 1062
Rutherford v. Com.	21, 1803	v. State		v. School District	2159
v. Foster	2512	91 Ind.	689, 1938	Sanchar's Case	2250
v. Morris	1738, 1938	127 Ind.	928, 1616, 1807	Sanchez v. People	390, 681, 728, 900
Ruthven v. Clarke	1212	Sailor v. Hertzogg	1062, 1778, 2529	Sandage v. Mfg. Co.	2433
Rutland v. Hathorn	2349	Saint v. Taylor	2110	Sandberg v. State	7, 1644, 2529
Rutland's Case	2426	Salazar v. Taylor	570, 696	Sandell v. Sherman	944
Rutland & B. R. Co.		Sale v. Eichberg	1700	Sanders v. Johnson	18, 73, 74
v. Lincoln	607	Salem v. Lynn	1784	v. Karnell	1256
v. Thrall	1195, 1206, 1248	v. Webster	65, 1719	v. Leigh	1013
Rutledge v. Evans	1867	Salem Bank v. Glouces- ter Bank	2016	v. Munson	2465
Rutter v. Baldwin	2232	Salem I. R. Co. v. Adams	460	v. O'Callaghan	282
v. Chapman	2596	Salem L. & T. Co. v. Anson	1230	v. Palmer	2554
v. Collins		Salem S. & L. Co. v. Griffin	458	v. Pepoon	1676
96 Mich.	1806	Salisbury v. Com.	1839, 1841	v. Pottlitzer B. F. Co.	2425
103 Mich.	1807	Salladay v. Dodgeville	2552	v. Reister	1714
v. Hebdon	1864	Sallee v. St. Louis	1943	v. State	
Rutzen v. Farr	21	Salley v. R. Co.	1415	105 Ala.	1124, 1263, 1330, 1842
Ryall v. Hannum	2463	Sally v. Capps	1256	131 Ala.	276
Ryan v. Bindley	6	v. Gunter	1215	113 Ga.	841, 2183
v. Bristol	1951	Salmer v. Lathrop	1388, 2465	v. Wakefield	761
v. Cooke	2435	Salmon v. Clagett	2268	Sanderson v. Nashua	1037, 1041, 1802
v. Couch	1840, 1841	v. Rance	1665	v. Osgood	2018
v. Lynch	1350	Salmon's Estate	2475	Sandford v. Remington	2309, 2315
v. Miller	2063	Salt Lake City v. Smith	18	Sandilands, re	2456
v. People		Salte v. Thomas	1240, 1639	Sandringham, The	1639, 1641
21 Colo.	1031, 1378, 1398	Salter v. Ely	2502	Sands v. Hammel	1521
79 N. Y.	276, 987, 987	v. Turner	1215, 2529	v. R. Co.	1890
v. State		Saltern v. Melhuish	1193, 1199	v. Robinson	2360, 2363
100 Ala.	2071, 2073, 2081	Saltmarsh v. Bower	2124	Sandwich v. State	2281
60 N. J. L.	318	v. Tuthill	529	Sandwich Mfg. Co. v. Nicholson	571
97 Tenn.	987, 1800	Salvo v. Duncan	1976	Sanford v. Rowley	66, 1612
Ryberg v. Smith	905	Sam v. State		Sanger v. Merritt	2141
Ryder v. Alton	1352	1 Swan	1800	Sanitary District v. Cul- lerton	2354
v. Bateman	1859	33 Miss.	2071, 2072	Sankey v. Cook	2020
v. Fash	1651, 2141	Sammis v. Wightman	2573	Sanson v. Rumsey	291
v. Fletcher	2202	Samonset v. Mesnager	1195		
v. Jacobs	1957	Sample v. Consol. L. & R. Co.	1750		
v. State	1921, 2501	v. Frost	2300, 2302		
v. Wombwell	2494, 2553	v. Wynn	66, 73		

TABLE OF CASES.

SAN

	Section		Section		Section
Santissima Trinidad, The	1001, 1009, 1013, 1346	Sawyer v. Cox	2169	Schell v. Stephens	1431
Saph v. Atkinson	709, 1993	v. Eifert	73, 209	Schenck v. Ins. Co.	1947
Sappenfield v. R. Co.	283	v. Garcelon	1186, 1913	v. Schenck	406
Sarbach v. Jones	493	v. Miller	1549	v. Stevenson	2356
Sargeant v. Sargeant	1076	v. R. Co.	2354	Schenley v. Com.	1003
Sargent v. ———	2349, 2354	v. Sawyer	1028, 2067	Schettler v. Jones	1551, 1560
v. Adams	2472	v. Shoe Co.	282, 1951	Schieffelin v. Schief- fein	905, 1738
v. Burton	1938	v. State	231, 232	Schierbaum v. Schemme	1081, 1738
v. Hampden	2304	v. Steele	2535	Schillenger v. McCann	586
v. Johns	2303	v. Stephenson	2354	Schillinger v. Verona	1750
Sarle v. Arnold	561	Sax v. Davis	1414	Schintz v. People	216
Sartell v. Scott	1567	Say & Seal's Case	2309	Schlaff v. R. Co.	458
Sartin v. State	152	Sayer v. Glossop	693, 1212, 1214, 1219, 1248, 2529	Schlater v. Winpenny	1021, 1040
Sartorius v. State	1842	v. Kitchen	2125	Schlee v. Guckenheimer	2536
Sass v. Thomas	2578	v. Wagstaff	788, 803	Schlei v. Struck	1665
Sasscer v. Farmers' Bank	1523, 2581	Sayles v. Bradley & M. Co.	1213	Schlencker v. State	1890, 1896, 1938
Sasse v. State	1168, 1802, 1803	v. Briggs	1267, 1348, 2450	Schley v. Lyon	1248, 1273, 1275
Sassenberg v. Huseman	2066	v. Fitzgerald	1117	Schlicht v. State	2582
Sasser v. Herring	1564, 1566, 1592	Saylor v. Com. Ky., 30 S. W.	363, 987, 1435, 1441, 1450, 2277	Schloss v. Inman	1664
v. Sasser	1062	Ky., 33 S. W.	1043	Schlotter v. State	1807
Sater v. R. Co.	1943	Ky., 57 S. W.	276	Schlottman v. Hoffman	2472
Sather v. Rogers	1675	Sayre v. Durwood	18, 770	Schmertz v. Hammond	961
Satterlee v. Bliss	2313	v. Mohnhey	1067	Schmick v. Noel	1416, 1963
Satterwhite v. Hicks	1082	v. Pollard	1350	Schmidt, ex p.	2363
Saults v. Eaket	2434	Sayres v. Allen	1890	v. Dunham	907, 908
Saunders v. Bates	2516	v. Com.	397	v. Ins. Co.	1800, 2570
v. Baxter	406, 1807	Scagel v. R. Co.	1698	1 Gray	1947
v. Blythe	2410	Scaggs v. R. Co.	1951	41 Ill.	377
v. Duval	2125	v. State	1749	v. Wambacker	748
v. Ferrill	1316	Scaife v. Land Co.	1566, 2593	Schmied v. Frank	2336
v. Fuller	2349	Scales v. Desha	657	Schmisser v. Beatrice	1065, 2506
v. Gallagher	392	v. Kelley	2300, 2317	Schmitt v. R. Co.	1010
v. Harris	1225, 1651, 1652	v. Key	2530	Schmitz v. R. Co.	1415
v. McCarthy	1063	v. Shackleford	1062	Schmuck v. Hill	501
v. People	987	Scalf v. Collin Co.	1921, 1938	Schnable v. Doughty	1890
v. R. Co.	6 S. D. 2509 99 Tenn. 1021, 1041, 1389	Scammon v. Scammon	1379	Schnee v. Schnee	1736
Saunderson v. Judge	95	Scanlan v. Childs	1625	Schneider v. Bray	2215
v. Piper	2473, 2477	v. Hodges	1195	v. Cochrane	1675
Sauntry v. U. S.	285, 1890	v. R. Co.	2580	v. Manning	681, 1958
Saurin v. Starr	1368	v. Wright	1225	Schneider Br. Co. v. A. I. M. Co.	677
Saussey v. R. Co.	65, 1109	Scanlon v. Walshe	2527	Schnek v. Hagar	64
Sauter v. R. Co.	1698	Scannell v. R. Co.	987	Schnell v. Tooner	286
Sauvé v. Dawson	701, 1991, 1993, 2008, 2016	Scarborough v. Baskin	1938	Schoeffler v. State	609, 852
Savage v. Blanchard	1391	v. Scarborough	2067	Schoep v. Ins. Co.	928, 1078
v. D'Wolf	1300	v. Smith	1263	Schoepflin v. Coffey	2494
-v. State	1890	Scarf v. Patterson	1225	Schofield, ex p.	2260, 2271
Savannah F. & W. R. Co.		Scarlet's Case	2360	v. Anderson	1890
v. Gray	285	Scates v. Henderson	2477	v. Schiffer	321
v. Holland	1750	Scattergood v. Wood	1951	Schoneman v. Fegley	93
v. McConnell	2509	Schaefer v. Gildea	1896	Schoolcraft v. People	106, 140
v. Quo	1910	v. Kienzel	2165	Schoonmaker v. Wil- braham	458
v. Wainwright	1719, 2220	v. R. Co.	1213, 1391, 1530	Schoonover v. Myers	1667
v. Wideman	1985	v. State	2059, 2071	v. Rowe	406
Savary v. State	20, 1157	Schafer v. Schafer	1666	Schott's Goods	2421
Saveland v. Green	1236	Schaidler v. R. Co.	682	Schradsky v. Stimson	463
Savery v. Spaulding	1086	Scharff v. Keener	1481, 1573	Schreyer v. Mills Co.	291
Saville v. Farnham	2355	Schaser v. State	21, 347, 1896	Schrimper v. Heilman	406
Sawrey v. Murrell	905, 911, 1888, 1890	Schattgen v. Holnback	2554	v. R. Co.	2433
Sawyer v. Birchmore	2317	Schaub v. Griffin	2531, 2532	Schroeder v. R. Co.	2220
v. Boston	463	Schauler v. Porter	2354	Schubert Lodge v.	
		Scheerer v. Harber	751, 1810	Schubert Verein	1278, 2159
		Scheerer v. Agee	2501, 2512		
		Schell v. Plumb	1041, 1698		

	Section		Section		Section
Schubkagel v. Dierstein	2300	Scott v. Ratliffe	1605	Security Co. v. Graybeal	1549
Schuchardt v. Allens	94	v. Rivers	1213	Sedgwick v. Tucker	581, 2336
Schuenke v. Pine River	437	v. Sampson	70, 73, 74, 207, 209	v. Waterman	1199
Schuler v. Board	1943	v. Scott		v. Watkins	2239
Schultes v. Hodgson	2250, 2268	191 Ill.	1777	Seefeld v. R. Co.	1168
Schultz v. Bower	1168	17 Ind.	1244, 2067	Seekel v. Norman	1879
v. Catlin	2349	17 Md.	2578	Seeley v. K. C. Star Co.	1387
v. Lindell	1956	v. State		Seely v. Blair	1985, 1986
v. R. Co.	950, 960, 1022	48 Ala.	1136, 1138	v. Cole	406, 1208, 2594
v. Schultz	1726	113 Ala.	950, 2183	v. Wells	1680
v. Terr.	1013, 2512	49 Ark.	1270	Segond v. Roach	1054, 1185
Schulz v. Modisett	682	63 Ark.	2059	Seibert v. McManus	451
Scumacher v. Pima Co.	1230	64 Ind.	1022	v. Ragsdale	1234
Schwalbe, The	1750	Tex. Cr., 47		Seibles v. Blackhead	1917, 1922, 1975
Schwartz v. Baird	1219	S. W.	1131	Seidenspinner v. Metrop.	
v. Osthmer	1267	v. U. S.	1003	L. Ins. Co.	1072
v. State	2060	v. Waithman	260, 1294	Seifert v. State	1432, 1434, 1725, 2385
v. Wilmer	1955	v. Wilson	1416	Seifred v. Pa. R. Co.	1951
v. Yearly	782, 1898	Scottish U. & N. I. Co. v.		Seiler v. Bank	2437
Schwarzbach v. Protec-		Stubbs	437	Seip v. Deshler	406
tive Union	1081, 1947	Scovill v. Baldwin	288	Seisel v. Register	1195
Schweinfurth v. R. Co.	460, 1163	Scoville v. R. Co.	2098	Seitz v. Refrig. Co.	2434
Schwerdtle v. Placer Co.	2575	Scranton v. Danenbaum	2572	v. Seitz	1405, 2336, 2389
Schwerin v. De Graff	377, 392	v. Stewart	2312	Seitz Brewing Co. v. Ayres	2498
Sciple v. Northcutt	2111	Scribner v. Crane	1511	Selby v. Clarke	1812
Scotland v. Parlin & O. Co.	2153	v. M'Laughlin	586, 1878	v. Crew	2257
Scoggin v. Dalrymple	1564, 1565	Scripps v. Foster	2388	v. Harris	1681
Scotia, The	2573	v. Reilly	406, 1808	Selden v. State	2307, 2339
Scotland Co. v. Hill	17	Scroggin v. McClelland	2536	Self v. State	837
Scott, re	2282	Scruggs v. State	2349	Selfe v. Isaacson	1841
v. Baber	803	Scullin v. Harper	1243	Seliger v. Bastian	1951
v. Bailey	93, 1203, 1556	Seudder v. Union Nat'l		Sellar v. Clelland	1198, 1877
v. Bank	1777	Bank	2451	Sellers v. Sellers	1041, 1511
v. Bassett		Scurr v. Burrell	2250	Selleck v. Janesville	
174 Ill.	1225	Seaborn v. State	852	100 Wis.	678, 789, 1835
186 Ill.	1225, 1676	Seale v. Chambliss	944, 1738	104 Wis.	792
194 Ill.	1225	Seals v. Edmondson	1976	Sellen v. Norman	98, 2517
v. Blanchard	1681	v. State	62	Seller v. Jenkins	1014, 1019, 1020, 1021, 1038, 1040
v. Clare	1256	Sealy v. State	460, 1026, 1028, 1037	Sellman v. Bowen	2083
v. Com.	2339	Searcy v. Miller	935, 1817, 1820, 2214	v. Cobb	1207
v. Crouch	1257	Searle v. Lord Barrington	1460	v. Wheeler	1721, 1963
v. D. Y. M. Society	2535	v. Price	2067	Sells v. Haggard	1414
v. Delany	2135	v. R. Co.	463, 1943	Selma R. & D. R. Co. v.	
v. Donovan	1141, 1154	v. Richardson	1856	Keith	657
v. Fletcher	64	Sears v. Dillingham	1304, 1316	Selover v. Bryant	905
v. Harris	2311, 2329	v. Hoyt	1778	v. Rexford's Ex'r	736, 754
v. Hartley	2440	Seaton v. Kendall	603	Selph v. State	910, 952, 2079, 2080, 2484
v. Hawk		Seattle v. Doran	1335	Selvidge v. State	857
105 Ia.	1513, 1736	Seattle & M. R. Co.		Selwood v. Mildmay	2474
107 Ia.	1511	v. Gilchrist	463, 1943	Selwyn's Case	803
v. Hooper	1817	v. Roeder	714, 1168	Selz v. Belden	581
v. Hyde	2529	Seaver v. Dingley	321	Semple v. Callery	2550
v. Jones	1249	v. R. Co.	1976	Senior, ex p.	2252, 2271, 2276
v. London & St. K.		Seavy v. Dearborn	736, 745, 747, 907, 944, 1019, 1023	v. State	1391
Docks Co.	2509	Seawell v. R. Co.	1755	Sentney v. Overton	1312
v. Lloyd	529	Sebree v. Dorr	1187	Sergeant v. Biddle	1417
v. Loomis	1267	v. Smith	1062, 1911	v. George	1664
v. Lord Oxford	406	Seckinger v. Mfg. Co.	569	Sergeson v. Sealey	233, 1671
v. McCann	1390	Second Nat'l Bank v.		Serles v. Serles	2494
v. McKee	1938	Herman	5, 2536	Sessions v. Little	1777
v. McKinnish	73, 406	v. Smith	5, 2536	v. Reynolds	1239, 1676, 2167
v. Maddox	2052, 2523	Secrist v. Green	1651		
v. Mortsinger	406	Securities Co. v. Richard-			
v. New Orleans	458, 792	son	1061		
v. O'Neil	1640				
v. People	1852				
v. R. Co.	665, 1230, 1639, 1700				

TABLE OF CASES.

SES

	Section		Section		Section
Sessions v. Trevitt	2336	Shamburgh v. Comma-		Shaw v. State	
Setchel v. Keigwin	1561	gere	529	79 Miss.	1840
Seton v. Ins. Co.	1271	Shamp v. White	1124	82 Tex. Cr.	782
Settle v. Allison	1311, 1312,	Shane v. Charlestown	1943	v. Sun Prairie	262
	1513, 1681	Shank v. Groff	2437	v. Van Rensselaer	2220
Seurer v. Horst	463, 720	Shanklin v. McCracken	2337	Shawneetown v. Mason	568
Seven Bishops' Trial	773, 1364,	Shanks v. Hayes	1013	Shawyer v. Chamberlain	2155
	1991, 1992	v. Lancaster	2141	Shea v. Glendale E. F. Co.	457
Seventh D. A. P. A.		Shanley's Appeal	1938	v. Hudson	716
v. Fisher	1552	Shannon v. The Common-		v. Leisy	2435
Sever v. Lyon	2575	wealth	585	v. Muncie	1956
Severance v. Carr	581, 770, 777	Shano v. Bridge Co.	1168	v. Murphy	1085
v. Hilton	66, 73, 76, 1898	Shantz v. Stoll	613	v. R. Co.	2508
v. Severance	2502	Shapter v. Pillar	1958	Sheaffer v. Eakman	1778
Severin v. Zack	1938	Sharkey v. Bankston	1225	Sheahan v. Barry	206, 213
Severn v. Olive	2203	Sharland v. Ins. Co.	1073, 1725	v. Collins	73, 74, 209,
Sewall v. Evans	2529	Sharman v. Morton	1911		987
v. Robbins	995	Sharon v. Davidson	1318	Shean v. Philips	2317
Seward v. Wilmington	1164	v. Sharon	987, 2311	Shear v. Van Dyke	751
Sewell v. Cohoes	283	Sharp v. Carter	2256	Shearer v. Buckley	252, 1718
v. Gardner	905	v. Emmet	1028	Shearm v. Burnand	1205
v. Moore	1674	v. Hall	1976	Shearman v. Atkins	1456
v. R. Co.	714	v. Hicks	1032	Shears v. State	347, 987,
v. Stubbs	1256	v. Ins. Co.	1647		988
v. Vincent	276	v. McIntire	1712	Shedden v. Heard	1268, 1269
Sexsmith v. Jones	1269	v. Petit	1658	v. Patrick	1483
Sexton v. Appleyard	1248	v. Scoging	979, 986, 1982	Sheehan v. Davis	1186, 2169
v. Brock	1389, 1416	v. Sharp	2271	v. Hennessey	1554
v. Hollis	1564, 1587	v. State	579	v. Kearney	1738, 1938,
v. Lamb	379, 571	v. Treece	784		2500, 2502
v. McGill	1225, 1313	v. Wickliffe	1651	Sheeler v. Speer	18
v. Perrigo	1525, 1675	Sharpe v. Hall	1966	Sheer v. Sheer	2421
v. Pickering	1676, 2163	v. Lamb	2132	Sheets v. Dufour	1676
Seymour v. Alkire	2498	v. Orme	1651, 1653	Sheffield v. Sheffield	1960, 2067,
v. Beach	1674	v. State	2513		2069
v. Fellows	681	Sharpless v. Knowles	1651	Shelburne v. Inchiquin	2462,
v. Merrills	73, 209	Shattuck v. Myers	75, 210,		2470
v. Osborne	1161, 1856		987	Shelden v. Merrill	1651
v. Wilson	581	v. People	2168	v. Warner	415
Seymour's Case	1193, 1199,	v. State	2364	Sheldon v. Benham	1521, 1635,
	1267	v. Stoneham R. Co.	463,		2025
Shaak's Estate	2231		1943	v. Bigelow	1037, 1971
Shackelford v. R. Co.	1954	Shauer v. Alterton	2286	v. Booth	571
v. State	1329, 1405	Shaufelter v. Baltimore	2572	v. Coates	1219
Shackleford v. Hooper	1664	Shaughnessey v. Fogg	2313	v. Frink	1269
Shad v. Livingston	2437	Shaul v. Brown	1388, 1856	v. Perkins	2349, 2354
Shaddock v. Clifton	1053, 2232	Shaver v. Ehle	1300	v. R. Co.	455
Shadwell v. Shadwell	1859	v. McCarthy	1938	Shellabarger v. Nafus	1009
Shaffer v. State	689, 1938	Shaw v. Boom Co.	571	Shelling v. Farmer	2212
Shafer v. Eau Claire	252, 1270,	v. Broom	1084	Shelp r. U. S.	936, 1854
	2384, 2569	v. Charlestown	720	Shelton v. Ellis	2416
v. Hausman	1969	v. Emery	923	v. Hampton	907
v. Lacock	1078, 2509	v. Fisk	2354	v. Reynolds	1249
Shaffer v. Clark	2027	v. Lindsey	787	v. State	1976
v. Gaynor	1587	v. Markham	1206	Shenkenberger v. State	1447
v. McCrackin	1245, 1549,	v. Mason	1213	Shepard v. Ashley	39
	1556	v. Moore	1817	v. Giddings	1213
v. State	78, 1620	v. Pershing	1195, 1311,	v. Parker	987
Shaffner v. Com.	192, 363		2141, 2143	v. Potter	1876
Shafter v. Evans	1951	v. R. Co.	250	v. Pratt	1969
Shaftesbury Case	526, 1712	v. Roberts	15, 2592	v. R. Co.	
Shahan v. Swan	1867	v. Schoonover	608, 1778	85 Mo.	2220
Shailer v. Bumstead	223, 233,	v. State		117 N. Y.	463
	1076, 1081,	60 Ga.	106, 863, 397	v. State	821
	1738, 1790	83 Ga.	792	Shephard, re	2194
Shakespeare v. Baugh-		102 Ga.	106, 390, 821,	v. Carriel	1635
man	392		967, 987, 1839,	Shepherd v. Brenton	2354
Shaller v. Brand	2117, 2138,		1841	v. Camden	1168, 2354
	2141, 2145	56 Ind.	2582	v. Currie	2518

	Section		Section		Section
Shepherd v. Goss	1304, 1312	Shock v. M'Chesney	406	Shute v. Mfg. Co.	451
v. Hamilton Co.	1230	Shockey v. Mills	581, 770	Shutesbury v. Hadley	1219,
v. Snodgrass	805	Shockley v. Morgan	1909		1644, 1677
v. Thompson	1566, 1587	Shocraft v. State	1142	Shutte v. Thompson	18, 1582
v. Turner	1586	Shoemaker v. Bryant L. &		Sias v. Consol. Light-	
Sheppard v. Yocum	1029, 1108,	S. M. Co.	969	ing Co.	283, 795
	1109	Shoenberger v. Hackman	1248	Siberry v. State	
Shera, re	2282	Shook v. Pate	790, 1587	133 Ind.	2079
Sherborne v. Naper	2083	Shorb v. Kinzie		149 Ind.	2115
Sherburne v. Rodman	581	80 Ind.	2008, 2021	Sible v. State	1476
Sherer v. Piper	1062	100 Ind.	2016, 2018	Sibley v. Smith	2220
Sherlock v. R. Co.	463	Shore v. Bedford	2312	v. Waffle	2301
Sherman v. Barrett	2200	v. Wilson	2467	Sichel v. Lambert	1645
v. Blodgett	1959	Shores Lumber Co. v. Stitt	2464	Sickles v. Dallas C. Bank	1879
v. Goble	1654	Shorey v. Hussey	917	v. Mather	1538,
v. Needham	1352	Short v. Currie	1677		1544, 1547,
v. R. Co.	720, 1943	v. Kingsmill	1271		1554, 1558
v. Sherman	2380	v. Lee	1464, 1466,	Sidebottom v. Atkins	2271
v. Stafford Mfg. Co.	2115		1471, 1472, 2168	Sidekum v. R. Co.	438, 2220
v. Story	1350	v. Mercier	2260, 2271	Sidelinger v. Bucklin	923, 1124,
v. Transp. Co.	1312, 1320	v. State			1125, 1141
v. Wilder	367	4 Harr.	2268	Sideways v. Dyson	1259, 1884
Sherrard v. Cudney	1665	63 Ind.	153, 1152	Sidgreaves v. Wyatt	1842
Sherrill v. State	281, 460	v. Tinsley	2341	Sieber v. R. Co.	1951
v. Tel. Co.	1974	v. Yelverton	392	Siebert v. People	111, 143, 274,
Sherrod v. Hughes	1415, 1893	Short Mountain Coal Co.			569, 946, 1726,
Sherwin v. Bugbee	1244	v. Hardy	1960		2183, 2264
Sherwood v. Adderley	1257	Shorten v. Judd	166, 792,	Siefert v. Siefert	1406
v. Houston	657, 1681		1977	Siebert v. Stiles	463, 2581
v. Sherwood	2477	Shorter v. Sheppard	1188, 1225,	Siegler v. Mellinger	1951
v. Sioux Falls	1158		1267, 2105	Siemens v. Electric R. Co.	2354
v. State	1842	Shortz v. Unangst	1198	Sievers v. P. B. & L. Co.	283,
v. Titman	15, 398	Shotter v. Friend	2032		437, 1951
Shields v. Baucher	1484, 1501	Shotwell v. Harrison	1651,	Sievers-Carson H. Co.	
v. Buchanan	1665		1681, 2088,	v. Curd	1669
v. Cunningham	1021		2573	Sigafus v. Porter	18, 2498
v. Lewis	1198, 1201	Shouler v. Bonander	1195, 2105	Sigfried v. Levan	728, 2135
v. McGrath	1911	Shove v. Martine	2312	Siglin v. R. Co.	283
v. Millet	1890	v. Wiley	735, 736, 747,	Sigsworth v. Coulter	1028
v. State			749, 753, 1560	v. McIntyre	1955, 2463
104 Ala.	2183, 2264	Showman v. Lee		Sigua Iron Co. v. Brown	1074
149 Ind.	992, 1076,	79 Mich.	463	v. Greene	1074
	2497	86 Mich.	1247	Sikes v. Marshall	1518
32 Tex. Cr.	62	Shreve v. Cicero	1384	v. Paine	571, 1951
Shifflet v. Morelle	1651, 2105,	Shrewsbury's Case	2250, 2286,	Sill v. Reese	704, 1239
	2143		2371	Sillman v. Whitmer	2477
Shifflet's Case	824, 830, 838,	Shrewsbury Peerage Case	1489,	Sills v. Brown	681, 1374,
	840, 854, 855, 865,		1644,		1949
	2100		1662, 1670	Silva v. Low	1009
Shilling v. Ins. Co.	1768	Shriedley v. State	326	v. Pickard	1129
Shillinger v. Shillinger	2067	Shrimpton v. Brice	728	v. Rankin	1195
Shimer v. R. Co.	720	v. Netzorg	1198	Silver Lake Bank v. Hard-	
Shinglemeyer v. Wright	2374	Shrimpton Co. v. Brice	1978	ing	1681
Shinkle v. Crock	693, 2048	Shriver v. R. Co.	1951	Silverman v. Blake	1312
Shinners v. Merrimack		Shrowders v. Harper	1189	Silverstein v. O'Brien	464,
Locks	283	Shroyer v. Miller	73, 76		1041, 1456
Shipley v. Reasoner	1064, 1067	Shuck v. Vanderverter	1774	Silverthorn v. Fowle	1955
v. Todhunter	95, 2152	Shufeldt v. Shufeldt	398	Sim v. Russell	229, 232
Shipman v. Seymour	321	Shular v. State	1168, 1803	Simmons v. Carrier	716
Shipp v. Com.	331	Shuldham's Divorce	2067	v. Havens	1896
Shipply v. People	321	Shulte v. Hennessey	571	v. Holster	73, 74, 259,
Shirley v. Fearn	1304, 2110	Shults v. State	689, 1938,		2260
v. Todd	1084		1958	v. Leonard	1302
Shirwin v. People	62, 200, 398	Shuman v. Shuman	2063	v. Norwood	2232
Shisser v. Burlington	1404	v. Supreme Lodge	2341,	v. Parsons	529
Shitler v. Bremer	702, 728		2391	v. R. Co.	1943
Shiver v. Johnson	1290, 1513	Shurtleff v. Parker	1003	v. Rudall	2525
Shiverick v. Gunning Co.	2580	v. Willard	586	v. Simmons	2045, 2046,
Shobe v. Bell	2349	Shuster v. State	928		2056

TABLE OF CASES.

SIM

	Section		Section		Section
Simmons v. Spratt	1665	Sinks v. Reese	1240	Sloan v. R. Co.	1018, 1021, 1028,
v. State		Sinnott v. Colombet	1700, 2582		1029, 2384
129 Ala.	1388	v. Mullin	1951, 1963	v. Somers	2098
32 Fla.	1263	Sinton v. Butler	458	v. Wolfsfeld	1681
115 Ga.	1072	Sioux City & P. R. Co. v.		Sloan S. M. & L. Co. v.	
v. Steamboat Co.	1951	Finlayson	571,	Guttsall	1896
v. Threshour	2450		1693, 2220	Slocovich v. Ins. Co.	561, 665,
v. Trumbo	2580	Sirk v. Emery	463		677, 720, 1706
v. Wood	1678	Sirrine v. Briggs	719, 1247	Slocum v. Bracy	1195
Simms v. Express Co.	2536,	Sisler v. Shaffer	15	v. Knosby	2276
	2573	Sisson v. R. Co.	571, 719, 1704	v. Newby	1911
Simon v. Brown	1664	Sitler v. Gehr	1490, 1491, 1493,	Sloman v. Herne	1077, 2294
v. Home Ins. Co.	782		1644, 1646, 2529	v. Kelly	2256
v. State		Sitterlee v. State	1781	Slone v. Thomas	1188
108 Ala.	1976	Sivell v. Hogan	770	Slossen v. R. Co.	456
31 Tex. Cr.	2063	Sivewright v. Sivewright	1841	Sluby v. Champlin	156, 1513
Simonds v. Clapp	1777	Sixth Av. R. Co. v. El.		Sly v. Sly	1461
Simons v. Cook	1681	R. Co.	1908, 1943	Small v. Belyea	1750
v. People	390, 1442	Sizer v. Burt	1908, 2105	v. Champney	233, 1671
v. Simons	2046, 2067,	Skaggs v. State		v. Prentice	95
	2086	108 Ind.	571, 811, 1399	v. R. Co.	2098
v. Vulcan Co.	321	31 Tex. Cr.	246, 248	v. Reeves	1371
Simonson v. R. Co.	728	Skeggs v. Horton	1267, 2052,	v. Rose	1466
Simpkins v. Rogers	1085		2106	v. Slocumb	2184
Simpson, ex p.	2065	Skellie v. James	1911	v. Williams	1072
v. Dall	1195	Skellinger v. Howell	900, 907	Smallcombe v. Bruges	1081
v. Dinsmore	2529	Skelton v. R. Co.	678	Smalley v. Appleton	568
v. Norton	1194	Skilding v. Warren	529	v. Hale	344
v. Robinson	406, 1072	Skinker v. Flohr	1225	v. Morris	2354, 2356
v. Smith		Skinner v. Brigham	1293, 2132	Smalls v. State	
1 Stark. Evid.	1894	v. Conant	1540	99 Ga.	238
27 Kan.	2268	v. Denning	1350	102 Ga.	195
v. State		v. Henderson	1198	Smart v. Prujean	2452
111 Ala.	177, 391	v. Judson	2216, 2256,	v. Williams	1224, 1275,
6 Baxt.	2054		2260, 2279		1306, 1518,
78 Ga.	949	v. Lewis	1511		1650
31 Ind.	506	v. R. Co.	2319	Smartle v. Williams; see	
v. Stewart	2529	v. Shew	1729	Smart.	
v. Thornton	1280	v. Skinner	2245, 2515	Smethurst v. Barton Sq.	
v. Union Stockyards		Skipp v. Hooke	2578	Church	20
Co.	1350	Skippy v. State	907, 1011,	Smets v. Plunket	64
v. Waldby	1249		1013	Smick v. Beswick	2312
v. Westenberger	64	Slack v. Buchanan	1062	Smiley v. Cockrell	1186
Sims v. De Graffenreid	1306,	v. Harris	1951	v. Dewey	1244, 1558
	1513, 2141	v. Moss	529	v. Gambill	1736
v. Gray	1225	Sladden v. Sergeant	1263	Smith, ex p.	1160
v. Hundley	6	Slade v. Tucker	2300	re	
v. Jones	1890	Slane Peerage Case	1279	7 Ch. D.	2287
v. Kitchen	1208	Slansy v. Wade	1483, 1573	2 D. & Ch.	2260
v. Meacham	1573	Slater v. D. S. & H. Co.	1971	112 Fed.	2282
v. Sims		v. Hodgson	2139	v. Andrews	1640
2 Mill	1195	Slatterie v. Pooley	1180, 1255,	v. Asbell	1033, 2491
75 N. Y.	522, 987, 1116		1256, 1257,	v. Assur. Co.	911
Sinclair v. Baggailey	2520		1260	v. Axtell	1195, 1268, 1280
v. Roush	1943, 2356	Slattery v. Slattery	586	v. Bank	
v. Stevenson	762, 1200,	Slaughter v. Birdwell	2205	171 Mass.	1254
	1861, 2447	Slavens v. R. Co.	266	45 Nebr.	716
v. Wood	1188, 1624	Slayback v. Witt	2503	32 Vt.	2408, 2420
Singer v. Bennett	1240	Sledge v. Scott	1966	v. Barger	2201
Singer Mfg. Co. v. Cramer	1013	Sleep v. Heymann	2165	v. Battens	2520
v. McFarland	2018	Sleeper v. Van Middles-		v. Beadnall	850
Singer & T. S. Co. v. Hutch-		worth	928	v. Beattie	736
inson	782	Slinghoff v. Bruner	1304,	v. Benef. Soc.	143, 1081
Singleton v. Barrett	2432		2102, 2500	v. Betty	1085
v. Bremer	2149	Sloan v. Ault	1549	v. Biggs	1893
v. State	1037	v. Coburn	1086	v. Blagge	1681
Sinking Fund Com'rs v.		v. Courtenay	1896	v. Blakey	1362, 1457, 1458,
Bank	2109	v. Pelzer	760		1461, 1465, 1524
Sinkler v. Siljan	1029	v. Petrie	406	v. Bonsall	1658

	Section		Section		Section
Smith v. Bradford	610, 2237	Smith v. Hickenbottom	568, 681,	Smith v. Prewit	1587
v. Brannan	1314		1938	v. Price	905
v. Brockett	1681, 2464	v. Hine	928, 1618, 1669	v. Proctor	2235, 2236, 2237
v. Brown		v. Holbrook	1202	v. Putnam	1778
151 Mass.	1194, 1234,	v. Holden	1782	v. R. Co.	
2 Mich.	1275	v. Holebrook	1212	137 Mass.	1040
v. Brownlow	1592	v. Hollings	1800	44 N. H.	619
v. Burnham	1367, 1856	v. Hughes	2413	63 N. H.	455
v. Bye	1867	v. Hunt	2117	70 N. H.	93
v. Caldwell	2297	v. Hutchings	770	68 N. C.	719
v. Capital Bank	1389	v. Ins. Co.	1878	10 R. I.	252, 455
v. Carolin	1300	v. Jackson	763	6 Sm. & M.	1195
v. Castles	987	v. Jeffries	2465, 2466	v. Rankin	1311, 2141
v. Chapman	1566, 1569	v. Johns	736, 747	v. Read	2256
v. Cheetham	2352, 2353	v. Jones		v. Redden	1680
v. Clark	93	15 John. Ch.	2117	v. Reed	1202
v. Cleveland	1354	6 Rand.	1312, 2049	v. Rentz	1537, 1539
v. Coffin	1828	v. Keyser	1306, 1312,	v. Rich	1674
v. Coker	1225		1388, 1513	v. Richardson	19
v. Com.		v. Kimball	2463, 2477	v. Royaltan	1003
21 Gratt.	2072, 2081	v. King	2018, 2220	v. Ruckecker	73, 74
Ky., 60 S. W.	398	v. Lane	736	v. Russell	270
Ky., 67 S. W.	1439	v. Large	1250	v. Sainsbury	701
90 Va.	580	v. Law	1555	v. Sanford	750, 1555, 1558
v. Cook	2341	v. Lawrence	1665	v. Scudder	2232
v. Cox	1253	v. Lindsey	2105	v. Scully	749
v. Cramer	1783	v. Long	615, 2297	v. Shakopee	2572
v. Crane	852, 2269,	v. Lowe	2098	v. Sherwood	252, 461
	2271, 2282	v. Lyon	1076	v. Shinn	1502
v. Culbertson	2349, 2354	v. McClain	2442	v. Shumway	73
v. Cushman	1225, 1651	v. McDonald	2219	v. Sleep	1192
v. Dall	2105	v. McWaters	1226	v. Smith	
v. Dawley	905, 1750	v. Madison	2143	3 Bing. N. C.	1081
v. De Wruitz	1084	v. Martin		10 Ir. R. Eq.	1196
v. Doe	2462, 2465, 2470	17 Conn.	1080, 1082,	119 Cal.	2046
v. Doherty	615		1459	106 Ga.	1189
v. Dreer	15	2 Overt.	1225	2 Greenl.	803
v. Dudley	1267	v. Mayer	1873	77 Ind.	2245, 2336
v. Duncan	1072	v. Mayfield	1058	157 Mass.	1938, 1958
v. Eames	2349	v. Merrill	2336	167 Mass.	770
v. Earl Ferrers	270, 986,	v. Merwin	2195	125 Mich.	916
	1807	v. Meyers	620	43 N. H.	1270
v. East India Co.	2375	v. Milldige	1318, 1651	50 N. H.	2351
v. Easton	1236, 2154	v. Montgomery	1725	163 N. Y.	1538, 1552,
v. Ehanert	907	v. Morgan			1555
v. Fell	2319	2 Moo. & R.	761	116 N. C.	2260
v. Feltz	1384	38 Me.	1124	117 N. C.	1958
v. Fenner	1738, 2005,	v. Morrill	1062	2 Pen.	2374
	2016	v. Morrow	1778	Rice	1195, 1664
v. First Nat'l Bank	1244	v. Mosier	1239	1 Tex.	1644
v. Forrest	1566, 1567,	v. Mounts	1300	v. Sparrow	586
	1568, 1570	v. Nat'l Ben. Soc'y	340	v. State	
v. Fuge	1647, 2529	v. Neilson	2110	9 Ala.	142, 273, 1476
v. Garden	1651	v. New Orleans C. &		55 Ala.	203, 257, 1921,
v. Gardner	2518	B. Co.	2016, 2145		1978
v. Garris	1195	v. Nowells	1587	59 Ala.	2059
v. Gerow	18	v. Olsen	2594	79 Ala.	2276
v. Gibbon	1513	v. Paul	2355	88 Ala.	246, 363, 1985
v. Gifford	1058	v. Paul Boyton Co.	1066,	103 Ala.	1781
v. Gillett	20		1677	118 Ala.	205
v. Glenn	1567	v. Palmer	1256	129 Ala.	987
v. Griffith	1391, 1624	v. People		133 Ala.	2073, 2513
v. Hall	77, 401	74 Ill.	1852	136 Ala.	1442
v. Hawley		2 Mich.	1028, 1029,	137 Ala.	821, 1974,
8 S. D.	1388		1037		2276
14 S. D.	758	v. Phila. Traction Co.	283,	59 Ark.	2354
v. Henderson	2529		1890	25 Fla.	247
v. Henry	335, 1021	v. Powers	1082, 1564	23 Ga.	1012, 1700
		v. Potter	1271, 1684	28 Ga.	1668

TABLE OF CASES.

SMI

	Section		Section		Section
Smith v. State		Smithwick v. Anderson	529	Soloman v. American	
63 Ga.	276	v. Evans	923, 1985	Merc. Exch.	1971
72 Ga.	1375	Smitson v. S. P. Co.	662	v. R. Co.	1943
77 Ga.	2008, 2131	Smock v. Pierson	923, 928,	v. Solomon	1058
106 Ga.	2511		1615	v. State	2060
109 Ga.	1013	Smoot v. Fitzhugh	1651, 1684	Solomon R. Co. v. Jones	
110 Ga.	1451	v. Russell	1678	30 Kan.	1066
118 Ga.	1451	Smucker v. Penns. R. Co.	2145	34 Kan.	736, 748, 754,
4 G. Greene	1852	Smuggler U. M. Co. v.			1668, 2098
9 Humph.	1440, 1442	Broderick	1951	Solum v. R. Co.	2509
10 Ind.	836	Smyth v. Caswell	2008, 2016	Solyer v. Romanet	2575
143 Ind.	949	v. Chamberlayne	2063	Somers v. Somers	1085
4 Lea	1842	v. New Orleans C.		v. State	1350
64 Me.	987	& B. Co.	2576, 2580	v. Wright	1540
64 Md.	1270	v. Sandeman	1208	Somerset v. France	380
58 Miss.	923	v. Smyth	1834	Somerville v. Richards	1873
75 Miss.	246	Snapp v. Pierce	1247	Somerville & E. R. Co.	
17 Nebr.	2071	Sneed v. Ewing	2083	v. Doughty	952, 2115
42 Nebr.	1669	v. State	1405	Somes v. Brewer	2413
2 Oh. St.	460	Snell v. Bray	278, 613	v. Skinner	233, 338,
41 Tex.	1825	v. Eckerson	1549		1738
42 Tex.	273, 1167,	v. Gregory	907	Sommerville v. Stephen-	
	1168	v. U. S.	232, 1621, 1639	son	1225, 1254
Tex. Cr., 50 S. W.	987,	Snellgrove v. Baily	1193	Son v. Terr.	118, 389, 390
	1106	Snelling's Will	681	Songster v. Payzant	2143
Tex. Cr., 73 S. W.	398	Snider v. Burks	1309, 1310,	Sonneborn v. Bern-	
Tex. Cr., 74 S. W.	398		1320, 1513, 2016	stein	406, 1111,
10 Wyo.	2056	v. State	826, 1938, 2501		1125, 1126
v. Stevens	1705	Snoddy v. State	2059	Sonoma Co. v. Stofen	460
v. Strong	791	Snodgrass v. Branch Bank	1248	Sontag, ex p.	2361
v. Taggart	1797	v. Chicago	714	Soper v. McClout	463
v. Tebbitt	1495	Snow v. Batchelder	1062	Sopwith v. Sopwith	2066
v. Terr.	792, 1750	v. Benton	232, 233	Soquet v. State	687, 1691
v. Thomas	1712	v. Carr	1213	Sorenson v. Sorenson	93, 2215
v. Townsend	1239	v. Gould	2310, 2314	Sorg v. Congregation	561, 1976
v. U. S.		v. Grace	928, 1985	Sornberger v. R. Co.	1158
Ariz., 45 Pac.	1680	v. Moore	1040	Sorrelle v. Craig	692, 923,
161 U. S.	246, 987,	v. Paine	581		987, 1612,
	1616	v. Phillips	1065		1871, 1985
v. Utesch	907	v. R. Co.	1921, 1942, 1943	Soto v. Kroder	1239
v. Valentine	1339	v. State	1476	Soulard v. Allen	1677, 1678
v. Veysey	1186	Snow Hardware Co. v.		Soule v. Bruce	64
v. Walton	694, 696, 704,	Loveman	751, 1541	Soule's Case	2239
	2004, 2006, 2007	Snowball v. Goodricke	1078	South v. Deaton	378
v. Whittier	208, 252, 1768,	Snowden v. Coal Co.	18, 458	v. State	1404
	1789, 2594	v. U. S.	1761	South Bend v. Hardy	62, 75,
v. Wilkins	377	Snowdon v. Smith	73		200, 210,
v. Wilson		Snyder v. Albion	438		987, 2270, 2277
3 B. & Ad.	2463	v. Bonbright	1354	v. Turner	2220
1 Dev. & B.	1225	v. Bowman	2159	South Branch R. Co. v.	
v. Wilton	2132	v. Com.	363, 1042, 1616	Long's Adm'r	1074
v. Winter	1858	v. Electr. Co.	2509	South Chicago B. Co. v.	
v. Wyman	73, 209, 406	v. Holt Mfg. Co.	1951	Taylor	2105
v. Yaryan	210, 987	v. Iowa City	2203	South Covington & C. S.	
v. York	1820	v. Nations	811, 1828	R. Co. v. Beatty	1117
v. Young	1243, 1248	v. R. Co.	1943	v. Stroh	2220
Smith's Case		v. Snyder		South Omaha v. Fennell	784
12 Co.	575	6 Binn.	607, 770	v. Wrzensinski	1078,
10 Gratt.	824, 830,	50 Ind.	803		1456
	861, 865	v. Wise	1681	South School District v.	
Smith's Ex'r v. Smith	96	Sociedad de Feliz, The	1641	Blakeslee	1587
Smith Charities v. Con-		Sodusky v. McGee	987	South Sea Co. v. Bump-	
nolly	1320	Sofferstein v. Bertels	1013	stead	2275
Smitha v. Flournoy's		Solander v. People	1079, 1750,	v. Dolliffe	2297
Adm'r	2575		2056, 2273	South Staff. T. Co. v. Ebb-	
Smithee v. Campbell	1350	Solari v. Snow	1066	smith	1859
v. Garth	1350	Solary v. Webster	2465	South & N. Ala. R. Co. v.	
Smithies v. Harrison	209	Solita v. Yarrow	1994	McLendon	1974
Smiths v. Shoemaker	1257, 2520	Solly v. Hind	917	Southall v. —	2256

	Section		Section		Section
Southampton v. Graves	1858	Southwestern R. Co.		Spenceley v. Schulenburg	2312, 2317
Southampton Case	526, 1712	v. Papot	1234	v. Wilmot	377, 1003, 1006
Southard v. Curley	2498	Southwick v. Southwick	2245, 2341	Spencer v. Billing	1249
v. Rexford	987, 2268, 2270	v. Stevens	415, 1254	v. Boardman	1205
Southerin v. Mendum	1225, 1651	Southworth v. Bennett	987	v. Com.	318
Southern Bell Teleph. Co.		Sovereign Camp v. Grandon	1672, 2384, 2390	v. Curtis	2579
v. Jordan	676	Sowden v. Quartz Mining Co.	561	v. Kinnard	1911
Southern Bell T. & T. Co.		Sowell v. Bank	1304	v. Langdon	1681
v. Mayo	900	Sowers v. Dukes	1943, 1951	v. Peterson	661
v. Watts	199	v. Terr.	2061	v. Robbins	987
Southern Car & F. Co. v. Jennings	1404	Spalding v. Hedges	1694	v. State	20 Ala. 1072
Southern Express Co. v. Thornton	702	v. Lowe	581	69 Md. 233	
v. Womack	1192	v. People	2497	v. White	907
Southern Georgia & F. R. Co. v. Ayres	1195	Spanagel v. Dallinger	1086, 2102	Spencer O. M. Co. v. Johnson	770
Southern I. C. Line v. R. Co.	665	Spangler v. Jacoby	1350	Spendlow v. Smith	2250
Southern Ins. Co. v. Estes	6	v. State	905, 2363	Sperry v. Moore's Estate	1390
v. White	1270	Sparf v. U. S.	851, 2559	Speyerer v. Bennett	1388
Southern Iron Works v. Central of G. R. Co.	1567	Spargo v. Brown	1456	Spiars v. State	2089
Southern Kansas R. Co. v. Michaels	688, 2220	Sparhawk v. Bullard	1573	Spicer v. State	851, 2265
v. Painter	1040, 1051	v. Sparkaw	582, 1510	Spiegel v. Hays	987, 1270
v. Robbins	65, 199, 461	Sparke v. Middleton	2290, 2304	Spiers v. Brown	371
Southern L. & T. Co. v. Benbow	2098	Sparks v. Com.	111	Spies v. Illinois	2276
Southern Life Ins. Co. v. Wilkinson	657, 1503, 1975	v. Rawls	1339	v. People	105, 238, 691, 923, 1079, 1157, 1985, 2276, 2354
Southern M. I. Co. v. Hudson	1947	v. Sparks	2297, 2312	Spigener v. State	2364
Southern Pacific Co.		v. State	59 Ala. 784, 2484	Spiro v. Nitkin	987
v. Arnett	1951	111 Ga. 2513		Spittle v. Walton	497
v. Hall	283, 791, 1976	Sparr v. Wellman	1053	Spitz's Appeal	2239, 2336
v. Huntsman	792	Sparrow v. Hovey	254	Spiva v. Stapleton	720
Southern Pac. R. Co. v. Tomlinson	2507	Sparta v. Lewis	2498	Spivey v. Platon	2336
Southern R. Co. v. Brantley	944	Spaulding v. Lithograph M. Co.	458	v. Rose	1347
v. Bush	2257	v. Merrimack	1003	v. State	26 Ala. 254, 1781
v. Covenia	2566	v. R. Co.	15, 905, 1405, 1407	26 Ala. 58 Miss. 246	
v. Crowder	961	v. Sherman	252	Spokes v. Hotel Co.	2268
v. Hagan	2580	v. Vincent	1681, 1684	Spoonmore v. Cables	1263
v. Hubbard	2124	Spaunhorst v. Link	1029	Sporrer v. Eifer	6
v. Kinchen	1078	Spear v. Coate	1564, 1566	Spottiswood v. Weir	1234, 2019
v. McLellan	461	v. Coon	1387, 1415	Spradling v. Conway	610
v. Mauzy	461, 1951	v. Drainage Com'rs	1943	Spraggins v. State	396
v. Posey	458	v. Richardson		Spragins v. White	2556
v. White	2325	34 N. H. 1974		Sprague v. Craig	64
v. Williams	1029, 1037	37 N. H. 681, 682, 770, 772		v. Kneeland	1086
v. Wilson	1873	v. State	1841	v. Sea	1944
Southern R. N. Co. v. Russell	2279	v. Sweeney	995	Spratt v. Spratt	229
Southern St. R. Adv. Co. v. Mfg. Co.	2406	v. Tilson	1267	Sprigg v. Beaman	1911
Southey v. Nash	1840	Spearbracker v. Larrabee	252	Sprigge v. Sprigge	2523
Southwark v. Ins. Co.	2103	Spears v. C. B. & Q. R. Co.	2552	Spring v. Ins. Co.	1513
Southwark Bank v. Com.	1350	v. Forrest	923	Spring City G. Co. v. R. Co.	714
Southwark & V. W. Co. v. Quick	2318, 2319	v. Ins. Co.	64	Spring Garden Mut. Ins. Co.	
Southwest School District v. Williams	1420, 1583, 1586	v. R. Co.	2509	v. Riley	745
Southwest Va. M. L. Co. v. Chase	2034, 2053	Speck v. Gray	617	Spring Valley v. Gavin	1023
		Speer v. Athens	1350	Springbok, The	367
		v. P. R. Co.	1350	Springer v. Byram	1072, 2381
		v. Speer	1198	v. Chicago	1158, 1162, 1164, 1168
		Spegail v. Perkins	1681, 2165	v. Ford	2509
		Spellings v. Parks	75	v. Hall	2008, 2016, 2018
		Spence v. Mitchell	18, 1391	v. State	2060
		v. Repass	586	Springfield v. Coe	1951
		v. Sanders	1547, 1554, 1561	v. Dalby	1896
		v. Smith	1778	v. Schmoock	463
		v. State	833	Springfield C. R. Co.	
				v. Hoeffner	1719, 2570
				v. Puntenney	1750, 1951

TABLE OF CASES.

SPR

	Section		Section		Section
Springfield C. R. Co. v. Welsch	770, 1750, 1951	St. Louis M. & M. Co. v. Montana Co.	1862	Stamper v. Griffin 12 Ga.	1035, 1108, 1263, 1983
Springfield & S. R. Co. v. Calkins	720, 1943	St. Louis O. H. & C. R. Co. v. Fowler	463, 1081, 1640	20 Ga.	1293, 2130
Springs v. R. Co.	736	St. Louis P. Ins. Co.		v. Walker	1035
Sprouse v. Com.	2265	v. Cohen	1213, 1244	Stamphill v. Bullen	1290, 1651
Sprowl v. Lawrence	2581	v. Homer	2436	Stampofski v. Steffens	1166
Spruil v. Cooper	2042, 2054	St. Louis S. W. R. Co. v. Dobbins	2220	Standage v. Creighton	1063
Spurck v. Crook	2354, 2358	St. Louis V. & T. H. R. Co. v. Haller	463	Standard Elevator Co. v. Crane El. Co.	1657
Spurr v. Trimble v. U. S.	1275 321, 1109, 1618	St. Louis & C. R. R. Co. v. Eakins	1248	Standard L. & A. Ins. Co. v. Tinney	1404
Squier v. Evans	2433	St. Louis & I. M. R. Co. v. Silver	770, 1890, 1893	Standard Oil Co. v. Bretz	1240
Squire v. State	2086, 2506	St. Louis & S. F. R. Co. v. Brown	571	Standback v. Thornton	1320
Squires v. Abbott v. State	736, 738 1270, 2277	v. Burrows	1722, 2509	Standen v. Bains	1587
St. Andrews v. St. Brides	2063	v. Kilpatrick	1254	v. Edwards	290
St. Bernard Coal Co. v. Southard	1389	v. McLelland	1078	v. Standen	1476, 1603
St. Clair v. U. S.	770, 794, 905, 1647	v. Mathews	1354	Standish v. Washburn	35, 442, 451
St. Cross v. Walden	2462	v. Ritz	1951	Stanford v. Bates	1062
St. Denis v. Grenier	1898	v. Weaver	283, 905	v. Murphy	2337
St. Devereux v. Much Dew Church	2088	St. Louis & S. W. R. Co. v. Elgin C. M. Co.	571	v. Pruet	1684, 1703
St. George v. Biddeford	232, 233	St. Louis & Tenn. R. P. Co. v. McPeters	1624	Stanger v. Searle	1993, 2018
St. John v. Kidd	1239	St. Martin v. Desnoyer	2354	Stanglein v. State	1644, 2086, 2166
v. Lofland	578	St. Paul F. & M. Ins. Co. v. Brunswick G. Co.	1066	Stanhilber v. Graves	1677, 1873, 2309
v. McConnell	529	v. Gotthelf	1560	Stanley v. Addison	2054
v. Redmond	1676	St. Paul & M. Trust Co. v. Harrison	2464	v. Anderson	1195
St. John Gaslight Co. v. Clerke	1706	St. Paul & S. C. R. Co. v. Murphy	1943	v. Green	1082
St. Joseph & D. C. R. Co. v. Chase	283, 456	St. Peter's Church v. Beach	1267	v. Ins. Co.	987
St. Katherine's Hospital	1598	St. Regis Lumber Co. v. Hotchkiss	1576	v. Stanley	761, 2336
St. Legar v. Adams	1658	Staats v. Bergen	619	112 Ind.	27 Wash.
St. Louis v. Foster v. R.	1877 291	Stace v. Griffith	2375	26 Ala.	257
v. Ranken	1943	Stack v. R. Co.	2220	88 Ala.	1219
v. State	390	Stackhouse v. Horton	1938	39 Tex. Cr.	521
St. Louis A. & T. H. R. Co. v. Bauer	1951, 2447	Stackus v. R. Co.	2552	v. Sutherland	1249, 2354
St. Louis Bridge Co. v. Miller	2220	Stacy v. Graham	953, 959, 1031, 1106, 1108, 1985	v. White	14 East
St. Louis Iron M. & S. R. Co. v. Ayres	1943	1106, 1108, 1985		14 East	378, 1080, 1476, 1778
v. Cady	2575	v. Publishing Co.	1974	160 Ill.	2408, 2410
v. Cantrell	2349	Stadacona Ins. Co. v. Rainsford	1074	v. Wilkerson	1530
v. Edwards	1941, 1943	Stafford v. Fargo	913, 1887, 1890	Stanley P. Co. v. Thomson	907
v. Faisst	1261	v. Journal Ass.	76	Stansbury v. Marks	2214
v. Greenthal	233, 1750	v. Rice	529	Stanton v. Embury	463
v. Hall	1943	v. State	106	v. Parker	987, 1985
v. Harper	1410	Stagg v. Pomeray	1392	v. State	2354
v. Henderson	1521	Stahl v. Duluth	738	v. Willson	610
v. Jacobs	1943	Stahle v. Spohn	1040	Stanwood v. McLelland	749
v. Lawrence	455	Stainer v. Droitwich	1364, 1644, 1670, 1703	Stapleton v. Crofts	601, 619, 2333
v. Magness	2575	Staines v. Stewart	1736	v. Monroe	15
v. Murphy	1550, 1552	Stalker v. State	318	v. Stapleton	604
v. Stroud	199	Stall v. State	949	Star Kidney P. Co. v. Greenwood	2212
v. Sweet	1668	Stallings v. Hullum v. State	2297 257	Star Mining & M. Co. v. White Co.	1862
v. Warren	507	Stambaugh v. Smith	438, 1978	Starace v. Rossi	2582
St. Louis K. & A. R. Co. v. Chapman	1943	Stambro, re	703, 839	Starchman v. State	1157, 2183, 2264
St. Louis K. & N. W. R. Co. v. Clark	463	Stammers v. Dixon	2556	Starin v. Kelly	581
St. Louis M. Life Ins. Co. v. Graves	1978		3804	Stark v. Boswell	1083
				Starke v. Wolf	1913
				Starkey v. People	1362, 1438
				Starks v. People	894, 950, 1108, 1109
				v. Sikes	950

	Section		Section		Section
Starksboro v. Hinesburgh	1415	State v. Angelo	1028	State v. Baldwin	
Starkweather v. Converse	1066,	v. Annice	526, 2085	15 Wash.	1398, 1445,
	1073	v. Anslinger	59		1446
v. Maginnis	2432	v. Anthony		v. Ballou	1873
v. Martin	2105	6 Ida.	987	v. Banks	
Starr v. People	460	1 McC.	609	40 La. An.	2056
v. State	106	v. Antonio	318	106 La.	1404, 1669
v. Tracy	2222	v. Apple	949	111 La.	1398, 1404
v. U. S.	21, 276	v. Araah	2062	78 Me.	2272
Staser v. Hogan	233, 1021, 1041	v. Archer		73 Mo.	581
State v. Aaron	2071	73 Ia.	1108, 1109	v. Baptiste	
v. Abatto	390, 826	54 N. H.	1938	26 La. An.	681, 1841
v. Abbey	1684, 1703, 2535	v. Ardoin	2512	105 La. An.	276
v. Able	2098	v. Armington	2085	v. Barfield	63
v. Abley	987	v. Armstrong		v. Barker	
v. Abbott		4 Minn.	2086, 2239	46 La. An.	246
65 Kan.	987	Mo., 66 S. W.	832	68 N. J. L.	987
59 Nebr.	1350	v. Arnold		28 Oh. St.	1432
8 W. Va.	111, 247,	12 Ia.	988	v. Barnes	1909
	1732	13 Ired.	222, 1154	v. Barrett	1976, 2079, 2080
v. Abrahams	1852	55 Mo.	2232	v. Barringer	2512
v. Abrams	2277	47 S. C.	1442, 1750	v. Barron	142, 278
v. Accola	2354	v. Arthur	276	v. Barrow	1226, 1681
v. Adams		v. Asbell	143, 457, 1975	v. Barrows	
78 Ia.	1669	v. Asbury	580	52 Conn.	2298, 2321,
20 Kan.	216, 238,	v. Ashworth	1441, 1445,		2327
	1803, 2056		1447, 1448	76 Me.	580
44 Kan.	457, 1853	v. Atkins	1398	v. Barry	1938
14 La. An.	1963	v. Atkinson		v. Bartlett	
76 Mo.	107, 108	33 S. C.	784	47 Me.	2450
49 S. C.	916, 1003	40 S. C.	2183, 2264,	55 Me.	414, 2272
v. Adamson	987		2265	v. Bartmess	247, 905, 1029,
v. Adler	2511	v. Aughtry	2349, 2497		1669, 2276, 2277
v. Ah Lee	1443, 1803	v. Auguste	832	v. Bassett	1378
v. Ah Loi	1749	v. Austin		v. Bates	
v. Aiken	1079	104 La.	1951	10 Conn.	194
v. Albert		113 Mo.	1674	38 La. An.	2349
50 La. An.	833	v. Avery		46 La. An.	347
73 Mo.	2130	113 Mo.	994, 1890	22 Utah	2579
v. Albright	247	R. I.	363, 1026, 2008	25 Utah	825
v. Alcorn	1461	v. Ayer	2354	v. Batson	2016
v. Alexander		v. Azoff	2354	v. Battle	391
109 La.	838	v. B. & M. Railroad	97, 376	v. Bauerkemper	770, 2062,
66 Mo.	111, 247, 2354	v. Babcock	987, 2276		2528
v. Alford	396, 1875	v. Bable	728	v. Baxter	142, 2079
v. Algood	1350	v. Bach Liquor Co.	2282	v. Bayonne	2056
v. Allen		v. Bacon		v. Bazile	2497
47 Conn.	265	13 Or.	987	v. Beabout	1908
1 Hawks	656, 658, 702,	14 S. D.	1350	v. Beach	1354
	704, 705, 2006	v. Baden	2060	v. Beal	923, 2277
57 Ia.	2059	v. Badger	1750	v. Bean	944
100 Ia.	1111	v. Bailey		v. Beard	398
37 La. An.	957, 1407	54 Ia.	2272	v. Beatty	276, 2354
107 N. C.	1890, 2276	Wash., 71 Pac.	507	v. Beaty	57
56 S. C.	318, 1232	v. Bailly	987	v. Beauleigh	1890, 2277
v. Aloe	2592	v. Bailor	2062	v. Beaudet	21, 140
v. Ames	343, 581, 968,	v. Baird	1680	v. Bebb	1135
	1079	v. Baker		v. Beck	
v. Anderson		106 Ia.	2062	46 La. An.	246
Ida., 59 Pac.	2061	110 Mo.	2514	25 Nev.	1350
96 Mo.	824, 832	136 Mo.	1018	v. Bedard	1136
10 Or.	682, 1048,	58 S. C.	826	v. Beebe	
	1726, 1852, 1976	33 W. Va.	2264	115 Ia.	78
v. Andre	2062	v. Baldoser	2062, 2272	17 Minn.	2364
v. Andrews		v. Baldwin		v. Behrman	1398, 1645,
29 Conn.	1802	36 Kan.	273, 394, 687,		2167
64 Kan.	1350		736, 738, 1041,	v. Beird	198, 248
35 Or.	852		1690, 1700, 1730,	v. Belcher	1362, 1442,
v. Angel	580		1963, 1974, 1977		1750, 2245

TABLE OF CASES.

STA

	Section		Section		Section
State v. Belding	1852	State v. Boswell	691, 922, 923, 1985	State v. Brooks	
v. Bell		v. Boughner	1852	23 Mont.	195
49 Ia.	2062	v. Bowe	852, 1066	v. Brookshire	1841, 1842
136 Mo.	2501	v. Bowen	2579	v. Broughton	821, 852, 2360, 2363
v. Bellard	1755	v. Bowman	683	v. Brown	
v. Belton	1821	v. Bowser	398, 667	1 Pen. Del.	1051
v. Benjamin	944	v. Boyd		20 Fla.	1350
v. Benner	10, 278, 770, 773, 774, 1021, 2363	38 La. An.	905, 1106, 1108	48 Ia.	934
v. Bennett		Mo., 76 S. W.	987, 988, 1985	86 Ia.	1969, 1974, 2062
31 Ia.	2239	v. Boyland and Mc-Curty	357	95 Ia.	2395
75 N. C.	133	v. Brabham	1128	22 Kan.	111, 247
40 S. C.	2349	v. Bradford	830	55 Kan.	200, 1615
v. Berger	351	v. Bradley		111 La.	390, 1036, 1442, 2276
v. Berkley	2595	6 La. An.	111, 143	64 Mo.	111, 1750
v. Berlin	2239	9 Rich.	609, 2236	73 Mo.	836
v. Bernard	949	64 Vt.	107, 108	168 Mo.	273
v. Berning	1890	67 Vt.	107, 728, 851, 1978	171 Mo.	2556
v. Bernstein	660	v. Bradneck	1750	N. J. L., 45 Atl.	2061
v. Berry	499, 851	v. Brady		76 N. C.	278
v. Bertin	1803	95 Ia.	754	125 N. C.	1138
v. Bertoch	2232	100 Ia.	321, 1230	28 Or.	953, 1028, 1732, 1974, 2363
v. Best		Ia., 91 N. W.	2513	3 Strobh.	2056, 2059
108 N. C.	1493	87 Mo.	1890	v. Brownlee	2060
111 N. C.	363, 2349	v. Branch	907	v. Bruce	278, 923
v. Beste	2349	v. Brandenburg	1614	v. Brundige	1960, 2513
v. Beswick	1354, 2582	v. Branham	852, 1326, 1328, 1329	v. Brunell	78
v. Betsall	2056, 2057	v. Brannum	1890	v. Bruner	580
v. Beuerman	689, 1938	v. Branstetter	2354	v. Brunetto	1362, 1398, 1438
v. Bickle	293	v. Brant	894	v. Brunson	2016
v. Biggerstaff	1755	v. Brantley	1010	v. Bryan	205
v. Bilansky	949, 987	v. Braskamp	2577	v. Bryant	
v. Billings	2079	v. Brassfield	205, 2062	55 Mo.	246, 783
v. Birchard	1135	v. Breaux	580, 1976	93 Mo.	1938
v. Bird	2349	v. Breckenridge	318, 1249	v. Buchler	1974
v. Birdwell	105, 246, 247, 396	v. Breeden	923, 950	v. Buck	
v. Bishop	142, 1476	v. Brent	1270	120 Mo.	1354
v. Black		v. Brette	2355	74 Vt.	20
143 Mo.	580, 2056	v. Brewer	1131	54 Ala.	1350
15 Mont.	987, 1270, 1853	v. Brick	825, 857	40 Conn.	78
121 N. C.	969	v. Bridgman	216, 398, 399, 402, 2235	v. Buckman	286
v. Blackburn	1127, 1446	v. Brien	246, 580	v. Buffington	2241, 2339
v. Blake	2260	v. Brierly	836	v. Buie	2042
v. Blakesley	1003	v. Briggs		v. Bulla	1890, 2277, 2513
v. Blanshard	1750	68 Ia.	398, 852	v. Bullard	194, 987, 988
v. Bliss	2513	9 R. I.	2234, 2235	v. Buralli	1976
v. Blitz	987	v. Brin	2059	v. Burke	1878
v. Blize	205, 2042	v. Brink	2081	v. Burks	905, 2349
v. Blodget	1182	v. Brinyea	1938	v. Burlingame	2232
v. Bloom	59, 923, 2277	v. Briscoe	1983	v. Burlingham	2236, 2239
v. Bloor	905	v. Britt	133, 166	v. Burnett	1447
v. Blue		v. Brittain		v. Burnham	1157
136 Mo.	2497	89 N. C.	2354	v. Burns	
17 Utah	56	117 N. C.	833, 2336	Ia., 78 N. W.	778, 811
v. Blythe	507	v. Britton	2086	110 Ia.	2062
v. Bodie	111, 247, 1021	v. Broadbent	821	119 Ia.	770, 1807
v. Bodly	1312	v. Brockman	826, 830, 838	30 Ia. An.	63, 246
v. Bogue	580	v. Bronstine	1938	19 Wash.	154
v. Bohan	1433	v. Brooks		v. Burrell	2276, 2282
v. Boise	1350	39 La. An.	247	v. Burt	2239
v. Bokien	321, 1807, 1853	92 Mo.	841, 1385, 1834, 1862, 1890, 2277	v. Burton	
v. Bolden	1079			63 Kan.	246, 247, 248
v. Bonsor	357			2 Marv. (Del.)	987
v. Boomer	1209, 1855, 1959			v. Burwell	2349
v. Borden	607			v. Butler	2268, 2270, 2271
v. Bostwick	836				

	Section		Section		Section
State v. Butts	1730	State v. Cater	457	State v. Coatney	923
v. Byers	1398	v. Cather	56, 1974	v. Coats	905, 2071
v. Byrd	63, 111, 246, 247, 2512	v. Caudle	1006	v. Cobbs	2349
v. Byrne	1138	v. Cavanaugh		v. Cochran	
v. Cadotte	821, 2130	98 Ia.	1910	2 Dev.	1623
v. Caddy	1129	52 La. An.	364	147 Mo.	106
v. Cadwell	1230	v. Caveness	1985	v. Coella	
v. Cady	1126, 1128	v. Cazeau	1028	3 Wash.	1041
v. Cain		v. Center	2339	8 Wash.	1164
106 La.	1263	v. Chaffin	111	v. Coffee	2363, 2364
9 W. Va.	667	v. Chamberlain	291, 1890, 2273	v. Coggins	1159
20 W. Va.	2079	v. Chambers		v. Cohen	1275, 2497
v. Cake	1677, 1680	87 Ia.	2239	v. Cohn	1243, 2277
v. Calder	1853, 2059	45 La. An.	851	v. Colbert	1877
v. Caldwell		v. Champion	1678	v. Colby	398, 526, 1644, 1645, 2060, 2109, 2167
3 La. An.	2355	v. Chandler		v. Cole	
50 La. An.	830	3 Hawks	522	9 Humph.	2576
v. Calkins	2016	5 La. An.	246	63 Ia.	569
v. Call	321	v. Chaney	1186	38 La. An.	1842
v. Callaghan	1445	v. Chanute	68	94 N. C.	561, 683
v. Callahan	21, 1128, 2059, 2060	v. Chapman		19 Wis.	1249
v. Callaway	390, 397, 1730	88 Ia.	2062	v. Coleman	1876, 1938
v. Callegari	1263	6 Nev.	2059	v. Coley	691, 1621
v. Callian	987	v. Chase	390	v. Collett	2059
v. Cameron	579, 2272	v. Chauvet	2059	v. Collins	
v. Campbell		v. Chavis	63, 246	3 Dev.	290
7 N. D.	149, 1013	v. Chee Gong	728, 770, 1803	20 Ia.	949
1 Rich. L.	1362, 1367, 1374	v. Cheek	570, 705, 762	32 Ia.	246, 247, 1029, 1035, 1263, 1398
v. Candler	16, 570, 705	v. Cherry	62, 200, 894, 987, 1104, 1871	68 N. H.	1219, 1273, 2257, 2498
v. Cannon		v. Chicago M. & S. P. R. Co.	1354	121 N. C.	2100
49 S. C.	862	v. Chiles	688	15 S. C.	759, 762
52 S. C.	499	v. Chingren	987, 2567	v. Colston	382
v. Cardinas	1239, 1273, 1651	v. Chittenden	928	v. Colwell	736
v. Cardoza	758, 759, 761, 762, 1007	v. Chretien	2354	v. Comer	2364
v. Carlisle	851, 2100	v. Christian	246, 1985	v. Compagnet	111, 246, 247
v. Carnagy	2272	v. Christmas	232, 1621	v. Comstock	2062
v. Carpenter	398, 852, 1003	v. Church	1852, 2582	v. Concannon	2056
v. Carr		v. Chyo Chiagk	580, 2056, 2059	v. Conerly	1021
25 La. An.	2273	v. Cincinnati T. & J. Co.	7, 1665	v. Conkle	949, 987
5 N. H.	705, 1680, 2163	v. Clancy	2497	v. Connelly	2061
28 Or.	2060	v. Clare	1350	v. Conness	1712
37 Vt.	832, 834, 855	v. Clarissa	833	v. Conway	1407
v. Carrick	824, 830	v. Clark		v. Cook	
v. Carrington	661, 1129, 1144, 1445, 1447, 1450	12 Ired.	662, 1976	75 Conn.	792
v. Carroll	852	69 Ia.	1136, 1138	92 Ia.	2062
v. Carron	205	100 Ia.	1037	17 Kan.	569
v. Carson	987, 2277	34 Kan.	2349, 2354	30 Kan.	1853
v. Carter		60 Kan.	520, 521	15 Rich. L.	851
1 Houst. Cr. C.	4, 25	54 N. H.	2088	v. Coolidge	1696
Ia., 96 N. W.	987	15 S. C.	678	v. Cooper	
45 La. An.	246	v. Claude	246	32 La. An.	247, 396
51 La. An.	1124, 1893	v. Cleaves	2272	71 Mo.	1108, 2277
106 La.	1072, 1448	v. Cleavland	2535	83 Mo.	1037
107 La.	1448	v. Clemens	2059	85 Mo.	2354
8 Wash.	1034	v. Clements	1230, 2059	103 Mo.	2085, 2086
15 Wash.	1014	v. Clifford	852	101 N. C.	2572
v. Cartwright	2354	v. Clifton	1616	Tenn. Ch., 53	
v. Case	1614	v. Clinton	923, 987, 2005, 2006, 2008, 2016, 2277	S. W.	1239, 1680, 2105, 2167
v. Casey	925, 987	v. Clough	2168	v. Corcoran	
v. Cas	2439	v. Clyburn	1873	7 Ida.	905
v. Cassidy	2062	v. Coates	195, 1021, 1126, 1985, 2056	38 La. An.	1755
				v. Cornhauser	330
				v. Cosgrove	246, 247
				v. Coss	825

TABLE OF CASES.

STA

	Section		Section		Section
State v. Costello	499, 933	State v. D'Angelo	141, 246, 396	State v. Dilley	1874
v. Costner	2273	v. Daniel		v. Dillon	581
v. Coudier	1405	31 La. An.	1441	v. Diskin	1072
v. Coudotte	273, 2059	49 La. An.	2100	v. Divine	1354
v. Congot	1493	v. Darnell	830, 841	v. Dixon	
v. County Commis-		v. Dart	1362, 1722	47 La. An.	687
sioners	1671	v. David	852, 1842, 1974, 2012, 2079, 2534	131 N. C.	1447, 2150
v. Coupenhaver	2354	v. Davidson		v. Dockstader	290
v. Couper	2494	77 N. C.	2239	v. Dodson	
v. Courtright	2042	9 S. D.	1021, 1041	4 Or.	247
v. Cousins	287, 288	30 Vt.	1718, 2073,	16 S. C.	609, 2100, 2245
v. Covington	2100		2081	v. Doherty	682
v. Cowan	826, 832, 852, 867, 1475, 2071,	v. Davis		v. Dolan	1974
	2100	3 Brev.	2239	v. Dollar	2203
v. Cowell	351	6 Ida.	106, 851	v. Dominique	1750
v. Cox	2277	110 Ia.	1839	v. Donehey	1350
v. Crab	2056	117 Ind.	1225	v. Donelon	194, 988, 2100
v. Cracker	507, 1821	77 Ired.	140	v. Donnelly	987, 2056
v. Craemer	218	34 La. An.	860	v. Donovan	
v. Craine	1441, 1446	29 Mo.	1028	61 Ia.	2097
v. Cram	2100	141 Mo.	2061	10 N. D.	2259
v. Crawford		63 N. C.	862	v. Doon	2354, 2355
35 Ark.	1350	77 N. C.	142	v. Dooris	2167
99 Mo.	106, 140	87 N. C.	1021	v. Douette	736
39 S. C.	326	109 N. C.	1645	v. Douglas	
Wash., 71 Pac.	246	125 N. C.	838	53 Kan.	506
v. Credle	1254	69 N. H.	106, 108, 216, 564	26 Nev.	2060
v. Creson	57	55 S. C.	1974, 1977	v. Douglass	
v. Crocker	1186, 1566, 1651	104 Tenn.	1732	34 La. An.	1404
v. Crofford	359	v. Dawson	2056	81 Mo.	1890
v. Cronin	1442	v. Deal		20 W. Va.	2183, 2306
v. Crook	1029	24 Fla.	1350	v. Dove	923, 1125, 1126
v. Cross		41 Ore.	1037, 1051, 1076, 1890	v. Dowd	1853
72 Conn.	862, 1938	v. Debolt	2497	v. Downs	
68 Ia.	1271, 1976, 1983	v. Dee	949	148 Ind.	2577
44 W. Va.	2183	v. Deering	1974	50 La. An.	585
v. Crofts	784	v. Degonia	285	v. Drake	
v. Crouse	1021	v. De Graff	852, 2008, 2056	82 N. C.	833, 855, 857
v. Crow	1275	v. De Hart	200, 398, 2056	113 N. C.	835, 855
v. Crowder	2535	v. Delaneuville	1028	v. Drawdy	609
v. Crowley		v. Delaney	136, 160, 451	v. Dreany	1205
13 Ala.	398	v. De Maio	1909	v. Driscoll	1142, 1750
33 La. An.	390	v. Demarest	247	v. Dubois	
v. Cruise	1129	v. Denis	505, 1896	54 Ia.	2071
v. Cuellar	564, 1678	v. Dennin	1126	49 Mo.	153
v. Cummins	905, 2259	v. Dennis	273, 1442	v. Dudley	2235
v. Cunningham		v. Depass	111	v. Dudoussat	987, 1128, 1129
31 Me.	2056	v. Deputy	953	v. Duestrow	233, 390, 770
72 N. C.	232	v. Derrick	862, 1876	v. Duffey	62, 923, 1010, 1014, 1839
v. Curran	2062	v. Desforges	1109	v. Duffy	
v. Curtis	1270, 2277	v. Desmond	276, 357	57 Conn.	944, 1909
v. Cushenberry	728, 1615	v. Desroches	351, 1755, 2097	15 Ia.	2261, 2271
v. Cushing		v. De Wolf	811, 1104, 1124, 1135, 1136, 1138, 1195	124 Mo.	1157
29 Me.	1010	v. Dexter	195, 321, 1072, 2530	v. Dufour	276, 1144
14 Wash.	111, 247, 1157, 1615	v. Dickey	1072	v. Dumphy	63, 111, 246, 247, 580
17 Wash.	84, 111, 220, 247, 1157, 1398, 1977, 2497	v. Dickinson	1398, 1432, 1725	v. Duncan	
v. Dale		v. Dickson		6 Ired.	109, 140, 142, 1476
109 Ia.	1855	6 Kan.	1853	64 Mo.	861
141 Mo.	728	78 Mo.	106, 278, 2071	116 Mo.	1476, 1755
v. Daley	1781	v. Dietz	2059	142 Mo.	2497
v. Dalton		v. Dildy	833	8 Rob. La.	1896
27 Mo.	59, 1013, 1028	v. Dill	248, 988	7 Wash.	2276
20 R. I.	1441			v. Dunn	
v. Danforth	166, 1154, 2062			109 Ia.	416
				116 Ia.	1855
				80 Mo.	2354

	Section		Section		Section
State v. Dunwell	2575	State v. Fairlamb	2273	State v. Foot You	1447
v. Duplechain	1116	v. Fannon	1842	v. Foote	675
v. Durham	321, 1212, 2233	v. Farmer	13, 987, 2277	v. Forbes	247, 794,
v. Durnam	343, 2060	v. Farrington	728, 1855,		1839, 1841
v. Dusenberry	2061		1890, 2016	v. Force	830, 836, 855
v. Dwire	1010	v. Fasset	2354, 2363	v. Ford	
v. Dyer		v. Faulkner	21, 2042, 2270,	37 La. An.	21, 246,
59 Me.	2239		2298		247, 1841
139 Mo.	923, 987, 2277	v. Favre	2276, 2354	3 Strobh.	21, 216, 290,
v. Earnest	1969	v. Fay	2276		349, 1985
v. Easterlin	2044	v. Feister	689	v. Forschner	62, 200, 398,
v. Eastwood	363, 2265	v. Felker	111, 248		923, 928, 1618
v. Eaton		v. Felter		v. Forsythe	1051
3 Harringt.	1349	25 Ia.	232, 233, 675,	v. Fortner	836, 851, 854
75 Mo.	111, 2079, 2080		681	v. Foster	
v. Eau	2060	32 Ia.	1384	30 Kan.	2044
v. Eddon	63, 1442	v. Feltes	495, 499, 821,	23 N. H.	2276
v. Edwards			933, 2071	v. Foulk	2513
34 La. An.	105	v. Ferguson		v. Fountain	2062
106 La.	851, 862	71 Conn.	195, 987	v. Fournier	143, 923, 987,
19 Mo.	1270, 2569	2 Hill S. C.	1431		1722, 2100
79 N. C.	1821	9 Nev.	923	v. Fowler	276
112 N. C.	1974	v. Feuerhaken	2059	v. Fox	
2 Nott & McC.	2260,	v. Field		79 Md.	2580
	2271	14 Me.	246	79 Mo.	2349
51 W. Va.	2183, 2264	119 Mo.	1350	25 N. J. L.	655, 793
v. Efler	2277	v. Fiester	2450	v. Francis	1350
v. Egan	923, 1985	v. Finch	716	v. Frank	
v. Ehinger	1960	v. Findley	1230, 2535	60 Nebr.	1350
v. Eisenhower	1877	v. Finley	761, 1382, 1442	61 Nebr.	1350
v. Ekanger	987, 2270	v. Fisher		109 La.	952
v. Elkins	111, 246, 247,	33 La. An.	111, 247	v. Franks	153, 238, 580
	1013	162 Mo.	949, 2276	v. Frannburg	1445
v. Ellington	949	v. Fitchette	343	v. Frazier	
v. Elliott		v. Fitzgerald		6 Baxt.	855
15 Ia.	2100, 2115	63 Ia.	1398, 2062,	109 La.	508
45 Ia.	111, 247, 804,		2098	v. Frederic	276
	935, 1442, 1443	130 Mo.	106, 143,	v. Freeman	
68 N. C.	1021		1697, 1896	5 Conn.	2354
v. Ellis	246	68 Vt.	286, 2306	4 Jones L.	354
v. Ellsworth	950, 953, 1029	v. Fitzhugh	1072, 1433	100 N. C.	1131
v. Ellwood	194, 789, 792,	v. Fitzsimmons	1625, 1839,	43 S. C.	1051
	995, 1270		1842	v. French	2062
v. Elmer	2273, 2276	v. Fitzsimon	200, 1761	v. Frew	1836
v. Emery	363	v. Flanagan	2081	v. Frey	2239
v. Emory	1778	v. Flanders		v. Frierson	247
v. En	278	118 Mo.	1205	v. Fritz	2016
v. England	131	38 N. H.	658, 726,	v. Froiseth	2252
v. Engle	1652		1969	v. Frugé	
v. English	239	v. Flemming	851, 2497	28 La. An.	2349
v. Enke	2062	v. Fletcher	140, 457,	44 La. An.	1106
v. Enochs	2281, 2282		1442, 1476	v. Furbeck	1164
v. Epstein	1072, 1750, 1810	v. Flint	261, 460, 1126,	v. Furgerson	278
v. Erb	1938		1128, 1129	v. Gabriel	1755
v. Erving	1195	v. Floyd	63	v. Gailor	238
v. Estoup	1072, 1750	v. Flynn		v. Galla	1890
v. Evans		124 Mo.	326	v. Gallagher	2086
8 Humph.	2576	36 N. H.	2183, 2264	v. Gallehugh	1750
55 Mo.	1476	v. Foley		v. Gannon	1807, 2559
124 Mo.	1439, 1440,	130 Mo.	258	v. Gardiner	1938
	1442	144 Mo.	118, 1072	v. Gardner	
138 Mo.	276, 2239	15 Nev.	522, 523	1 Root	2235
166 Mo.	1671	45 N. H.	1620	88 Minn	2270
33 W. Va.	111, 246,	v. Folwell	216, 414, 1977	v. Garic	63, 246
	247, 581, 1626	v. Fontenot		v. Garland	987, 1044
v. Everitt	1852	48 La. An.	363, 390,	v. Garrand	396, 1434, 1442
v. Fahey	2042		692, 770	v. Garrett	
v. Faile	111	50 La. An.	248, 1976	Busbee	987, 2272
v. Fairfax	2595	v. Fooks	1398, 2595	71 N. C.	2265

TABLE OF CASES.

STA

	Section		Section		Section
State v. Garrington	149, 2272	State v. Grant		State v. Hall	
v. Garrison	276, 1442, 2497	22 Me.	830	14 S. D.	702
v. Garth		79 Mo.	106, 108, 391, 923, 1124, 1131, 1263	S. D., 91 N. W.	696, 1633
v. Garvey	1439			v. Hallock	354
25 La. An.	852, 860	144 Mo.	987	v. Halstead	1234, 1235
28 La. An.	858, 860	v. Granville	1406	v. Hamilton	923
11 Minn.	661	v. Grate	1614	v. Hancock	1163
v. Gates		v. Graton	2555	v. Hand	1620
130 Mo.	1976	v. Graves	1890, 2273, 2276	v. Haney	2056
28 Wash.	106, 2081			v. Hanley	682
v. Gaubert	1877	v. Grear		v. Hanna	150, 218, 2081
v. Gay	2354	28 Minn.	499, 933	v. Hannett	391
v. Gaylord	1890, 2276	29 Minn.	2071, 2073	v. Hardin	2056
v. Geddes	390, 815, 2059	v. Grebe	154, 285	v. Harding	347
v. Geddis	689	v. Green		v. Hargrave	1362
v. Geddicke	1722	35 Conn.	390, 397	v. Hargroves	784
v. Geer	2241	Kirby	238	v. Harkins	2056, 2059
v. Gemmill	1195	46 La. An.	246, 247	v. Harlan	105, 2079
v. George		92 N. C.	118, 238	v. Harman	832, 1349
8 Ire.	1126, 1131, 1132	48 S. C.	520, 770, 2056, 2100	v. Harper	
60 Minn.	1375, 1398	v. Greenburg	982, 987	101 N. C.	2355
v. German	2071	v. Greenleaf	1807, 1854, 1976	35 Oh. St.	1432
v. Gesell	987, 1842			v. Harr	791
v. Gigher	580	v. Greenwade	351	v. Harras	2059
v. Gilbert	1072, 1075	v. Gregor	111	v. Harrington	581
v. Gilcrease	2100	v. Gregory		v. Harris	
v. Gile	1447	5 Jones L.	855	100 Ia.	235
v. Gillick	1855	33 La. An.	952, 1963	5 Ired.	570, 705
v. Gilman	821, 843, 852	v. Griffin		45 La. An.	111, 247
v. Gin Pon	1818	48 La. An.	830	48 La. An.	276
v. Giroux	1955	87 Mo.	1852	51 La. An.	280
v. Givens	2008, 2016	v. Grimmell	2385	59 Mo.	246, 247
v. Glass		v. Griswold		76 Mo.	247
5 Or.	1976	67 Conn.	2183, 2264, 2277	150 Mo.	1079
50 Wis.	852, 2276			63 N. C.	1975
v. Glave	2273	73 Conn.	2273	v. Harrison	
v. Gleim	934, 987, 2497	v. Grover	860, 862, 867	111 La.	111
v. Glenn	1350	v. Groves	2496	66 Vt.	918, 2079
v. Glynden	821	v. Grubb	1974	36 W. Va.	2349, 2354
v. Glynn	948, 953, 1029	v. Gruff	861	v. Harrold	153, 194, 216, 326
v. Goddard	1154, 2016	v. Guild			
v. Goetz	347	149 Mo.	728, 2513	v. Hartley	1803
v. Goff	105, 237, 916	10 N. J. L.	275, 836, 855, 2071	v. Harvey	
v. Goforth	2236, 2497			112 Ia.	166, 1154
v. Goin	2514	v. Gunagy	2062	28 La. An.	1398, 1405
v. Gonce	2085, 2086	v. Guy		131 Mo.	693, 728, 994, 2512
v. Gonsoulin	1874	106 La.	923	v. Hascall	2349, 2354
v. Goodbier	953, 1036, 1037, 1046	107 La.	1034	v. Haskins	2535
		69 Mo.	106, 111, 247	v. Hastings	
v. Goode	1807	v. Haab	987	24 Minn.	1350
v. Goodrich	111, 247, 953	v. Hack	142, 960, 987, 1476	53 N. H.	701, 2008, 2016, 2020
v. Goodwin	394, 694, 728				
v. Gore	1842	v. Haddonfield & C.		v. Hasty	1855, 2273
v. Gorham		Turnpike Co.	2572	v. Hatcher	852, 1667, 2243
60 Me.	2183	v. Hagan			
67 Vt.	851, 862	45 La. An.	1839, 1842	v. Hatfield	
v. Gosey	2079, 2296	54 Mo.	836	3 Head	2281
v. Gossett	832, 861, 2100	164 Mo.	832, 852	72 Mo.	2205
v. Gottfreedson	347	v. Hagood	1350	48 W. Va.	905, 1890
v. Goyette	2582	v. Hahn	1706		
v. Grady	2354	v. Haines	692	v. Hathaway	716
v. Graff	2059	v. Hairston	62, 1496	v. Hathorn	1890
v. Graham		v. Hale	987, 1072	v. Hawkins	2116
46 Mo.	254	v. Halford	1136	v. Haworth	861, 1037
74 N. C.	859, 2265	v. Hall		v. Hayden	
121 N. C.	354	9 Nev.	247	45 Ia.	1667, 1669, 2060
23 Utah	360	N. C., 44 S. E.	581	51 Vt.	681, 1938

	Section		Section		Section
State v. Hayes		State v. Hobbs	852	State v. Hudson	
105 Ia.	2062	v. Hocker	1350, 2577	50 Ia.	278, 580
14 Utah	218	v. Hockett	1976	110 Ia.	2079
v. Haynes		v. Hodge	2559	v. Hudson Co. Elec-	
71 N. C.	142, 1476,	v. Hodges	318, 2513	tric Co.	2579
	1873	v. Hodgskins	2085, 2086	v. Hudspeth	
7 N. D.	1002, 1003	v. Hoffman	2513	150 Mo.	396, 1890,
v. Hays		v. Hogan			2273
22 La. An.	228, 233	67 Conn.	278	159 Mo.	692, 1750
23 Mo.	4, 247, 276	115 Ia.	987	v. Huff	
v. Hayward		120 Ind.	1738	161 Mo.	280
62 Minn.	105, 232,	v. Hogard	2081	11 Nev.	987, 2277
	233, 932, 961,	v. Hogue	63	v. Hughes	
	1725, 1726	v. Holcomb	1450, 2535	58 Ia.	2239
1 Nott & McC.	2042	v. Holden	792, 794	106 Ia.	398, 2062
v. Hazen	2088, 2239	v. Holland	2056	29 La. An.	2097
v. Heacock	59, 1022	v. Hollenbeck	200, 398	71 Mo.	1018, 1021,
v. Head	1198	v. Hollingsworth	247		1841
v. Healey	258	v. Holloway	1938	8 S. D.	1029
v. Heatherton	2062	v. Holmes		v. Hull	
v. Heed	2042	65 Minn.	331, 2272	26 Ia.	1349, 2059
v. Height	2252, 2264,	12 Wash.	1853	18 R. I.	78, 2272, 2273
	2265, 2382	v. Hooker	1375, 2098	45 W. Va.	1951
v. Heldenbrand	7	v. Hooks	2088	v. Humason	326, 1404
v. Helm	106	v. Hooper	706, 709	v. Hunsaker	1029, 1873
v. Henderson		v. Hopkins		v. Hunt	
84 Ia.	2060	50 Vt.	915, 1236,	112 Ia.	1802
52 S. C.	1028		1841, 1871, 1890,	128 N. C.	105
29 W. Va.	2016		2154	v. Hunter	791, 1136, 1164
v. Hendricks		56 Vt.	760, 1876	v. Huntly	1732
172 Mo.	1126, 1750	13 Wash.	831, 852	v. Hurd	398, 2239
15 Mont.	78, 1620	v. Hopkirk	660, 728	v. Hurst	689
v. Hennessy	2059	v. Hopper	111, 276	v. Hussey	
v. Henry		v. Hoppiss	1897	Busbee	2239
107 Ala.	1044	v. Horn	2016, 2167, 2569	7 Ia.	1141
5 Jones L.	56, 200	v. Horne	85, 106, 1014,	v. Hutchison	394, 1718,
51 W. Va.	568, 1168		1028, 2276		2062
v. Henson	987, 1066	v. Horton	1755	v. Huxford	1974
v. Herbert	660, 1911,	v. Hossack	792, 968,	v. Hyde	580
	2304, 2319		2130	v. Hyer	2056, 2057, 2060
v. Hernia	851	v. Houghton	744	v. Hymer	106
v. Herron	2513	v. Houser	1374, 1397,	v. Ice	2272
v. Hersom	792		1398, 1404	v. Imlay	1135, 1138
v. Hess	318	v. Houston		v. Irwin	
v. Hice	56	78 Ala.	1974	1 Hayw.	1327
v. Hicks		1 Bail.	313, 318	Ida., 71 Pac.	987
27 Mo.	246	v. Houx	987	v. Isaacson	106, 457, 1852
6 S. D.	2059	v. Howard		v. Isenhardt	1645, 1796,
v. Higdon	205	19 Kan.	521		1876
v. Higgins	1354	4 McC.	2042	v. Isham	1273, 2555
v. Hilberg	62, 398,	91 Me.	1219, 2109,	v. Jackson	
	1616, 2060		2464	12 La. An.	246, 396
v. Hildreth	1732	118 Mo.	498, 811	33 La. An.	246, 247
v. Hill		9 N. H.	923, 1111,	37 La. An.	246
2 Hill S. C.	1375, 1402		1618, 1985	44 La. An.	247, 923, 987
46 La. An.	2514	17 N. H.	2354	106 La.	1046
91 Mo.	2061	82 N. C.	266, 1732	111 La.	1382
134 Mo.	1072	Or., 72 Pac.	1044	17 Mo.	63, 246, 247
65 N. J. L.	851, 2130	35 S. C.	1884, 1890	95 Mo.	2273, 2276
2 Speer	1225	32 Vt.	1714, 1725,	106 Mo.	580, 2056,
48 W. Va.	2056		2059		2059
52 W. Va.	983, 987,	v. Howell	95, 2520	112 Mo.	321
	1270, 2196	v. Hoyt		9 Mont.	1045
v. Hilmantel	1712, 2215	46 Conn.	1700	65 N. J. L.	398
v. Hinkle		47 Conn.	106, 232, 238,	9 Or.	506, 507
6 Ia.	39, 238, 390,		1621, 2339	v. Jacobs	
	569, 2273	13 Minn.	1029	5 Jones	2265
33 Or.	1079	123 Mo.	2534	6 Jones	571, 1978
v. Hilton	2086	v. Huckins	1853	107 N. C.	1131

TABLE OF CASES.

STA

	Section		Section		Section
State v. Jacobs		State v. Jones		State v. Kingsley	
28 S. C.	1044, 1873	50 N. H.	228, 233, 1938	39 Ia.	2062
21 R. I.	2071	68 N. C.	1977	108 Mo.	1354
v. Jaeger	1061	29 S. C.	736, 1040,	v. Kinley	56, 59, 1029
v. Jagers	1440		1108, 1109, 1329,	v. Kinney	1138, 1761
v. James			1374, 1667, 2098	v. Kirby	
45 Ia.	276	6 Wash.	1350	62 Kan.	194, 231, 581
31 S. C.	1974	v. Jordan		1 Strobh.	824, 832, 1475
v. Jamison		87 Ia.	835	v. Kirkman	953, 1021, 1028
74 Ia.	321	34 La. An.	1404	v. Kirkpatrick	
110 Ia.	341	v. Josey	279	32 Ark.	1331
v. Janvier	246, 247	v. Judd	2511	63 Ia.	923, 2277
v. Jarvis	2060	v. Juneau	507	v. Kissock	1842, 2062
v. Jay	835	v. Justus	442, 457	v. Kline	
v. Jeandell	406, 777	v. K.	2276	54 Ia.	390
v. Jefferson		v. Kabrich	56, 57, 290	109 La.	1398, 1404
6 Ired.	62, 200,	v. Kaiser	1755	v. Klinger	689, 1938
	398, 1062	v. Kane	1963	v. Klitzke	2276
125 N. C.	21, 1434	v. Kartz	1354	v. Knapp	59, 200, 220, 398,
v. Jeffries	334	v. Kean	2088		1005, 1135, 1136, 1164
v. Jenkins		v. Keenan	1614, 2201	v. Knight	
5 Vt.	833, 857	v. Keeler	2081	43 Me.	662, 790, 791,
139 Mo.	2086	v. Keene			795, 900, 901, 907,
v. Jerome	78, 1983	50 Mo.	246, 247		1976, 2363
v. Jersey City	2144	100 N. C.	683	Wis., 95 N. W.	928
v. Jeswell	1398	v. Kellar	2060	v. Knighten	2061
v. Jim	1009, 1013, 1015	v. Kellerman	2056	v. Knock	1076
v. Johnson		v. Kelley		v. Knowles	821, 2071
29 La. An.	772	50 La. An.	2513	v. Knutson	2062
30 La. An.	63, 141,	57 N. H.	233	v. Kodat	2237, 2341
	834, 860	46 S. C.	792, 1037	v. Koontz	2008, 2016
41 La. An.	1615	65 Vt.	347	v. Koplan	2056
47 La. An.	851, 905,	v. Kelly	1853	v. Kornstett	832
	1028, 1037, 1131	v. Kemp	398, 1072	v. Kouhns	2060, 2061
48 La. An.	949	v. Kenilworth	2044	v. Kraft	2196, 2215
50 La. An.	2272	v. Kennade	246, 2276	v. Krause	1672
40 Kan.	987, 1985	v. Kennedy		v. Kremling	761
12 Minn.	7, 905, 1018,	154 Mo.	2511	v. Kuhlman	2060
	2085, 2086, 2231	177 Mo.	1079, 2383	v. Labuzan	247, 780
26 Minn.	2582	v. Kent		v. La Grange	2513
76 Mo.	107	4 N. D.	967, 1070	v. Laliyer	2071, 2073
118 Mo.	1442, 1448	5 N. D.	216, 276,	v. Lamb	
33 N. H.	334		390, 1807, 1853,	28 Mo.	852, 867, 2071
12 Nev.	1398		1890, 2270, 2276	141 Mo.	1908
67 N. C.	2265	v. Kenyon	1618	v. Landry	2272
43 S. C.	770, 905	v. Kervin	246	v. Lang	1116
66 S. C.	1976	v. Kessler	1447	v. Langford	
28 Vt.	62, 133,	v. Ketchey	1938	Busbee	397
	200, 987	v. Kidd	2298, 2311	45 La. An.	1138
Winston	1618	v. Kiesewetter	1350	v. Lanier	928
v. Jones		v. Kilburn	661, 1079	v. Lapage	12, 57, 193, 216,
3 Dev. & B.	1781	v. Kilgore	1018, 2079		302, 357
33 Ia.	821	v. Kimball	2081	v. Larkin	390, 923, 987
64 Ia.	104, 233	v. Kindle	1398	v. Larkins	106, 689,
89 Ia.	1157	v. King			1890, 2276
115 Ia.	2059	117 Ia.	398, 505, 506,	v. La Rose	1066
41 Kan.	1976, 1978		507, 508, 1828	v. Lattin	664
38 La. An.	1442	Ia., 96 N. W.	2513	v. Lauderbeck	2349
47 La. An.	851, 1842,	47 La. An.	111, 247	v. Lautenschlager	681
	2119	88 Minn.	934, 987, 2354	v. La Vigne	2008,
51 La. An.	1877	78 Mo.	56, 276		2016, 2020
51 Me.	580	79 Mo.	987	v. Lavin	1062
54 Mo.	826, 841, 855	83 Mo.	59, 1985	v. Lawhorn	2099, 2276, 2277
61 Mo.	1135, 1136,	84 N. C.	1873	v. Lawlor	390, 1022,
	1138	86 N. C.	581		2059, 2060
64 Mo.	911, 1867, 2056	9 S. D.	1618, 1853, 2062	v. Lawrence	
153 Mo.	1807, 2265	24 Utah	1405	57 Me.	2272
171 Mo.	354, 851,	v. Kingsbury	149, 1021,	70 Vt.	1873
	852, 861		1041	v. Lawson	1347

	Section		Section		Section
State v. Laxton	56, 194, 357, 1131, 1611, 1618	State v. Lyon	736, 748, 749	State v. McLain	2059
v. Laycock	1877	v. Lyons		v. McLaughlin	
v. Leabo		Ida., 64 Pac.	276	44 Ia.	1029, 2062
84 Mo.	1730, 2511	44 La. An.	1874	76 Mo.	1890
89 Mo.	1385	v. Lytle	105, 658, 660	149 Mo.	293, 692, 988, 1615, 1976
v. Leblanc	507	v. McAfee	1181	126 N. C.	2098
v. Ledford	18	v. McAllister	290, 318, 1871	v. McLelland	1350
v. Lee		v. McAuley	2332, 2336, 2341	v. McLeod	1415, 2354
65 Conn.	132	v. McBride	1350	v. McMahan	1239
69 Conn.	272, 2501, 2512	v. McCall	354	v. McManus	524
95 Ia.	988	v. McCann		v. McNally	106, 108, 111
22 Minn.	52, 55, 1614, 1983, 1986	Or., 72 Pac.	950, 1750	v. McNamara	2355
13 Mont.	1398	16 Wash.	1079	v. McNeely	246, 396
80 N. C.	784, 1898	v. McCartney	987	v. McNeil	1374, 1398
121 N. C.	949	v. McCauley	1207, 1235	v. McNinch	1391, 1884
58 S. C.	1447	v. McClain		v. McO'Brien	1395, 1397, 1398
v. Lee Doon	1803, 1842, 1853	49 Kan.	667	v. McPherson	2363
v. Lehman	2270	137 Mo.	851	v. M. & L. Railroad	65, 97, 249, 376,
v. Lenihan	1620, 2062	v. McClellan	1117	v. Mace	105, 363, 907, 949, 1442, 1447
v. Lentz	2354	v. McClintic	2062	v. Mack	524
v. Letourneau	321	v. McConkey	2349	v. Maddox	1750
v. Levers	2059	v. McConnell	1350	v. Madison	
v. Levy	506, 507	v. McCord	2241	47 La. An.	2097
v. Lewenthall	1230	v. McCormick	1531, 2354	50 La. An.	1404
v. Lewis		v. McCourry	1755	49 W. Va.	246
45 Ia.	233, 2072	v. McCoy		v. Ma Foo	2514
96 Ia.	352	109 La.	1136, 1270	v. Magers	
56 Kan.	2276	2 Speer	1189	35 Or.	2568
80 Mo.	1270	15 Utah	792, 1951	36 Or.	762
136 Mo.	2501	v. McCullum	833, 1072	v. Magone	18, 580, 1079
20 Nev.	233, 689, 1935, 1938	v. McCune	62	v. Magoon	
N. C., 45 S. E.	963	v. McDaniel	665, 851, 905, 2183	50 Vt.	918, 1873, 2079
31 Wash.	1853	v. McDonald		68 Vt.	1072
v. Libby	2086	57 Kan.	988, 2056	v. Mahon	2100
v. Liedtke	1350	65 Me.	1330	v. Maier	677, 1938
v. Lightfoot	106, 363	25 Mo.	2086	v. Main	561, 571, 1699, 2451, 2567, 2580
v. Lindoen	457	8 Or.	1029	v. Mairs	923
v. Lingle	1807, 2570	v. McDonough	200, 1938	v. Mallett	2264
v. Linney	1873	v. McDowell		v. Mallon	276
v. Lipscomb	832	Dudley	78, 1620	v. Maloy	111, 247, 749
v. Litchfield	2056, 2057, 2287	129 N. C.	821, 1976	v. Mandich	2497, 2513
v. Lockerby	1620	v. McFarlain	950	v. Manley	2168, 2535
v. Lockett	784, 1750	v. McGahey	1807, 2079	v. Mannion	1399
v. Lockwood		v. McGee		v. Marceaux	347, 1974, 2272
5 Blackf.	1208	81 Ia.	194, 988	v. March	987
58 Vt.	1841	55 S. C.	1890	v. Marchbanks	770
v. Lodge	1033	v. McGilvery	2088	v. Marcks	1135, 2056, 2061
v. Loehr	987	v. McGinn	2062	v. Marion Co. Court	1671, 2577
v. Long		v. McGonigle	246, 247, 1853	v. Markins	398, 399
1 Hayw.	825, 2071	v. McGrath	2242	v. Marks	923, 1612, 1618, 1985
21 Mont.	1350	v. McGraw	1890	v. Marler	1029, 1036
v. Lopez	1802	v. M'Gregor	78, 204	v. Marsh	
v. Lord	2534	v. McGrew	609	1 Jones	2258
v. Lowthorne	836, 855	v. McGuire		70 Vt.	143, 144, 1207, 1974, 2570
v. Lucas		87 Mo.	2529	v. Marshall	
57 Ia.	660, 728	15 R. I.	2277	8 Ala.	2294, 2297
124 N. C.	1893	v. McIver	63, 198	105 Ia.	2497
v. Lucey	118, 276, 1974	v. McKean	2060	36 Mo.	2276
v. Ludwig	143	v. McKenzie			
v. Lull		18 Ia.	2060		
37 Me.	759, 770, 786	144 Mo.	861		
48 Vt.	246	v. McKinistry	1005		
v. Lurch	1890	v. McKinney			
v. Luy	1351	31 Kan.	1853		
v. Lynde	754, 1273	111 N. C.	1131		
		v. McKinzie	1890		
		v. McKnight	1434, 1974		

TABLE OF CASES.

STA

	Section		Section		Section
State v. Marshall		State v. Miller		State v. Morphy	1976
137 Mo.	667, 1493,	71 Mo.	923, 1963	v. Morris	
	1503, 2061	100 Mo.	987, 1270	47 Conn.	153, 1698,
Phillips	1135, 1138	144 Mo.	149		2581
v. Martin		156 Mo.	928, 1890	41 La. An.	2349
2 Ired.	2079	47 Wis.	354	84 N. C.	390, 571,
89 Me.	1878	v. Millican	2349		1367, 1385
74 Mo.	363	v. Millmeier	105, 1977, 2081	v. Morrison	
124 Mo.	987, 1270,	v. Mills		64 Kan.	1442, 1750
	1750	88 Mo.	1890	49 W. Va.	246
47 S. C.	2081	91 N. C.	1028	v. Morse	
v. Marvin	398, 2088,	v. Mims		67 Me.	62, 923, 987
	2235	26 Minn.	821, 2354	35 Or.	150
v. Mason		36 Or.	248, 664, 907,	v. Mortensen	1072, 1725,
38 La. An.	580, 2056		1951		1803, 2595
155 Mo.	2576	v. Minard	276	v. Mortimer	858
v. Mathers	2183	v. Miner	2513	v. Morton	
v. Mathews	2273	v. Minnick	2577	107 N. C.	1028, 1042,
v. Mathis	1230	v. Minor	580, 2056		1131
v. Matlock	1398, 1644	v. Minot	1157	8 Wis.	318
v. Matthews		v. Minton	318, 693, 2016	v. Moses	2551
44 Kan.	2419	v. Misenheimer	2086	v. Motley	824, 858
88 Mo.	1263	v. Missio	1672, 2535	v. Mowry	238, 458, 1048
69 N. C.	934	v. Mitchell		v. Moxley	1157
v. Maulsby	1131	68 Ia.	1136, 2062	v. Moy Looke	1703
v. Maxey	1750	119 N. C.	1398, 2540	v. Mulch	961
v. Maxwell	1963	Phillips	824, 839	v. Mulholland	
v. May		49 S. C.	2100	16 La. An.	390, 1018
4 Dev.	139, 142, 1362,	56 S. C.	2277	115 Ia.	2062
	1476	v. Mix	318, 1010, 1013	v. Mulkern	1136
142 Mo.	923, 1079	v. Moelchen	57, 396, 968,	v. Mullen	247
v. Mayberry	1202, 1205		1977, 2100	v. Mullins	1072
v. Maynes	1984	v. Moffitt	1350	v. Munco	218
v. Mayor	1680	v. Molier	2042	v. Munson	821, 851
v. Mead	1350	v. Molisse	1750	v. Murphy	
v. Meares	2061	v. Montgomery		45 La. An.	890, 987,
v. Medbury	2086	8 Kan.	1750		2277
v. Medlicott	672, 1362,	28 Mo.	949	118 Mo.	1157
	1440, 1853	v. Moody	1434, 1913	84 N. C.	326
v. Mellor	1354	v. Moon	2089	9 Nev.	1876
v. Melton		v. Moore		16 R. I.	1398, 1750
37 La. An.	1750, 1963	25 Ia.	894, 2059	48 S. C.	1985
120 N. C.	852, 1644,	81 Ia.	2061	v. Murray	851, 1072
	2086, 2231	38 La. An.	1755	v. Musgrave	21, 1010,
v. Melvern	2276	52 La. An.	2026		1164, 1974
v. Melville	1671	61 Mo.	2529	v. Musick	293
v. Menard	738	117 Mo.	851, 2513	v. Myers	1959
v. Merkley	364	156 Mo.	1397, 1732	v. Nagle	457, 655, 832,
v. Merrill	57	160 Mo.	833		851, 1385
v. Merriman	852, 2277	37 Nebr.	1350	v. Napoleon	246
v. Metcalf	2079	104 N. C.	1808	v. Nash	
v. Mewherter	2310	129 N. C.	177	7 Ia.	1398
v. Meyer		32 Or.	194, 1079,	10 Ia.	580, 949
64 N. J. L.	1432		1807, 2276	8 Ired.	949
65 N. J. L.	1432	v. Moothart	359	45 La. An.	63, 246, 851
v. Meyers		v. Moran		v. Nat	949
99 Mo.	682	34 Ia.	2059	v. Neal	1671
46 Nebr.	496, 1138	15 Or.	1803, 2363	v. Neel	
v. Meyenburg	463	v. Mordecai	1157	21 Utah	1135, 1136
v. Michael	506, 508,	v. More	398	23 Utah	166, 398
	1821	v. Morea	1820	v. Neill	612
v. Middleham	2079, 2336	v. Morey		v. Nelson	
v. Middleton	276	25 Or.	246	58 Ia.	1614
v. Mikesell	2059	2 Wis.	2089	59 Kan.	967
v. Milam	1388	v. Morgan		3 La. An.	838, 851
v. Miles	1985	40 Conn.	78	32 La. An.	2354
v. Miller		95 N. C.	1976	132 Mo.	505, 507
65 Ia.	2061	133 N. C.	2270, 2281	19 R. I.	2155
67 Mo.	2595	22 Utah	276, 390	13 Wash.	1109

	Section		Section		Section
State v. Nestaval	969	State v. Painter	2062	State v. Pettaway	2063
v. Nett	246	v. Palmer		v. Pettis	1781
v. Nettlebush	1447, 1448	88 Mo.	2277	v. Pettit	246, 928, 1615
v. Nettleton	2016	161 Mo.	1958	v. Pfefferle	457, 987, 1270, 2277
v. New Orleans Water-works Co.	1388, 1408	v. Pancoast	987	v. Phair	664, 1523
v. Newlin	1938	v. Parham	1445	v. Phelps	
v. Newman	233	v. Parish		74 Mo.	824, 841
v. Newton	1346, 2427	Busbee	561, 1327	5 S. D.	2059
v. Nichols	2058, 2061, 2276	22 Ia.	1855	2 Tyler	2237
v. Niles	1135, 1136	79 N. C.	1124, 1129, 1131	11 Vt.	826, 836
v. Noakes	20, 784, 1976	83 N. C.	133, 1021	22 Wash.	1853
v. Nocton	1442	v. Park	987	v. Phillips	
v. Noe	2008	v. Parker		118 Ia.	1442, 1451
v. Nolan	933	33 Ind.	1873	24 Mo.	276, 1045
v. Nordstrom	2264, 2265	7 La. An.	59, 195, 923, 987, 1374, 1671, 1985	v. Pierce	
v. Norris		89 Mo.	1974	90 Ia.	106
1 Hayw.	905	96 Mo.	1029, 1974	85 Minn.	661
27 Wash.	351	172 Mo.	988, 1434	91 N. C.	736
v. Northrup	56, 290	132 N. C.	852	v. Pike	
v. Norton	105, 111	v. Parks	691, 1612, 1985	65 Me.	363, 676, 2354
v. Novak	821, 822, 839, 2109, 2497	v. Parrotty	2235	20 N. H.	2349
v. Nowell	2281, 2282	v. Paterno	246	49 N. H.	571, 656, 1927, 1934, 1938, 1941
v. Nugent	216, 397, 1852	v. Patrick	2061	v. Pippin	398
v. Nussenholtz	987	v. Patterson		v. Place	360
v. Nye	1350	2 Ired.	204, 605, 953, 987, 1022, 1028, 1362	v. Plant	1620
v. Ober	2273, 2276	52 Kan.	2056	v. Platt	1350, 2492
v. O'Brien		73 Mo.	824, 832, 1852, 2071	v. Plum	2349
81 Ia.	987, 2098, 2277	88 Mo.	205, 1890, 2062	v. Plunkett	367
18 Mont.	852, 1263	68 N. C.	852	v. Plym	2506
7 R. I.	1690	74 N. C.	1021	v. Polhemus	1985
v. O'Day	1852	45 Vt.	1448, 2511	v. Pollard	923, 1750
v. Odell	2056, 2059, 2060	v. Patza	364	v. Polson	1398
v. O'Donnell	414	v. Payne		v. Pomeroy	
v. Ogden	200, 770, 949, 988	6 Wash.	987, 1270	25 Kan.	1750
v. O'Hara	2276	10 Wash.	2079	130 Mo.	2183, 2264
v. Olds	1398	v. Peace	1013, 1014	30 Or.	2513
v. Olin	1712, 2196, 2215, 2270	v. Peach	2513	v. Porter	
v. Oliver		v. Pearce		34 Ia.	728, 1750, 1938, 1976
2 Houst.	1398	56 Minn.	1432, 2272	105 Ia.	1669
55 Kan.	1416	15 Nev.	59, 246, 1614, 1983	75 Mo.	1890
39 La. An.	1755	v. Peel	682, 688, 689	32 Or.	56, 218, 247, 821
78 Miss.	1680	v. Peffers	2276	v. Potter	
v. O'Neal	57, 290, 1807	v. Penney	851	18 Conn.	826, 830, 832, 855
v. O'Neale	691, 923, 1612, 1985	v. Pennington	1877, 2575	Ida., 57 Pac.	1404, 1418
v. O'Neil	1700, 1807	v. Penny	1225	13 Kan.	246
v. O'Reilly	792	v. Pepper	2059	42 Vt.	2056, 2059
v. Osborn	1182	v. Peres	398, 1135, 2060	52 Vt.	4, 398, 1644, 2072, 2073, 2081, 2109, 2167, 2168
v. Osborne		v. Perkins		v. Potts	
28 Ia.	2089	3 Hawks	1071	78 Ia.	928
96 Ia.	987	66 N. C.	923, 1111, 1612	100 N. C.	1938
v. O'Shea	1434, 1446, 1447	v. Perry		v. Powell	
v. Ostrander	1035, 1669	Busbee	2079	61 Kan.	2513
v. Owen		136 Mo.	218	7 N. J. L.	672, 2346
73 Mo.	2027	121 N. C.	1163, 1802	v. Power	1442, 1725
78 Mo.	2277	v. Petersen	770, 851, 1135, 1136, 1157, 1693, 1976	v. Powers	
v. Owens		v. Peterson		25 Conn.	2575
109 Ia.	1106, 1108	38 Minn.	1350	130 Mo.	1977
22 Minn.	2060	129 N. C.	2105	72 Vt.	2118
v. Owsley	2513	v. Petsch	1434	v. Prater	987, 1079, 2196
v. Oxford	2364			v. Prather	507
v. Page	862			v. Pratt	
v. Pagels	232, 1219, 1674, 1852			98 Mo.	1896
v. Pain	105, 620, 988			121 Mo.	987, 1270

TABLE OF CASES.

STA

	Section		Section		Section
State v. Prendible	781, 987	State v. Revells	833, 1841	State v. Romain	987
v. Price	2355	v. Reynolds	2245	v. Roscum	367
v. Prins		v. Rhodes		v. Rose	
113 Ia.	318	111 N. C.	105	33 La. An.	1876
117 Ia.	318, 928	44 S. C.	933	Mo., 76 S. W.	1808
v. Privitt	681	v. Rice		v. Rosencrans	2513
v. Probasco	987, 1270, 2277	7 Ida.	568, 2079	v. Rosier	288
v. Prudhomme	580, 2056,	49 S. C.	1079, 1108,	v. Ross	505
	2265		2450	v. Roswell	2085, 2086
v. Pruett	111, 247, 1873	v. Richards		v. Rothschild	280
v. Pucca	2194	28 Ia.	1135, 1136	v. Rowe	1131
v. Pugh	1750	72 Ia.	2062	v. Roy	1852
v. Pugsley	987	v. Richie	1821	v. Royal	2349
v. Pulley	1045	v. Richmond	2354	v. Rozum	278, 987, 2277
v. Punshon		v. Ricks	246	v. Rugan	987, 1270, 2277
124 Mo.	143, 144,	v. Riddle	246	v. Ruhl	1021, 1029, 1036,
	1726, 1730	v. Rider			1896, 1899
133 Mo.	571, 852,	90 Mo.	63, 111, 923,	v. Rush	2354
	950, 1045		2277	v. Russell	
v. Quarles	2252, 2281, 2282	95 Mo.	238, 2277	90 Ia.	2059
v. Quinlan	2060	v. Ridgely	522	33 La. An.	2056
v. Quinn	905	v. Riggs		13 Mont.	1442, 2079
v. R. Co.	1350	39 Conn.	396, 406	83 Wis.	2302
v. Raby	398, 2237	110 La.	2354	v. Rutherford	1908
v. Rachman	2056	v. Riley	1755	v. Rutten	994
v. Railroad	92	v. Riney	580		
v. Rainsbarger	660, 1976,	v. Ripley	987, 1750	70 Ia.	2272
	2236	v. Rivers	321	30 La. An.	111, 247,
		v. Roach	1079		610
v. Ramsey		v. Robbins		v. Sadler	1072, 1439, 1442,
48 La. An.	1750, 1755	109 Ia.	232, 1938		1750
82 Mo.	1974	6 Ired.	2088	v. Saidell	166, 1045, 1154,
v. Rand	276	v. Roberts			1614
v. Randolph	922, 987, 1985	1 Dev.	826, 837	v. Sale	248, 1447, 1476
v. Rankin	949	15 Mo.	580	v. Salge	1842
v. Raper	364	52 N. H.	2535	v. Salverson	1230
v. Rash	397, 1878	v. Robertson		v. Samuel	2230
v. Rathburn	118	41 Kan.	1350	v. Sanders	
v. Rawls	4, 735, 1072	30 La. An.	246, 247	68 Mo.	1166, 1802
v. Raymond		111 La.	851, 1877	76 Mo.	363
20 Ia.	342, 2042	121 N. C.	398, 2097,	84 N. C.	290
53 N. J. L.	354		2100	52 S. C.	1003
v. Reader	2059	26 S. C.	1807, 2277	v. Sanford	2513
v. Reasby	2265	v. Robinson		v. Sannerud	2529
v. Reavis	347, 967, 2056	51 La. An.	1072	v. Sargent	
v. Red	821, 2277	52 La. An.	63, 852,	32 Me.	15, 1020
v. Reddick	568, 675		905, 1270,	32 Or.	1135, 1138
v. Reddington	506, 1828,		1750, 2100	v. Sater	923, 987
	1852	117 Mo.	568, 832, 2272	v. Satterfield	2494
v. Reed		20 Nebr.	1350	v. Sattley	2494
3 Ida.	1803	16 N. J. L.	216, 318,	v. Sauer	
53 Kan.	390, 987, 1439		406	38 Minn.	2497
49 La. An.	1018	32 Or.	398, 852, 1899,	42 Minn.	987, 2277
50 La. An.	390, 580		1974	v. Saunders	
60 Me.	1018, 1043	20 W. Va.	2354	68 Ia.	318, 1249
62 Me.	278, 1044, 1126	12 Wash.	934	37 La. An.	246
89 Mo.	1029, 1036	v. Robison	1850	14 Or.	194, 987,
137 Mo.	247, 1445	v. Rockett	1270		1398, 1435, 1447,
39 Vt.	62, 200	v. Rodman	276, 285		1452, 1890, 2277
v. Regan	1853	v. Roe	1108	v. Savage	347, 580,
v. Reick	1003	v. Rogers			987, 1684, 2059
v. Reidel	1398, 1675	54 Kan.	1079	v. Sawtelle	16, 507, 2183
v. Reinhart	278, 331, 1230	112 N. C.	852, 1700	v. Sayers	1890
v. Reinheimer	1620, 1669,	119 N. C.	1398, 2497,	v. Scates	855
	1974, 2062		2540	v. Schaefer	2349
v. Reitz	571, 660, 1977	22 Or.	1350	v. Schaffer	391
v. Renard	2183	v. Rolla	2079	v. Schlagel	2059, 2060
v. Reno	1853	v. Roller	2060	v. Schmidt	1750
v. Renswick	987, 2042	v. Rollins	246, 933, 1005	v. Schneider	1779
v. Renton	194, 367				

	Section		Section		Section
State v. Schnepel	1853, 2277	State v. Shonhausen	901	State v. Snow	2575
v. Schooley	1267	v. Shores	1912	v. Snowden	2304
v. Schroyer	923	v. Shreve	1852	v. Soper	
v. Schweitzer	2088, 2167	v. Shuff	689, 2501	Ia., 91 N. W.	321
v. Scott		v. Shuford	363	16 Me.	2374
1 Hawks	233	v. Sibley		148 Mo.	232, 688, 1700,
4 Ired.	247	Mo., 31 S. W.	987, 1135	1890, 1898,	
24 Kan.	111, 246, 247	131 Mo.	923, 924	1899, 1938, 2511	
12 La. An.	1442	v. Simas	858	v. Sorter	852, 905, 1853,
24 La. An.	1897	v. Simms	232	2098	
48 La. An.	1021	v. Sims	580, 1876, 2100	v. South Kingston	2580
49 La. An.	2501	v. Simon	905	v. Southall	321
39 Mo.	2071	v. Simonis	569, 675	v. Southern	944, 987, 2277
45 Mo.	2008, 2016	v. Simons	291	v. Spangler	246
172 Mo.	225, 357	v. Simpson		v. Sparrow	1839, 1842
81 N. C.	1021	91 Me.	2575	v. Spaulding	238, 1219, 1639
28 Or.	2059	N. C., 45 S. E.	852	v. Speaks	569
v. Seals	2086	v. Sioux Falls Brewing		v. Speight	691, 1614
v. Seawell	1605	Co.	2582	v. Spell	247
v. Secrest	560, 561	v. Skidmore	105, 111	v. Spence	700
v. Seeyers	133, 280, 923	v. Slack	15, 905, 918,	v. Spencer	
v. Seiler	2061	987, 1270, 2079		45 La. An.	1874
v. Senn	852, 2349	v. Slamon	288, 2183, 2264	73 Minn.	1141
v. Severson	811, 1821	v. Sloan		21 N. J. L.	232, 233
v. Sexton		55 Ia.	2239	15 Utah	2059
147 Mo.	1451, 1750	47 Mo.	111, 247	v. Spendlove	63, 111
10 S. D.	1012, 1696	22 Mont.	56, 107	v. Spengler	1078
v. Seymore	276, 390,	v. Slutz	580	v. Spiers	784
394, 728, 1976		v. Smalley	106, 354	v. Spillers	821, 2100
v. Seymour	1911	v. Smalls	1350	v. Spotted Hawk, see	
v. Shackelford	851	v. Smallwood		State v. Yellow Hair.	
v. Shadwell		75 N. C.	285, 2079	v. Sprague	
22 Mont.	246, 248,	78 N. C.	2349	149 Mo.	2056
	987, 1983	v. Smarr	142	64 N. J. L.	1003, 1618
26 Mont.	111, 248	v. Smith		v. Spray	351
v. Shafer		49 Conn.	104, 451, 1725,	v. Squires	2264, 2307
22 Mont.	246, 1614	1890, 2044		v. Stade	1684
26 Mont.	363	5 Day	301, 318	v. Stair	696, 1157, 1168
v. Shaffer	1033, 1439,	54 Ia.	166, 1154, 2062	v. Staley	
2550		74 Ia.	1398, 2259	14 Minn.	824, 832, 834,
v. Shannehan	1034, 1035	84 Ia.	2062	1021, 1028, 1042	
v. Shattuck	2536	99 Ia.	736, 2060, 2385	45 W. Va.	1108, 1874
v. Shaw		102 Ia.	363, 1388, 2060	v. Stallings	923
58 N. H.	93, 367, 376	106 Ia.	104, 2059	v. Standard Oil Co.	2257
73 Vt.	276, 987, 1913	48 La. An.	1442	v. Standley	2062
v. Shea	2512	106 La.	1938	v. Stanley	2059
v. Shean	205, 1620,	32 Me.	1976	v. Staples	280, 987, 1408
1878, 2062		56 Minn.	1157	v. Starnes	287, 1117
v. Sheets	569	78 Minn.	460, 2079	v. Starr	1028
v. Shelton		72 Miss.	830, 835	v. Staton	761, 1131
64 Ia.	389, 1974	80 Mo.	1877	v. Stearns	2577
2 Jones L.	1362, 1442	114 Mo.	293	v. Stebbins	2056
16 Wash.	995, 2512	125 Mo.	923, 987, 2277	v. Steeves	905, 1263, 1349
v. Shepherd	105	137 Mo.	1852	v. Stegman	2016
v. Sheppard	266, 390,	164 Mo.	111, 247, 1908	v. Steifel	580, 1852
396, 1003		68 N. J. L.	794	v. Stein	960, 1263
v. Sheridan	2264	75 N. C.	1807	v. Steinborn	2421
v. Sherman	2572	86 N. C.	580	v. Sterrett	
v. Sherwood	2085, 2505	44 Oh. St.	1350	68 Ia.	1983, 2326
v. Shettleworth	1135, 1136	Phillips	1974	71 Ia.	194, 968, 988
v. Shields		12 Rich.	246, 247	v. Stevens	
45 Conn.	62, 200,	8 S. D.	580, 949	67 Ia.	2272
	923, 987	7 Vt.	923	56 Kan.	357
112 Ia.	2184	26 Wash.	1142	S. D., 92 N. W.	952,
13 Mo.	923	v. Snider	1135	1959	
13 S. D.	1157	v. Snover		v. Stevenson	2059
v. Shinborn	413, 750,	63 N. J. L.	59, 1646	v. Stewart	
1977, 2011, 2016		64 N. J. L.	398, 399	51 Ia.	580
v. Shive	157	65 N. J. L.	398	9 Ired.	2079

TABLE OF CASES.

STA

	Section		Section		Section
State v. Stewart		State v. Testerman	363, 2277	State v. Tulley	2059, 2062
65 Kan.	276	v. Tettaton	363, 2265	v. Turley	
45 La. An.	246	v. Thaden	2271	142 Mo.	321
142 Mo.	580	v. Thawley	246, 1446	153 Ind.	2276, 2281
v. Stice	360	v. Thibeau	1003	v. Turner	
v. Stickley	689	v. Thibodeaux	2100	19 Ia.	2071
v. Sloan	1750	v. Thomas		76 Mo.	194, 1890
v. Stoffels	2264, 2272	47 Conn.	78, 1354	110 Mo.	1890
v. Stokely	2349	111 Ind.	1842, 1908	119 N. C.	1079
v. Storms	851, 861, 862	58 Kan.	276	29 S. C.	246
v. Stowell	2062	28 La. An.	905	36 S. C.	692, 935, 1612, 1807, 1985,
v. Strong	293	30 La. An.	1781		2277
v. Stroope	2535	111 La. An.	247	Wright	1671
v. Stuckey	1033, 1446	68 Mo.	2595	v. Turpin	63, 111, 246, 247
v. Sudduth	1135	99 Mo.	1669, 2363	v. Tuten	1807
v. Sullivan		138 Mo.	111	v. Tweedy	1450
51 Ia.	1450	98 N. C.	2258, 2276	v. Twitty	194, 318, 1126, 1131, 1684
43 S. C.	1977	3 Strobh.	1126		2231, 2339
v. Summar	923, 928, 968, 1620	v. Thomason	1125, 1126, 1131, 1514	v. Ulrich	461
v. Summer	1874	v. Thompson		v. Ulsemer	1442, 2060
v. Sumpter	1842	69 Conn.	1079	v. Umble	2354
v. Surry	59	79 Ia.	1195	v. Underwood	290
v. Swafford	2303	87 Ia.	2059	v. Upham	2059
a. Swayze	1890, 1896	106 La.	1807	v. Upton	988
v. Swett	208	80 Me.	561, 2008, 2016, 2020	v. Ussery	293, 821, 822, 843, 850, 852, 856, 857, 861, 2071
v. Swift		132 Mo.	1750, 2016	v. Vaigneur	1586
57 Conn.	1208	141 Mo.	7, 1750, 1819	v. Valentine	1375, 1410, 1667
120 Ia.	2513	97 N. C.	105, 354	v. Vallery	246, 2100
10 Nev.	1350	14 Wash.	357, 811	v. Van Buskirk	2296, 2363
v. Symmes	1157	v. Thomson	222, 1154	v. Van Duyen	1350
v. Tackett	63	v. Thornhill		v. Van Houten	818
v. Talbert	1750	174 Mo.	59, 987	v. Van Tassel	232, 852, 960, 2183, 2497
v. Talbott	987, 1041, 1045, 2260	Mo., 76 S. W.	960	v. Van Winkle	
v. Tall	905, 2327	v. Thornton	2059	1 Dutch.	1661
v. Tarter	111	26 Ia.	2485, 2512	80 Ia.	276, 347, 2059
v. Tasby	247	10 S. D.	347	v. Van Zant	1732
v. Tate		v. Thurtell	693, 1079, 2008	v. Vance	
50 La. An.	1671	v. Tice	861, 1750, 1974,	32 La. An.	246, 247
156 Mo.	1852	v. Tighe	2079	17 Ia.	2119
v. Tatrow	835	v. Tilghman	1398	v. Vandergraff	1144
v. Taylor		v. Tilly	63, 1750	v. Vandiver	987
Ia., 61 Pac.	363	v. Timberlake	1405	v. Vaun	233, 862, 1732
36 Kan.	1853	v. Timmens	205, 2062	v. Vaughan	
45 La. An.	628, 923, 987, 2277	v. Tindall	2354	152 Mo.	1335
64 Mo.	111	v. Tippet	194	22 Nev.	246, 363
98 Mo.	923, 987, 2277	v. Tipton	1141	v. Vickers	247, 905
118 Mo.	987, 1270	v. Tisdale	2582	v. Vicknair	826, 2056
134 Mo.	276, 968, 1003, 1126, 1128, 1131	v. Tobie	2056	v. Vincent	
136 Mo.	140	v. Toby	1144	24 Ia.	923, 1125, 1126, 1127, 1128, 1129, 1157, 1975, 1976
88 N. C.	905	v. Todd	1821	S. D., 91 N. W.	861
3 Or.	1263	v. Toland	2579	v. Vines	
54 S. C.	821	v. Tomblin	1398, 1404	34 La. An.	218
56 S. C.	787, 1033, 1442, 1840	v. Tompkins	2008, 2016, 2027	93 N. C.	1963
57 S. C.	62, 1618, 1974, 1976	v. Toombs	1807	v. Vittum	2529
70 Vt.	278, 2535	v. Tosney	961	v. Von Sachs	836
v. Teeter	242, 2277	v. Totten	142, 1476	v. Wackernagel	347
v. Teipner	2203	v. Tough	581	v. Wagner	1436, 1747, 1748
v. Teissedre	1853	v. Townsend		v. Waldron	1398
v. Tennebom	720	19 Or.	2059		
v. Terline	1810	7 Wash.	1852		
v. Terrell	569, 687, 1433, 1438	v. Tozier	57, 290		
v. Terry	1076	v. Traveler's Ins. Co.	2578		
		v. Traylor	925, 2277		
		v. Trusty	851		
		v. Tuffy	1350		

	Section		Section		Section
State v. Walker		State v. Wells		State v. Williams	
77 Me.	1732	11 Oh.	1672, 1674, 1677	67 N. C.	1362, 1438, 1447
78 Mo.	1750, 1755	1 N. J. L.	56, 63, 1349	97 N. C.	1451
98 Mo.	580, 2056, 2059	v. Welsh	1275, 2109	129 N. C.	1128
50 La. An.	1898	v. Welsor	678, 1441	27 Vt.	278
34 Vt.	824, 832	v. Wentworth		49 W. Va.	1819, 1873
v. Wallace		65 Me.	2251, 2270, 2276	v. Williamson	
9 N. H.	398, 1644, 2529	37 N. H.	131, 220, 835, 1768, 2531	42 Conn.	2056, 2059
44 S. C.	142	v. West		57 Mo.	1684
v. Wallis	2410	1 Houst. Cr.	1160	106 Mo.	689, 1938
v. Wallman	2349	45 La. An.	1476	65 S. C.	987, 1270, 2276
v. Walsh		46 La. An.	78	v. Willingham	949, 1891, 1963
44 La. An.	111, 2276	95 Mo.	1890, 2277	v. Willis	
5 Nev.	106	118 Wis.	2235, 2236	71 Conn.	815, 822, 823, 855, 862, 1048
v. Walters		v. Westfall	396	9 Ia.	2059
45 Ia.	357	v. Wetherell	2025	119 Mo.	2245
7 Wash.	2513	v. Whalen		v. Wilmbusee	1852
v. Walton	321	98 Ia.	2349, 2354	v. Wilson	
v. Waltz	254	148 Mo.	770	22 Ia.	2088
v. Ward		v. Wheat	1124, 1398, 1406	10 Ired.	2063
49 Conn.	155, 987, 1104, 1106	v. Wheeler		24 Kan.	1375, 1387
103 N. C.	1131	116 Ia.	1136	23 La. An.	1433
39 Vt.	560	94 Mo.	205	43 La. An.	247
61 Vt.	177, 354, 451, 728, 1841, 1974	108 Mo.	2061	109 La.	507
v. Warner		v. Whelehon	1131, 1666, 1669	72 Minn.	321
13 Lea	2281	v. Whit	1807	137 Mo.	2513
74 Mo.	1135	v. White		143 Mo.	321
v. Warren		19 Kan.	2324, 2327	31 N. J. L.	2235
124 N. C.	133, 987	46 La. An.	1405	15 R. I.	1354, 1608
41 Or.	952, 1851	68 N. C.	142, 1476	v. Wiltsey	2191
v. Wart	2059	15 S. C.	1029, 1051	v. Windahl	105, 792
v. Washington		70 Vt.	367, 1219, 2464	v. Windsor	1041
49 La. An.	1817, 1828	10 Wash.	500	v. Wines	2272
104 La.	1135	v. Whiteacre	791, 794, 1385	v. Wing	1398, 1405
v. Waters	1781	v. Whitesell	62, 200	v. Wingo	2056
v. Watkins	10, 40, 390	v. Whitfield		v. Winkley	1044, 1045, 2084, 2085, 2088
v. Watson		70 N. C.	826, 832	v. Winner	2081
81 Ia.	778, 2062	92 N. C.	1131, 1132	v. Winston	838, 857
102 Ia.	987	v. Whiton	1908	v. Winter	1694, 1938
65 Me.	987, 1116, 1951, 1978, 2277	v. Whitt	1442	v. Wintzingerode	216, 414
31 Mo.	2056	v. Whittier	506	v. Wisdom	
36 La. An.	246, 1842	v. Whitworth	1841	119 Mo.	9, 275, 852
v. Watt	833	v. Wickliff	133, 772	8 Port.	347, 1781
v. Way		v. Wiewers	1157	v. Wiseman	2235
5 Nebr.	398	v. Wiggin	1219	v. Witham	15, 133, 142, 216, 398, 2277
6 Vt.	2081, 2088	v. Wiggins	247, 968, 987, 1003, 1031	v. Wolcott	2056
v. Wayman	1195	v. Wilcox	293, 561, 791, 1976, 2497	v. Wolf	
v. Wayne	238	v. Wilkerson	1205, 1254	112 Ia.	56
v. Weaver	105, 580, 2273	v. Wilkins	1135	118 Ia.	1136
v. Webb		v. Williams		v. Wolff	318, 326
6 Ida.	968	20 Ia.	2088	v. Wong Gee	218
18 Utah	561, 1873, 2026	120 Ia.	2513	v. Wong Quong	2089
v. Weber	728, 1873	2 Jones L.	1010, 1015	v. Wood	
v. Webster	238	7 Jones L.	2081	49 Conn.	326
v. Weeden	923	40 La. An.	111, 246	17 Ia.	2042
v. Welch		46 La. An.	246	124 Mo.	2354
26 Me.	2234, 2235	111 La.	505, 524, 780, 1828, 1978	53 N. H.	687, 1700, 1726, 2363
22 Mont.	390, 1198	54 Mo.	276	53 Vt.	1362, 1431
33 Or.	949, 1029	136 Mo.	343	v. Woody	1015
v. Weldon	492, 498, 571	152 Mo.	2520	v. Woodruff	166, 660, 693, 1154, 2016
v. Wells		65 N. C.	1807	v. Woods	1874, 1898
46 Ia.	1013				
48 Ia.	2062				
54 Kan.	987				

TABLE OF CASES.

STA

	Section		Section		Section
State v. Woodside	1911	Steadman v. Arden	1858	Steinbrunner v. R. Co.	1698,
v. Woodson	111, 247	Steagald v. State	1398, 1404		1699
v. Woodward	248	Steam Stone Cutter Co. v.		Steinburg v. Meany	1890
v. Woolard	2056	Scott	714	Steiner v. Snow	1653
v. Workman	609, 619, 2100	Steamboat Albatross v.		v. Trainum	1291, 1960
v. Worthing	609	Wayne	1960	Steinham v. U. S.	2056
v. Worthingham	2083	Steamboat Clipper v.		Steinhofel v. R. Co.	1750
v. Worthington	1144,	Logan	1977	Steinke v. Graves	1633
	1781, 2100	Steamboat Neptune, The	6	Steinke's Will	1736
v. Wrاند	216	Steamboat Thames v.		Steinkeller v. Newton	761, 1213
v. Wright		Ersline	2164	Steinman v. McWilliams	72, 73
112 Ia.	228, 1447,	Steamboat Wisconsin v.		Steinmetz v. Versailles &	
	1878, 1938	Young	1195	O. Turnpike Co.	2575
40 La. An.	581	Steamboat Co. v. Brockett	1078	Steinway, re	1858
48 La. An.	1062	Steamship Ville du Havre	285	Steketee v. Kimm	1244, 1729
134 Mo.	678, 2501	Stearman v. R. Co.	905	Stell v. Prickett	1587
141 Mo.	108	Stearns v. Bank	905, 907	Stembridge v. Southern	
41 N. J. L.	2522	v. Cox	406	R. Co.	1976
75 N. C.	953, 1028,	v. Doe	150, 1214,	Stennett v. Ins. Co.	1947
	1042		1335, 1674	Stennil v. Brown	1681, 2164
14 Or.	1350	v. Field	682	Stephan v. Metzger	750, 1198,
2 Pen. Del.	905	v. Gosselin	581		1539
v. Wyld	2086	v. Hendersass	1469	Stephen v. Gwenap	1456
v. Wyse	247, 987,	v. Vincent	1890	v. State	832, 1135,
	1003, 2277	Stebbing v. Spicer	2529		1136
v. Yandle	2513	Stebbins v. Anthony	2239	Stephens, re	797
v. Yanz	1750	v. Duncan	1268, 1306,	v. Bernays	6
v. Yellow Hair	778, 987,		1320, 1513	v. Com.	1003
	1674, 2059, 2512	v. Miller	89	v. Cotterell	2237
v. Yerger	153	v. Sackett	585, 1258	v. Foster	1884
v. Yokum		Stecher Lith. Co. v. Inman	1072	v. McCloy	1778
11 S. D.	246, 2512	Steel v. Pope	1677	v. Mattox	2313
14 S. D.	246	v. Williams	1195	v. People	363, 398, 747,
v. York	825, 832	Steele v. Dart	803		987, 1005, 1028,
v. Young		v. Helm	1938		1873, 1874
39 N. H.	580	v. Logan	2354	v. State	609
104 Ia.	1442	v. Lord	1198	v. Vroman	1053
52 La. An.	833	v. People	56, 318	v. Westwood	1680
107 La.	1476	v. Price	271, 1736, 2106	v. Williams	1779
99 Mo.	1051, 1263	v. Queen	1681	Stephenson v. Baumister	1681
119 Mo.	852	v. R. Co.	2509	v. Cook	2245
153 Mo.	580	v. Schricker	1335	v. Doe	1239, 1651
67 N. J. L.	851, 861	v. State		v. Kilpatrick	254
9 N. D.	2497	83 Ala.	194	v. State	1168
67 Vt.	416	33 Fla.	111, 246, 247	v. Stephenson	1738
v. Zdanowicz	488, 2252,	76 Miss.	852	Stepp v. State	2155
	2276	v. Stewart	2317	Steptoe v. Flood	2349
v. Zeigler	2512	Steele-Smith G. Co. v.		Sterling v. Detroit	792
v. Zellers	111, 247, 1329,	Potthast	2363	v. Potts	1195
	1838, 1839,	Steen, ex p.	2159	Sterling L. Co. v. Stinson	1073
	1890	v. Santa Clara V.		Stern v. Loewenthal	406
State Bank v. Brewer	736, 1913	M. & L. Co.	987	v. People	1668
v. Brown	1521	Steele v. Aylesworth	944	v. Stanton	782
v. Carr	770	Steenerson v. R. Co.	1700, 2566	Sternan v. Marx	1966
v. Dutton	1062	Steeple v. Downing	1651	Sternberg v. Callanan	1275
v. Enslinger	1280	Steeple v. Newton	987	Sternheim v. Burcky	1705
v. Hutchinson	1768,	Steer v. Little	769, 770, 771,	Sterrett v. Bull	1518, 1521,
	2337, 2339		772		1537
v. Rhoads	529	Steffen v. Bauer	613	Stetson v. Gulliver	1275, 1651
State National Bank v.		Stegall v. Stegall's Adm'r	1492,	Stetson's Will	2591
Butler	2415		1605, 2063	Stettauer v. White	751
Statham v. Ferguson	613, 2123	Stein v. Ashby	1665	Stevellie v. Lowry	2158
v. State	770	v. Bowman	1483, 1487,	Stevens v. Beach	944, 1003,
Stauffer v. Young	38, 89,		2235, 2336		1007
	233, 344, 392	v. Fogarty	2444	v. Beardsley	392
Staunfield v. Jutter	2536	v. Leeper	1350	v. Com.	2059, 2497
Stayner v. Droitwich	1364, 1644,	v. Stein	1335, 1674	v. Dudley	1873
	1670, 1703	Steinbach v. Ins. Co.	758, 907,	v. Ellsworth	718
Stead v. Heaton	1465, 1476		912	v. Hatch	2408

	Section		Section		Section
Stevens v. Irwin	1312, 1985	Stewart v. Spedden	1871	Stockton v. Williams	1586
v. Leonard	1041, 1511	v. State		Stockton C. H. & A. W. v.	
v. Miles	1777	42 Fla.	1003	Ins. Co.	451
v. Miller	1072	58 Ga.	2236	Stockwell v. Blamey	1082
v. Montgomery	2356	19 Oh.	111, 778, 1951,	v. R. Co.	1151, 1160, 1802
v. Moulton	1554		1976	v. Silloway	1225
v. Pinney		Tex. Cr., 67 S. W.	1117	Stoddard v. Ham	2413
3 B. & Ald.	2447	v. Stewart		v. Mix	1195
2 J. B. Moore	2447	177 Mass.	1737	v. Winchester	681
8 Taunt.	2447, 2456	41 Wis.	609	Stoddard Mfg. Co. v.	
v. R. Co.	1621	v. Swanzy	1271, 1677	Miller	2466
v. Reed	2083		1681, 1684	Stodder v. Hoffman	608
v. State		v. Trenier	2167	Stoddert v. Manning	2222, 2223
Ala., 35 So.	851, 1974	v. Valley R. Co.	1074	Stoeber v. Whitman	1223, 1257,
3 Ark.	2570	Steyner v. Droitwich	1179, 1598		1644, 1683
76 Ga.	2239	Stice, ex p.	580, 2268,	Stoffer v. State	1009
50 Kan.	1188		2279	Stoher v. St. L. I. M. &	
19 Nebr.	1853	Stickney v. Stickney	2340, 2341	S. R. Co.	437
v. Stevens		Stier v. Oskaloosa	2572	Stokes v. Carne	1647
150 Mass.	581	Stiles v. Eastman	1141	v. Dawes	1573, 1605,
56 N. J. Eq.	2505	v. Homer	1521		1670, 2143
v. Vancleve	233, 1735,	Still v. Hoste	2474	v. People	21, 105, 106, 110,
	1738	v. Hutto	2531		111, 247, 389,
v. Webb	1807	Stille v. Lynch	528		987, 1005
v. West	1956, 1963	Stilling v. Thorp	1696	v. State	
v. Whitcomb	2222	Stillingfleet v. Parker	1273	5 Baxt.	2265
Stevenson v. Com.	1043	Stillwater Turnpike Co. v.		18 Ga.	923, 1985
v. Dunlap	1298,	Coover	1951	Stokoe v. R. Co.	2307, 2309
	1300	Stillwell Mfg. Co. v.		Stoll v. Daly Min. Co.	199, 249,
v. Ebervale Coal Co.	561	Phelps	561, 660		250, 1984
v. Gunning's Estate	1106,	Stinehouse v. State	1890	Stolp v. Blair	377, 1125, 1126,
	1108, 1109,	Stinson v. R. Co.	463		1127, 1128, 1131
	2027	v. Russell	2168	Stolze v. Term. Co.	463, 714
v. Hoy	377, 1268	Stipp v. Claman	1878	Stomne v. Hanford P. Co.	571
v. McReary	2083	Stirling v. Sterling	1618	Stone v. Blackburn	586
v. Moody	1186, 1677,	v. Wagner	1174	v. Boscawen Mills	1876
	1681, 2373	Stith v. Peckham	2437	v. Carter	1876
v. Morris	2336	Stittgen v. Rundle	2572	v. Com.	1066
v. Stewart	38, 39, 392	Stobart v. Dryden	1033, 1431,	v. Covell	714, 718
v. U. S.	106		1432, 1505	v. Fitts	1651
Stevison v. Earnest	1186, 2183	Stober v. McCarter	610, 2237,	v. Goss	2212
Steward v. Scott	1239		2336, 2337	v. Hubbard	2025
Stewart v. Allison	530, 1352,	Stockbridge v. Quicke	1644,	v. Huffine	950
	1632, 1635		1645	v. Ins. Co.	
v. Anderson		v. W. Stockbridge	1267,	68 Ia.	64
111 Ia.	416, 1974		2139, 2141	71 Mich.	460, 779
59 Ind.	2409	Stockbridge Iron Co.		v. Langworthy	68, 201, 1244
v. Bank	1871	v. Cone Iron Works	1862	v. Moore	1719
v. Blease	2132	v. Hudson Iron Co.	2417,	v. Nash	1662
v. Butler	1257		2498	v. Pendleton	201, 461
v. Cheatham	1777	Stockdale v. Bushby	2474	v. People	1835
v. Conrad's Adm'r	18	v. Escant	1212	v. R. Co.	
v. Equit. M. L. Ass'n	1693	v. Hansard	2375	N. H., 55 Atl.	93, 199
v. Everts	1721	v. Young	1188, 1189, 1195,	88 Wis.	1721
v. Hood	901, 913, 1389		2522	v. Sanborn	1198, 2104
v. Lispenard	229	Stocken v. Collin	2152	v. State	
v. Massengale	1254, 2222	Stocker v. Foster	1576	105 Ala.	841, 861
v. Morris	6, 747, 754	Stockett v. Watkins	1083	Ga., 45 S. E.	342, 527,
v. Muirhead	1062	Stockfeth v. De Tastet	815, 850,		1871, 2042,
v. People	38, 1126,		2183		2059, 2060
	1194, 1195	Stocking v. State	2056, 2081	4 Humph.	363, 390
v. Nashville	2507	Stockley v. Cissna	1573	v. Tupper	715
v. R. Co.		Stockman v. Hampton	1211,	v. Vance	529
11 Ia.	2354		1252	v. Varney	66, 73, 74
141 Ind.	2433	Stocks v. Ellis	983	v. Watson	568, 1722
78 Minn.	792	Stockslager v. M. L. & S.		Stoner v. Ellis	1084, 1678
v. Redditt	689, 1938	Institution	2526	Stones v. Byron	1911
v. Rossiter	1388	Stockton v. Demuth	905, 907,	v. Menhem	1163
v. Sherman	2119		1043	Stoops v. Smith	2465

TABLE OF CASES.

STO

	Section		Section		Section
Stoppert v. Nierle	64, 133, 1010, 1013, 1141	Stratton v. Hawks	1225	Studebaker Mfg. Co. v.	
Storer's Will	681	v. Henderson	1911	Dickson	1195
Storey v. Bank	2008	v. Oregon City	2577	Stukeley v. Butler	2094
v. Flanagan	1651, 2144	v. State	928	Stull v. Stull	
v. Lord Lennox	1856,	Strauss v. Heiss	1350	Nebr., 96 N. W.	1091
	2218, 2319	Straw v. Greene	2115	197 Pa.	2354
v. State	246	Strawbridge v. Clamond		Stumm v. Hummel	166
Storm v. Green	1246	Tel. Co.	1199	Stumore v. Shaw	1951
v. U. S.	944, 1856	Street v. Broadus	2349	Stump v. Hughes	1312, 1513
Storms v. Storms	2237	v. Brown	1858	v. Napier	529
Storr v. Scott	1060	v. Nelson	1246	Sturbridge v. Franklin	2505
Storrie v. Grand Trunk		Streeter v. Bartlett	1290	Sturdevant's Appeal	225, 2491
El. Co.	1951	v. Sawyer	785	Sturdy v. Armand	2455
Storrs v. Wetmore	2222	Streppone v. Lennon	2465	Surge v. Buchanan	1208, 2119,
Story v. De Armond	2358	Stribling v. Stewart	2054		2153
v. Gammell	2416	Strickland v. Hudson	1388	Sturges v. Hart	1195
v. R. Co.	288, 1807	Strickler v. Todd	18	Sturgis v. Baker	2120
v. Saunders	905, 912, 913, 1028, 1126, 1502, 1873	Strimpfler v. Roberts	89, 1219, 1246, 1680	v. Robbins	15, 944
v. State		Stringer v. Marshall	15	v. Work	2477
99 Ind.	413, 1157	Stringfellow v. State	770, 778, 2071	Sturla v. Freccia	1495, 1632, 1633, 1634, 1661, 1670, 1672, 1674
68 Miss.	390, 1263	Stroble v. New Albany	2552	Sturm v. Ins. Co.	18, 1390
Stoudenmire v. Brown	1354	Strode v. Churchill	1681	v. Jeffree	1208
v. Williamson	1691, 1693, 1694, 1697	v. Russell	2426, 2470	Sturtevant v. Robinson	1267,
v. Wilson	944, 1770	v. Washer	7		2107
Stough v. Ogden	2525	Strohaner v. Voltz	2433	v. Wallack	1073
Stout v. Rassel	987	Strohm v. R. Co.	663	Styles v. Decatur	438
v. Rigney	1225	Strom v. R. Co.	2218	v. Gray	1225
v. Slattery	2165	Strong v. Brewer	693, 1779	Suddeth v. State	821
v. Wood	586	v. Dodds	2304	Suddith v. Boone	568
Stovel v. Coles	1859	v. Runnels	1681	Sudlow v. Warshing	1651, 2026
Stover v. Boswell	2083	v. State	321	Suffolk v. Green	2257
v. People	2273	v. Stevens Point	613	v. Greenville	1179, 1199
Stow v. Converse	55, 64, 66, 73, 1983	v. Stewart	1062	Sugar C. C. M. Co. v.	
v. Grand Rapids	1350	Strosser v. Ft. Wayne	1956	Peterson	451
v. People	1195	Strother v. Barr	4, 1174, 1246, 2091	Sugar Pine D. & L. Co. v.	
Stowe v. Bishop	1951	v. Christy	1651	Garrett	1201
v. Querner	1189	v. Lucas	2005, 2008, 2016, 2573	Sugden v. St. Leonards	112, 271, 1129, 1267, 1362, 1420, 1576, 1714, 1735, 1736, 2052, 2106
Stowell v. Flagg	529	v. State	2512		1290, 2048
v. Hazelett	1083	v. Willan	1647	Suggett v. Kitchell	
Strachan, re	1856, 2319	Stroud v. Com.	1755	Sullivan v. Collins	
v. Jones	1842	v. Springfield	1564, 1570, 1587, 2141	20 Colo.	2464
Strahan, re	2281	Stroud Election Case	2287	107 Wis.	1890
Strain v. Fitzgerald	2105	Struckmeyer v. Lamb	2323	v. Com.	457
v. Murphy	1225	Strudgeon v. Sand Beach	252,	v. D. & H. Canal Co.	458
Strait v. State	857		1721, 2220	v. Foley	1938
Straker v. Graham	2352, 2353, 2354	Strudwick v. Brodnax	907, 913, 916, 1389	v. Goldman	2515
Stranahan v. East Had-		Strunk v. Ochiltree	1029	v. Hense	379, 1225, 1651, 2580
dam	1062	Struthers v. R. Co.	714	v. Kuykendall	95, 668, 669
Strang v. People	200, 246, 391, 933, 950, 987, 1005, 1135, 2079	Strutton v. Com.	1807	v. Lear	1943
v. State	318	Stuart v. Allen	2195	v. Nicoulin	1862, 2183
v. Wilson	529	v. Fitzgerald	1267	v. Norris	913, 1124, 1389
Strange v. Crowley	2105	v. Havens	2220	v. O'Leary	406, 987
v. Donohue	1777	v. Lovell	406	v. Oshkosh	252
Stranham v. Cullington	1364	v. People	136	v. R. Co.	2510
Strata Mercella's Case,		v. Swazy	1681	v. Richardson	1239, 2145
Abbot of	1152, 1154, 1160, 1211, 1347	Stubblings v. Curtis	1890	v. Salt Lake	199
Stratford v. Ames	1244, 1391	Stubbs v. Houston	229, 1938	v. State	
v. Sanford	774	Stubly v. Beachboard	321	66 Ala.	1612, 1807
Straton v. Rastall	2432	Stuckey v. Bellah	689, 1958	102 Ala.	1447
Stratton v. Dole	206, 213, 1623	Stuckslager v. Neel	1549, 1560	66 Ark.	830
		Studdy v. Sanders	2313, 2529	101 Ga.	1750
		Studebaker B. M. Co.		58 Nebr.	1750, 2071
		v. Endom	1960		

	Section		Section		Section
Sullivan v. State		Sutton v. Griebel	2410	Swing v. Sparks	1543
6 Tex. App.	1398,	v. Johnson	194	Swink v. French	1503
	1404, 1405	v. Lumber Co.	2442	Swinerton v. Stafford	2139
v. Sullivan		v. McLoud	1195, 1196,	Swinney v. Booth	728
92 Me.	96		1225	v. Patterson	321
114 Mich.	1310	v. People	2514	Swire v. Bell	1510
Sulphur Mines Co. v.		v. R. Co.	905, 2578	Swisher's Case	1441
Thompson	1778, 1956	v. Sadler	2500	Switzer v. Boulton	1407
Summer v. Crawford	1021	v. Snohomish	1835	v. Knapp	2105
Summerbell v. Summerbell	2067	v. Walters	1877	Swope v. Donnelly	112
Summerhill v. Darrow	1503	Suttrell v. Dry	2355	Swygert v. Taylor	2141
Summerlin v. R. Co.	586, 1976	Swain v. Cheney	392, 463, 1541,	Sybray v. White	1070
Summerour v. Felker	1291		1548, 1560	Sydeleman v. Beckwith	1918,
Summers v. Ins. Co.	1947	v. Comstock	2572		1984
v. M'Kim	787, 803	v. Lewis	1206	Syers v. Jonas	2440
v. Moseley	1894, 2193, 2200	Swamscot M. Co. v. Walker	377	Sykes v. Beck	1218, 1244,
v. State	2203	Swan v. Com.	351		1272, 1678
Summersett v. Adamson	1256	v. Gilbert	1959	Sykes' Goods	1736
Summersville v. Summer-		v. Middlesex	561, 714,	Sylvester v. Casey	283
ville	2083, 2085		1040, 1942, 1943	v. Crapo	1084
Summons v. State	4, 1362, 1386,	v. People	1013, 1014	v. Paper Co.	2442
	1395, 1397,	v. Polk	2027	v. State	
	1398, 2098	v. State	150	71 Ala.	276, 1374
Sumner v. Blair	38, 1890	v. Thompson	207	Fla., 35 So.	396, 770,
v. Cooke	619, 2336	v. Thurman	1530		905, 961, 1807,
v. Sebec	1644, 2159	Swancey v. Farrish	1290, 1312		2099
v. State		Swank v. Phillips	15	42 Tex.	78
11 Fla.	2056	Swann v. Buck	1350	Sylvius v. Kosek	2047
Fla., 33 So.	1012	Swanson v. Mellen	681	Symes, ex p.	2257
Sun Ins. Co. v. Earle	1201	Swartz v. Chickering	745, 1898	Symons v. Blake	406
Sun Mut. Ins. Co. v. Barrel		Swearengen v. Gulick	1195	Symonds v. Carter	406
Co.	377	Sweat v. Rogers	1893	v. Lloyd	2465
Sun Printing & P. Ass'n		Sweeney v. Hjul	1877		
v. Edwards	2442, 2465	Sweenie v. State	1853		
v. Schenck	74	Sweet v. Gilmore	957, 987, 1985		
Sunberg v. Babcock	1244	v. Sherman	1108		
Sunbury & E. R. Co. v.		v. Spencer	1779		
Cooper	1350	v. Tuttle	1960	T. F. Oakes, The	457
Supplee v. Hall	2298	v. Wright	1963	Tabb v. Cabell	1066
Supples v. Lewis	1244	Sweetland v. Porter	2529	Tabor v. Judd	1018, 1913
Supreme Council v. Brash-		Sweeter v. Bates	253, 392	v. Van Tassel	1086
ears	1671	v. Lowell	2012	v. Ward	7
v. Conklin	1496	Swewart v. Richards	704	Tacey v. Noyes	1141
Supreme Lodge v. Fletcher	1671	Swensen v. Bender	682	Tackett v. May	2233
v. Jaggars	1384	Swerdferger v. Hopkins	1458,	Tacoma R. & P. Co. v. Hays	905
Supreme Tent v. Stens-			1968	Taft v. Com.	1943
land	1073, 2537	Swett v. Shumway	451, 660,	v. Fiske	1064, 1067
Surber v. State	1072		1022	v. Simpson	2184
Surtees v. Hubbard	1202,	Swicard v. Hooks	2529	Taggart v. Bosch	1890
	1206, 1234	Swift v. Dean	586	Tagiasco v. Molinari	1513
Susewind v. Lever	738	v. Dickerman	404, 406	Tague v. Caplice Co.	1066
Sussex v. Temple	1082, 1257	v. Fitzhugh	1195, 1213,	Tait v. Hall	658, 1777
Sussex Peerage Case	564, 1271,		1225, 1651, 2109	Takamori v. Kanai	2327
	1476, 1528,	v. Ins. Co.	266, 1715	Talbot v. Bradford	1378, 2164
	1576, 1697, 1953	v. M'Tiernan	1640	v. Clark	18, 586
Sutch's Estate	1890, 2054, 2431	v. Madden	1037, 1263	v. Cusack	735, 745, 747,
Sutcliffe v. Iowa		v. Perry	1911		748, 749, 750
S. F. M. Ass'n	1081, 1750	v. Rutkowski	1158	v. Jansen	1678, 1680
Suter v. Page	916	v. Short	905, 907	v. Marshfield	2312
Suther v. State	205, 2062	v. Stevens	1196	v. Peoples	1271
Sutherland v. Hankins	2245	v. Swift		v. Seeman	1684, 2573
v. Ins. Co.	2510	4 Hagg. Eccl.	2252	v. Wilkins	1329
v. Williams	689	9 La. An.	382	Talcott v. Goodwin	1225, 1651
v. Young	1644	v. Tyson	6	v. Harris	1073
Sutor v. McLean	1404	v. Wiley	1304	Taliaferro v. Ives	1539
v. Wood	1003	v. Withers	1040	Tall v. Baltimore S. P. Co.	1951
Sutter v. Rose	1058	Swigart v. State	222, 1168	Tallasse F. M. Co. v. R. Co.	2432
Sutton v. Devonport	291	Swindell v. Harper	406	Talley v. Moore	1302
v. Gregory	1518	v. Warden	1779	Tallman v. Dutcher	586
				Tally v. Butterworth	2050

TABLE OF CASES.

TAL

	Section		Section		Section
Tally v. Cross	2027	Taylor v. Com.		Taylor v. Terr.	2513
Talmadge v. Baker	207	3 Bush	987	v. Tucker	1547, 4815
v. Northrop	2352, 2354	Ky., 34 S. W.	2273	v. U. S.	
Taney v. Kemp	2223	Ky., 42 S. W.	833	7 D. C. App.	228, 689,
Tankard v. Railroad	791	109 Pa.	1938		1938
Tanner v. Taylor	735, 749,	90 Va.	1160, 2354	89 Fed.	451, 1160
	760	v. Cook	704	v. Webb	1086
Tanner & D. E. Co.		v. Cox	2141	v. Willans	261, 289, 1063
v. Hall	1195	v. Davis	1555	v. Witham	1464
Taplin v. Atty	1208	v. D'Egville	2452	v. Wood	2269, 2270
Tappen v. Davidson	1511	v. Felsing	1010, 2498	v. Youngs	1651
Tarbell v. Forbes	392, 2106	v. Fomby	1587	Taylor's Trustees	2528
v. Tarbell	2356	v. Forster	2301	Taylor's Will	797
Tarbox v. State	321	v. Garnett	2354	Taylor, B. & H. R. Co. v.	
Tarkio v. Cook	1684	v. Giger	2349, 2354, 2355	Warner	225, 792
Tarpley v. Blabey	406	v. Glenn	1566, 1568	Taylorville v. Stafford	283, 458
v. Poage	2083	v. Greeley	2354	Taylor-Woolfenden Co.	
Tarr Co. v. Kimbrough	1078	v. Henry	2451	v. Atkinson	1555
Tarrant v. Ware	1302, 1304,	v. Holcomb	1352	Tays v. Carr	2325
	2049	v. Horsey	349	Teachout v. People	845, 846,
Tarsney v. Turner	908	v. Hunt	2435		852, 1719
Tate v. Fratt	1976	v. Jeffries	1678	Teagle v. Deboy	406
v. Humphrey	406	v. Jones	1650	Teague v. Williams	406, 2097
v. Penne	1195, 2063	v. Lawson	1839	Teasley v. Bradley	1062
v. R. Co.	1943	v. Lewis	1664	Teass v. St. Albans	2515
v. Southard	1587	v. Lumbering Co.	1951	Tebbetts v. Haskins	1943
v. Tate	2067	v. Lusk	1779	Tebbs v. White	1225, 1651
v. Tate's Ex'r	1461, 2327	v. Luther	529	Tebo v. Augusta	678, 682, 1721
Tatham v. Wright	1304	v. McGonigle	1592	Tedens v. Schumers	59, 923,
Tatum v. Goforth	1347	v. McIrvin	1195, 1709,		1109
v. Lofton	2222		2260	Tedrowe v. Esher	1086
v. Mohr	568, 1312	v. McKee	1681	Teed v. Martin	1275, 1647
v. State		v. Mallory	1406	Teegarden v. Lewis	2503
63 Ala.	257	v. Massey	749	Teele v. Boston	463, 714
131 Ala.	141, 279	v. Meekly	1300	Teese v. Huntington	691, 923,
v. Young	1651, 1680	v. Meyers	1320		928, 1985
Taulman v. State	2239	v. Monroe	438, 458, 1923,	Tefft v. Wilcox	681, 1944, 1951
Taunton Bank v. Richard-			1951	Teil v. Roberts	1203, 1219
son	1196	v. Peck	1246, 1256	Telegraph Co. v. Cooper	1951
Taunton Case	2287	v. Pegram	1738, 2315,	Telford v. Ruskin	2212
Taussig's Ex'rs v. Glenn	1074,		2500, 2530	Telts v. Foster	2083
	2529	v. People	1963	Tempel v. Hunter	2536
Taylor v. Riggs	1180, 1196,	v. Preston	1669	Temperance Hall Ass'n v.	
	2105	v. R. Co.		Giles	458
Taylor, ex p.	1644	80 Ia.	754, 1521	Temperley v. Scott	2103
		Ky., 41 S. W.	283, 456	Temple v. Com.	2271, 2276,
60 Kan.	1350	48 N. H.	687, 1718,		2280, 2282
9 Paige	1603, 2083		1974	Templeton v. Luckett	1977, 2139
v. Adams	1186	v. Robinson		v. People	390
v. Archbishop of York	2250	2 All.	334, 1086	Tenant v. Rumfield	1651
v. Auditor	1678	29 Me.	2083	Tenbroke v. Johnson	1540
v. Bank		v. Roulstone	2312	Ten Eyck v. Runk	1257
5 Leigh	1684	v. Security M. F. I.		v. Whitbeck	2503
7 T. B. M.	1206, 1681,	Co.	1947	Tennant v. Dudley	1062
	1684	v. Shemwell	2083	v. Hamilton	451, 464,
v. Barclay	2566, 2569	v. Shufford	1587		1061
v. Batten	1859	v. Smith	1614	Tennessee C. I. & R. Co.	
v. Beatty	1064	v. Star Coal Co.	461, 684,	v. Haley	949, 1117
v. Beck	529, 531		1951	v. Hansford	664
v. Beckham	1350, 1351	v. State		v. Linn	254
v. Blacklow	2290	42 Ala.	1781	Tennessee & C. R. Co. v.	
v. Brewer	2414	110 Ga.	398, 1263, 2059	Danforth	1521
v. Briggs	2463	Miss., 30 So.	1842	Tenney v. Evans	2222, 2354
v. Burnsidis	1658	37 Nebr.	821	v. Rapid City	1124, 1944
v. Buttrick	2500	v. Steamer Robert		v. Tuttle	65
v. Cayce	1877	Campbell	2154	Tenney's Case	1836
v. Clark	1195	v. Slater	2573	Tennis v. R. Co.	1750
v. Cole	1065	v. Swett	2083	Terpening v. Holton	1189
v. Colvin	1195	v. Taylor	582	Terre Haute v. Hudnut	571

	Section		Section		Section
Terre H. & I. R. Co.		Texas & P. R. Co.		Thomas v. Dyott	
v. Brunker	2220	v. Watson		v. Gage	1073
v. Clem	283	U. S., 23 Sup.	455, 456,	v. Glendinning	2538
v. Stockwell	1236		664, 1951	v. Grand Lodge	1081
v. Voelker	2552	112 Fed.	1415	v. Graves	2053
Terrell v. Allen	218	v. Wilder	1417	v. Hamilton	1944
Terrill v. Beecher	1537, 1541	Texas & St. L. R. Co.		v. Harding	1256
Territory v. Chavez		v. Eddy	1640	v. Hargrave	2232
6 N. M.	150	v. Kirby	1943	v. Herrall	1718
8 N. M.	967, 983, 987	Thacher v. Phinney	581, 1225,	v. Isett	1978
v. De Gutman	505, 506,		1651	v. Jenkins	1587
	508, 923,	Thalheim v. State	331, 1890,	v. Kean	1878
	987, 2277		2115, 2148	v. Kinsey	1391
v. Egan	1977	Thalheimer v. Crow	1681	v. Lawson	1651
v. Evans	1398, 1404	Thallheimer v. Brinckerhoff	95	v. Loose	1890, 2054, 2431
v. Godfrey	1852	Thams v. Sharp	1651	v. McCormack	2437
v. Hall	247	Thanet v. Foster	1670	v. McDanel	916
v. Hanna	2079	Tharpe v. Pearce	1186, 1681	v. McDonald	1083, 1086
v. Hart	689	v. State	318, 2098	v. Mallinckrodt	714, 1943
v. Lermo	2497	Thatcher v. Kautcher	719	v. Miller	994, 2103
v. Lucero	2511	v. Olmstead	1385, 1705,	v. Morgan	1062
v. McClin	833, 2071		2132, 2596	v. Newton	2270
v. McGinnis	216	v. R. Co.	455	v. People	
v. McKern	658	v. Stickney	1879	59 Ill.	367
v. Maldonado	1138	v. Waller	1364, 1404	39 Mich.	2079
v. O'Connor	1350	Thayer v. Barney	1195, 1201	67 N. Y.	63, 246,
v. O'Hare	987, 2277	v. Boyle	64, 923, 933		248, 1616, 2511
v. Padilla	1938, 2497	v. Crossman	529	v. Porter	751
v. Pino	200	v. Davis	398	v. Price	749
v. Pratt	247	v. Deen	1547, 1549	v. R. Co.	456
v. Rehberg	1890	v. Gallup	1040, 1415	v. Ribble	2106
v. Roberts	108, 689, 1938	v. Ins. Co.		v. Scutt	2437
v. Williams	2042	10 Pick.	291, 1199	v. Sellman	613
Territt v. Woodruff	1684, 1703	70 Me.	1947	v. Springville	252, 461
Terry v. Belcher	603	v. Lombard	1432	v. State	
v. Birmingham N.		v. Street	1075	100 Ala.	1899, 2276
Bank	1074, 1521	v. Thayer	216, 398,	106 Ala.	2497
v. Rodahan	1049, 1314		399, 437	107 Ala.	88
v. Sickles	1073	Theaker's Case	2220	117 Ala.	905
v. State		Theakston v. Marson	2048	27 Ga.	1841, 1874
118 Ala.	988, 1977	Theisen v. Dayton	2304	59 Ga.	2016
120 Ala.	1974	Theodore Körner, The	2319	103 Ind.	318, 367, 702,
13 Ind.	1010	Thetford's Case	1661		2007, 2015, 2276
Terryberry v. Woods	2518	Thibault v. Sessions	73, 406	40 Tex.	689, 1938
Terwit v. Gresham	1388	Thiede v. Utah	84, 397, 987,	43 Tex.	2059
Tesney v. State	396, 664, 988		1852, 1910	v. Stevens	2463
Tessman v. United		Thiel v. Kennedy	451	v. Steward	2477
Friends	1644, 1678	Thiele v. Newman	905	v. Tanner	1677, 1681
Tetley v. Easton	2212	Thielmann v. Burg	2576	v. Thomas	
Tetlow v. Savournin	2212	Third G. W. Turnpike Co.		2 Camp.	1072
Tetrault v. O'Connor	1960	v. Loomis	983, 987	2 La.	1188, 1192
Tewksbury v. Howard	2472	Third Nat. Bank v. Cosby	565	6 T. R.	2474
v. Schulenberg	1210	v. Owen	747	v. Turnley	1195
v. Tewksbury		v. Robinson	1126	v. Wallace	1304, 1306
2 Dane's Abr.	2069	Thistlewaite v. Thistle-		v. Wheeler	1779
4 How. Miss.	2067	waite	1777	Thomas's Goods	1512
Texas Land Co. v. Wil-		Thoen v. Roche	1587	Thomas Fruit Co. v. Start	1160
liams	1299, 1651	Thom v. Wilson	1213	Thomas Iron Co. v. Allen-	
Texas & P. R. Co.		Thomas v. Ansley	1249	town M. Co.	1862
v. Donovan	718, 719	v. Bank	1225, 1226, 1651	Thomason v. Insurance Co.	716
v. Johnson		v. Carey	1062	Thomasson v. Driskell	2166
89 Tex.	249	v. Com.	2577, 2578, 2582	v. State	1896
90 Tex.	1018	v. Connell	1783	Thommon v. Kalbach	1074, 2118
v. Phillips	1003	v. Crowell	406	Thompson, re	463
v. Raney	1109	v. Dakin	1350	v. Anderson	1654
v. Reed	379, 657	v. David	949, 1005, 1842	v. Bennett	
v. Reid	1822	v. Degraffenreid	664, 1779	22 U. C. C. P.	697,
v. Robertson	1750	v. Denning	1085		2017, 2139
v. Volk	2507	v. Dunn	1858	194 Ill.	2500

TABLE OF CASES.

THO

	Section		Section		Section
Thompson v. Bertrand	568	Thompson v. The Phila-		Throckmorton v. Chap-	
v. Blackwell	2098	delphia	1641	man	285, 289
v. Blanchard	905, 907	v. Thompson		v. Com.	104
v. Boston	463, 464	9 Ind.	291, 1198, 2105,	v. Holt	87, 1735, 1736,
v. Bowie	96		2524, 2593		1737, 1738,
v. Boyle	712, 720	4 Ont. L. R.	2016		1873
v. Brannon	2141	9 Pa. St.	1658	Throgmorton v. Davis	406, 1867
v. Bryant	2433	v. Trévanion	612, 1364,	Thruston v. Clark	2257
v. Bullock	2141		1714, 1747,	Thum Co. v. Tloczynski	2212
v. Cashman	2312		1749	Thunder v. Warren	2447
v. Church	64	v. Updegraff	1738, 1782	Thurland's Case	2250
v. Clendenening	75, 210	v. Utah	2220	Thurman v. Bertram	1161
v. Clubley	2444	v. Watson	2054	v. Cameron	2167
v. Cody	2433	v. Wilson	1313	v. Virgin	923, 987, 1985,
v. Com.		v. Woolf	1490		2201
8 Gratt.	2354	Thompson's Case		Thurmond v. Trammell	2098
Ky., 26 S. W.	580	20 Gratt.	833, 855, 860	Thursby v. Myers	1658, 2141
1 Metc. Ky.	609	9 Op. Att'y-Gen'l	1350	Thurston v. Cavenor	1770
v. Davitte	289	Thompson Co. v. Gunder-		v. Cornell	581
v. Didion	1072	son	2354	v. Masterson	2141
v. Ewing	2215	Thomson v. Austen	1061, 1062,	v. Murray	1770
v. Exum	377		2094	v. Slatford	1352
v. F. W. & R. G. R.		v. Gaillard	1273, 1662	Tibbet v. Sue	1072
Co.	2592	v. Hines	1651	Tibbetts v. Flanders	658, 2098
v. Fry	1257	Thomson-Houston El.		v. Sterberg	753, 762
v. Gaffey	463	Co. v. Palmer	1213, 2567	v. Sumner	377
v. Gregor	1035	Thorington v. Smith	2463	Tice v. Bay City	252
v. Halstead	1511	Thorn v. Kemp	1195, 1842	Tichborne v. Lushington	270
v. Ish	1984, 2391	v. Knapp	406		1023,
v. Ives	1225	v. Moore	907		2220, 2298
v. Kilborne	2303	Thornburgh v. Hand	1890	Tichborne Case, see	
v. Lambe	2122	v. R. Co.	1185, 1230	R. v. Castro.	
v. Libby	2434	v. Savage M. Co.	1862,	Tickel v. Short	1073
v. McCreedy	406		2221	Tickner v. Roberts	5, 2165
v. Mapp	1247	Thorndell v. Morrison	2083,	Ticknor v. Calhoun	1225
v. Mawhinney	1779		2086	Tiffany v. McCumber	1194
v. Miles	2132	Thorndike v. Boston	1784	Tift v. Jones	1841
v. Missouri	7	Thorne v. Mason	1249	Tiget v. State	579
v. Mosely	87, 341, 2211	v. Rolff	2032	Tigner v. McGehee	1678
v. Nye	210, 211	Thornton v. Adkins	2268	Tile Co. v. Snyder	282
v. Owen	917, 1303,	v. Britton	1406	Tiley v. Cowling	607
	1511	v. Hook	1890	Tilghman v. Fisher	1196
v. Patton	2437	v. Lane	1662	Tilk v. Parsons	1729
v. Porter	1554, 1555, 1561	v. State		Tillard v. Shebbeare	1275
v. R. Co.		113 Ala.	149, 728, 1974	Tiller v. State	1005
110 Ky.	2141	107 Ga.	198, 1750	Tillett v. R. Co.	1951, 2552
91 Mich.	283	117 Wis.	2265	Tilley's Case	1409
22 N. J. Eq.	2371, 2375	v. Stephen	2104	Tillinghast v. Walton	803
v. Richards	1247, 1890	v. Thornton	1304, 1738,	Tillotson v. Warner	1267
v. Ruiz	1548		1897	Tillson v. Bowley	987, 1141,
v. Schuyler	2168	Thornton's Ex'rs v. Thorn-			2276
v. Smith	2465	ton's Heirs	917	Tilly v. Fisher	1205
v. State		Thoroughgood's Case	2405	Tilson v. Terwilliger	1086
99 Ala.	748, 905	Thorp v. Craig	1675	Tilton v. American Bible	
100 Ala.	988, 1270,	v. Goewey	2304	Society	2462, 2472
	1899, 2276	v. Leibrecht	907	v. Beecher	15, 783, 949,
106 Ala.	1404, 1405,	Thorpe v. Gisburne	702		1045, 1073, 1243,
	1408, 2098	v. Macauley	2260		1260, 1368, 1699,
15 Ind.	1040	Thrall v. Todd	1194, 1195		1775, 1807, 1871,
38 Ind.	1136, 1138	Thrasher v. Ballard	1681		1897, 1911, 2094,
37 Tex.	1819	v. Ingram	1681		2102, 2113, 2228, 2242
30 Tex. App.	2079	Thrawley v. State	63, 451, 1157,	v. Miller	451
33 Tex. Cr.	1138,		1618	Timberlake v. Thayer	1842
	2061	Threlfall v. Webster	1858	Timmings v. Timmings	2067,
Tex. Cr., 74 S. W.	821,	Thresher v. Bank	785, 1911		2069
	823	Threshers' Trials, The	660,	Timmons v. Timmons	1725
v. Stewart			1982	Timothy v. State	392, 451,
3 Conn.	2164	Throckmorton v. Tracy	1252,		1693
5 Litt.	1777		2462	Tindle v. Nichols	2363

	Section		Section		Section
Tingle v. U. S.	987	Tomb v. Sherwood	1062	Townsend v. Downer	
Tingley v. Cowgill	613, 682	Tombler v. Reitz	2406	27 Vt.	1651
v. Land Co.	1530	Tome v. R. Co.	797, 2008,	32 Vt.	1651, 1664, 2141,
v. Providence	1943		2016		2143, 2522
Tinklepaugh v. Rounds	1040	Tome Institute v. Davis	794, 1960	v. Graves	64, 194, 341
Tinkler v. Walpole	1647,	Tomer v. Densmore	1878	v. Hargreaves	2454
	1650	Tomkies v. Reynolds	1777	v. Ives	1304
Tinnin v. Price	1316	Tomlinson v. Croke	1364	v. Johnson	1082
Tinsley v. Carey	772	v. Derby	458, 461, 655	v. Lawrence	1858, 1859
Tioga v. South Creek	2063, 2064	v. Earnshaw	451	v. Phillips	1670
Tipper v. Com.	1781	v. Greenfield	2581	v. Pepperell	1621, 1938
Tipton, <i>ex p.</i>	1350	Tompkins v. Crane	1085	v. State	133, 987
v. State	2100	v. Saltmarsh	1142	Townsend's Succession	773,
Tischler v. Apple	1890	v. Wiley	1405		1391, 1872
Tisdale v. Ins. Co.		Toms v. Beebe	2311	Townsend Mfg. Co. v.	
28 Ia.	1877	v. Whitmore	1086	Foster	738
116 N. Y.	1064, 1067	Toohy v. Plummer	1263, 1669	Townshend v. Stangroom	2417
Tisman v. District	1018	Tooker v. Beaufort	1670	Townslay v. Simrell	1675
Titford v. Knott	703, 2016	Toole v. Nichol	1890, 1893	Towson v. Moore	1738
Title v. Grevett	529, 2222	v. Toole	2067, 2336	Traber v. Hicks	1234
Titley v. Foxall	1211	Tooley v. Bacon	18	Trabing v. N. & I. Co.	1021
Titlow v. Titlow	1738, 1938	Toomer v. Gadsden	1548	Trabue v. Com.	987
Tittle v. State	150	Toomes v. Etherington	1671	v. Sayre	95
Titus v. Ash	953, 1022, 1026,	Toomes' Estate	569, 1938,	Traction Co. v. Lambertson	688,
	1028, 1111		2395		1721
v. Gage	228, 232, 1899	Toomey v. Kay	777, 1956	Tracy v. Eggleston	1566
v. Gunn	747	v. R. Co.	2494	v. Jenks	1352
v. Kimbro	1239	Tootle v. Kent	1943	v. McManus	1971
v. State		Topeka v. Martineau	1168	v. People	396, 1438,
117 Ala.	967, 1441,	v. Sherwood	458, 1951		1443
	2497	Topeka Water Co. v.		Tracy Peerage Case	285, 2024
7 Baxt.	62, 200, 987,	Whiting	461	Trader v. McKee	1681
	1035, 1263,	Topham v. McGregor	735, 748,	Traders' Ins. Co. v. Catlin	1947
	1329		749, 750	Trainor v. German Am.	
v. Sumner	406	Toplitz v. Hedden	18, 1263	S. L. & B. Ass'n	751
Tla-koo-yel-lee v. U. S.	987	Torbert v. Wilson	1681	Trambly v. Ricard	2415
Tobin, <i>re</i>	1303	Toronto G. R. Co. v. Taylor	2319	Trammell v. Hemphill	2098
v. Brimfield	437	Torque v. Carrillo	2355	v. Hudson	1456
v. Portland F. M. Co.	1389	Torre v. Summers	211, 987	v. McDade	770
v. Seay	1215, 1664	Torrey v. Burney	748, 1254,	v. Roberts	1290, 1513
v. Shaw	261, 291, 1198,		1958	v. Thurmond	1225, 1651,
	1963, 2105	v. Nixon	112		2143
v. Shea	406	Torris v. People	852	Transportation Line v.	
Todd, <i>ex p.</i>	1658, 2110	Totman v. Forsaith	1141	Hope	1951
<i>in re</i>	1955	Totten v. James	1225	Transue v. Brown	1513
v. Keene	379	v. U. S.	2375	Tranum v. Wilkinson	1651
v. Munson	2311	Touchard v. Keyes	1651	Trapp v. Druecker	1951
v. Neal	1633	Toulmin v. Austin	1676	Trask v. People	1852, 2183,
v. Ockerman	1267, 1674	Tousley v. Barry	1083		2264
v. Rowley	201	Towdy v. Ellis	1247	Travelers' Ins. Co.	
v. Stafford	529	Tower v. Whip	2008	v. Sheppard	64, 728, 770,
v. Weed	1778	v. Wilson	1206, 1268		771, 792, 1481,
Toland v. Paine F. Co.	437,	Towers v. Moor	2426		1747, 1750,
	561, 2218	Towle v. Blake	1721, 1722		1770, 1840
Tolbert v. Burke	1777	v. Pacific Imp. Co.	65	Travelers' Protective	
Toledo St. L. & K. C. R.		v. Sherer	715	Ass'n v. West	1750
Co. v. Bailey	65	Town v. Needham	586	Travers v. McMurray	911
Toledo W. & W. R. Co. v.		Town Council v. Owens	2268	v. U. S.	862
Chew	1275	Towne v. Towne	266	Travis v. Barkhurst	1779
Toledo & A. A. R. Co. v.		Towner v. Lucas	2435, 2439	v. Brown	1040, 2005,
Johnson	1651	Towns v. Alford	770, 774		2007, 2008, 2016,
Toler v. State	279	v. Riddle	1877		2020, 2026, 2027
Toll v. Lee	1256	v. State	1108, 2512	v. Ins. Co.	6
v. State	367	Townsend v. Atwater	1213	v. January	2307, 2309
Tolleson v. Posey	1640	v. Briggs		v. Stevens	987, 2239
Tolman v. Emerson	2139, 2141,	Cal., 32 Pac.	1890	Treadwell v. Wells	736
	2144	99 Cal.	223, 1698	Treager v. Mining Co.	1078
v. Johnstone	1003, 1116	v. Bush	529, 531	Treasurer v. Moore	2373
Tolson v. Coasting Co.	1951	v. Covington	1290	Treasurers v. Witsall	1221, 1677

TABLE OF CASES.

TRE

	Section		Section		Section
Treat v. Browning	73, 74, 1040, 1620, 2196	True v. Plumley	406	Tupper v. International B. & T. Co.	751
v. Merchants' Life Ass'n	1960	v. Sanborn	377	Turbaville v. State	1841
Trees v. Eakin	1878	v. True	2067	Turberville v. Savage	986
Tregany v. Fletcher	2578	Trueman v. Loder	2413	Turley v. Logan	1350
Treleaven v. Dixon	608	Trull v. True	38, 377	Turnbull v. Com.	2239
Tremain v. Barrett	2203	Trulock v. State		v. O'Hara	1126
v. Edwards	1544	Ark., 69 S. W.	657, 660	v. Payson	1074, 1681
Tremblay v. Harnden	393, 451	1 Ia.	2595	v. Richardson	682, 715
v. M. R. C. Co.	1976	Truman v. Lore	530, 1347	Turner v. Belden	1133, 1779
Trentham v. Bluthenthal	1261	Truslove v. Burton	2148	v. Cates	1314
v. Waldrop	1674	Trustees v. Hogg	2116	v. Child	2118
Trenton B. Co. v. Woodruff	603	v. Jessup	2465	v. Coe	2232
Trenton Pass. R. Co. v. Cooper	770, 1750, 2509	Trustees Canandargua Academy v. McKechnie	2169	v. Com.	216, 279, 390, 1144
Trenton Potteries Co. v. Title G. & T. Co.	1947, 1951	Trusty v. Com.	2277	v. Crisp	1466
Treon v. Brown	529	Tubbs v. Garrison	716, 1943	v. Fish	2580
Trepp v. Barker	616	Tuberson v. State	2056	v. Grand Rapids	1890
Treusch v. Ottenburg	2504	Tucker v. Barrow	850	v. Hardin	1086
Trevor v. Colgate	2165	v. Constable	261	v. Hearst	283
Trehvitt v. Lambert	1243	v. Finch	2304	v. Jenkins	2115
Tribette v. R. Co.	456	v. Henniker	1807	v. Johnson	1300
Trim v. State	507	v. Hood	1142	v. Keller	581
Trimble v. Am. Sugar Ref. Co.	1858	v. Hyatt	697, 2008, 2015, 2016	v. King	928, 1489
v. Shaffer	1247	v. Kellogg	704, 2016	v. McFee	728
v. State	1853, 2089	v. McDonald	1690	v. Moore	1225, 1306, 1513
v. Tautlinger	664	v. McMahon	2065	v. Newburgh	663
v. Terr.	1012, 1135, 2060	v. McMahon		v. Overall	612
v. Trimble	2085	v. People		v. Pearte	586
Trimby v. Vignier	1271	117 Ill.	1644, 2086	v. Poston	2132
Trimblestown v. Kemmis	18,	122 Ill.	1393, 1644,	v. R. Co.	
1053, 1085,			1878, 2086	158 Mass.	438, 792
1256, 2105				15 Wash.	1944
Trimmer v. Trimmer	2098	v. R. Co.	561, 1943	v. Reynolds	1890
Trinity Co. Lumber Co. v. Denham	966	v. Seaman's Aid Soc'y	2462, 2463, 2476	v. Sealock	1484, 1487
Trinity House v. Burge	2279	v. Smith	1564, 1566,	v. State	
Triplett v. Gill	1633		1568	124 Ala.	154, 1109
Tripp v. Garey	1352	v. South Kingston	2349	114 Ga.	2513
Trischet v. Ins. Co.	2120	v. State		102 Ind.	218
Trist v. Johnson	1208	71 Ala.	612	4 Lea	1807
Trogdon v. Trogdon	2437	89 Md.	1963, 2512	60 Miss.	2241
Trogdon's Case	4, 321	v. Tucker		89 Tenn.	1157
Troop v. Union Ins. Co.	2463	11 Jur.	2067	39 Tex. Cr.	150
Trott v. R. Co.	1976	74 Miss.	923, 987	v. Strip	1290, 1651
v. Skidmore	1512	v. Welsh	1026, 1032, 1247	v. Turner	1304, 1312
Trotter v. Maclean	95, 1524	v. Whitehead	1737	v. Tyson	1458, 2141
v. Trotter	1271	v. Wilamonicz	529	v. U. S.	794
v. Watson	1086	Tuckwood v. Hanthorn	1640	v. Warren	2306
Troughton v. Getley	2218	Tudor v. Com.	111, 1166	v. Water Co.	2354
Troup v. Sherwood	923, 986,	v. Tudor	1299	v. Yates	1072, 1213
1985		Tudor Iron Works v. Weber	789, 944, 1158	Turner's Appeal	1042, 1958, 2296
Trout v. R. Co.	2495	Tufts v. Du Bignon	1062	Turner's Estate	2304
Trowbridge v. Addoms	1676,	v. Hatheway	289	Turner F. L. Co. v. Burns	1566,
v. Sickler	2184	Tug R. C. & S. Co. v. Brigel	2410	1567	
v. Spinning	1391	Tugwell v. Hooper	2312	Turney v. Barr	2355
v. State	2573	Tulley v. Alexander	2237	v. Turney	2066
Trow v. Castle	609	Tullidge v. Wade	19	v. State	770, 771
Troxdale v. State	2110	Tullis v. Kidd	569, 687, 1984	Turnipseed v. Goodwin	1536
Troyer v. State	1807	v. Rankin	675, 1976	v. Hawkins	1225
Truax v. Slater	1083	v. State	280	Turnley v. Hanna	1388
Truby v. Byers	1313	Tulloch v. Hartley	5	Turnpike Co. v. Hearn	68
v. Seybert	1048, 1063, 1066	Tulloch v. Cunningham	1911	v. McNamara	2184
True v. Bullard	2445	Tullos v. Lane	2215	Turnure v. Turnure	1511
		Tully v. Canfield	1225, 1226	Turpin v. Brannon	1778
		v. R. Co.	1168	v. State	111, 247
		Tunks v. Vincent	93, 2215	Turquand v. Guardians	1862
		Tunstall v. Cobb	2008, 2016	v. Knight	2296
		Tupling v. Ward	2268	Turrell v. Morgan	2134, 2596
				Turrentine v. Grigsby	1060

	Section		Section		Section
Turton v. Benson	1062	Underhill v. Hernandez	2566, 2569	United States v. Beavers	2195, 2207
Tuschinski v. R. Co.	1352	v. Van Cortlandt	787	v. Bell	2281, 2282
Tustin v. Faught	1651	Underwood v. Huddleston	1206	v. Benner	1674
Tuthill v. Davis	529	v. Thurman	1511, 1738	v. Biena	2349
Tutt v. Hawkins	2421	v. Waldron	1976	v. Breedmeyer	923
Tuttle v. Burgett's Adm'r	2442	Ungles v. Graves	1312, 1513	v. Britton	1268, 2105
v. Com.	396	Union v. Plainfield	1503	v. Brooks	318
v. Rainey	704, 2016	Union Bank v. Commis-	1350	v. Brown	2282, 2364
v. Russell	235, 932, 933	sioners	1521, 1539	v. Burns	238, 318, 2582
Tutton v. Darke	1698	v. Knapp	95, 289	v. Burr	367, 2038, 2260, 2271, 2371, 2374, 2375, 2376
Twaites v. Smith	2048	Union Central L. I. Co.	266, 1081, 1807	v. Butler	1854
Tway v. State	2061	v. Cheever	1807	v. Cameron	1381
Twemlow v. Oswin	2531	v. Smith	748	v. Castro	1239
Twentyman v. Barnes	1862, 2221	v. Prigge	1555	v. Charles	2363
Twigg v. State	852	Union Electric Co. v.	1555	v. Chaves	2573
Twohig v. Leamer	1371, 2098	Theater Co.	1555	v. Chun Hoy	2540
Twombly v. Leach	681, 1951	Union Elev. Co. v. R.	714, 1943	v. Collins	133, 166
Twomey v. Swift	1951	Co.	1078	v. Coolidge	2364
Twomey v. R. Co.	461	Union Guaranty & T. Co.	1496	v. Cooper	2371, 2375
Twyman v. Com.	1079	v. Robinson	1951	v. Craig	317, 987, 1732, 1781
v. Twyman	2067	Union Ins. Co. v. Pollard	1496	v. Crandell	406
Tyler v. Beversham	2426	v. Smith	1951	v. Cross	276, 761, 987, 1040, 1144, 1530, 1635, 1639, 1969, 1974, 2265
v. Flanders	1501	Union Nat'l Bank v. Mill-	1675	v. Curtis	1854
v. Hamilton	1062	ing Co.	1159, 2220	v. Darnand	2008
v. Mather	1082	Union Pacific R. Co.	1350	v. Davis	949
v. Mutual D. M. Co.	703	v. Botsford	1750	v. Des Moines N. & R.	1350
v. Nelson	396	v. Carr	1244	v. Dickinson	769, 772, 773, 774, 923, 1021, 1022, 1028
v. Pomeroy	1022	v. Elliott	2495	v. Doebler	14, 318, 977, 1198, 1200, 1205, 2104
v. R. Co.	754	v. Jones	561, 688, 1719, 1951	v. Dow	1854
v. Stephens	1299	v. McDonald	779	v. Dumas	1674
v. Stevens	2349, 2354	v. Novak	2509	v. Dunbar	1236
v. Todd	2011, 2015, 2016	v. Reed	1651, 1652	v. Edwards	2286
v. Trabue	1271	v. Reese	1007	v. Eighteen Barrels	952
v. Tyler	2312	v. Yates	6, 1693, 1696	v. Farrington	2364
v. Ulmer	1078	Union R. & T. Co.	1273	v. Faulkner	688
Tyler's Estate	1512	v. Shacklet	1908	v. Flemming	291, 2273
Tylden v. Bullen	1313	Union R. T. & S. T. Co. v.	1029	v. Ford	1042
Tynan v. Paschal	1736	Moore	1026, 1028, 1031	v. French	1371
Tyner v. State	276, 2081	Union Sheet M. W. v.	568	v. Fries	367, 852, 1909, 2038, 2354
Tyree v. Magness	1192, 1194, 1195	Dodge	609	v. German	2495
Tyrrell v. Painton	2503	Union S. N. Bank v. Sim-	2163, 2525	v. Gibert	867, 1286, 1641, 2079, 2081
Tyrwhite v. Kynaston	1644	mons	568	v. Glassware	1684
Tyrwhitt v. Wynne	21	Union Stock Y. Co. v.	609	v. Graff	824, 843, 845, 849, 851, 852, 1182
Tyson v. Chestnut	1704	Conoyer	2507	v. Gray	1620
U.		Union Water Co. v. Crary	1873	v. Griego	398, 2081
Udderzook v. Com.	792, 1977, 2566	Unis v. Charlton's Adm'r	1026, 1028, 1031	v. Groesbeck	398
Ueland v. Dealy	18	United B. Mut. Aid Soc.	2163, 2525	v. Grundy	2222
Ugla v. R. Co.	2509	v. O'Hara	568	v. Guiteau	106, 232, 682, 987, 1041, 1160, 1976, 1984, 2214, 2337, 2372
Uhde v. Walters	2464	United States v. Addatte	2163, 2525	v. Gumm	2572
Uhl v. Com.	923, 1985	v. Amedy	2163, 2525	v. Hanway	1854
Uhl v. Adams	334	v. American Bell	2498		
Uihlein v. Matthews	2463	Tel. Co.	1404		
Ullman v. Babcock	702	v. Angell	95, 1073, 1182, 2056, 2200		
Ulmer v. State	2056	v. Babcock	2100		
Ulrich v. Litchfield	2470	v. Ball	1681		
v. McConaughey	1389, 1847	v. Bank of U. S.	2086, 2239		
v. People	437, 460, 782, 830	v. Bassett	2559		
v. Ulrich	2526	v. Battiste	2559		
Ulrick v. Dakota L. & T.	2354				
Co.	2354				
Underhill v. Durham	1193, 1633				

TABLE OF CASES.

UNI

	Section		Section		Section
United States v. Harris		United States v. One Case		United States Express Co.	
D. C.	682	of Hair Pencils	18, 586	v. Henderson	2259
5 Utah	2086	v. Ortiz	704, 797,	v. Hutchins	1013, 1014
v. Holmes			2016, 2017	United States Fidelity &	
1 Cliff.	58, 228, 232,	v. Pagliano	790	G. Co. v. Dampskib-	
	233, 568, 1028,	v. Palmer	2163, 2566	aktieselskabet Habil	1263
	1040, 1041,	v. Peay	398	United States Ins. Co. v.	
	1124, 1845	v. Percheman	1239, 1677,	Wright	321
1 Wall. Jr.	1836		1680	United States Life Ins. Co.	
v. Holtsclaw	570, 705	v. Porter	1212	v. Kielgast	1073,
v. Horn	2059	v. Randall	278		1671
v. Howe	2203	v. Reed	457	v. Ross	1381, 1387
v. Hunter	2200, 2287	v. Reid	6, 580, 2354	v. Vocke	1073, 1671
v. Hutchings	2566	v. Reyburn	1212, 1269	United States Mail Line	
v. Hutton	1859	v. Reynes	2573	Co. v. Mfg. Co.	571
v. Insurgents	1854	v. Reynolds	1395, 1398,	United States Mutual Acc.	
v. James	2255, 2281		1405	Ass'n v. Kittenring	2442
v. Johns	1677, 1680, 1684	v. Rio Grande D. & I.		United States Nat'l Bank	
v. Jones		Co.	2580	v. Venner	2529
10 Fed.	2016	v. Ross	41	United States Sugar Refin.	
2 Wheeler	523	v. Roudenbush	301, 318	v. Allis Co.	290
v. Jourdine	1620	v. Sacramento	2595	Universities v. Richardson	1684
v. Kershaw	2059, 2060	v. Saline Bank	2258	University of Illinois v.	
v. Kessler	2056	v. Schindler	285, 953,	Spalding	2000, 2016,
v. Kimball	852, 2270		1022		2018
v. King	1747	v. Schneider	1441	Unsell v. State	347, 851
v. Kirkwood	842, 852, 2363	v. Schow	2086	Unthank v. Turnpike Co.	1248
v. Klein	1354	v. Seufert B. Co.	1168	Upson v. Raiford	1779
v. Lambell	1195, 1267	v. Shriver	2286	Upstone v. People	232, 235, 1938
v. Larned	2005	v. Simpson	2086	Upton v. Hume	406
v. Lead Co.	2264	v. Six Lots of Ground	2375	v. Winchester	392
v. Lee	2313	v. Smith		Ury v. Houston	1225
v. Lee Huen	936, 2273,	4 Day	787, 2275, 2279	Usener v. State	1350
	2498	5 Utah	398	Ushers v. Pride	1674, 2167
v. Lee Seick	2066	v. Smith and Ogden	2201,	Uthermohlen v. Boggs	
v. Leffler	529		2371	R. M. & M. Co.	507
v. Lew Poy Dew	1674, 1678	v. Snyder	321	Uxbridge v. Staveland	2256
v. Lodge	1195	v. Stevens	78		
v. Long	1212	v. Stewart	1854		
v. Lynn	1212	v. Stone	824, 830, 861,		
v. Lyon	1909		865		
v. McCann	1944	v. Sutter	1239		
v. McCarthy	2271, 2282	v. Tilden	2211		
v. McGlue	672	v. Troax	2056		
v. McMasters	18	v. Trumbull	2372, 2566		
v. McMillan	2008	v. Twenty-Eight			
v. McRae	2256, 2258	Packages	2257		
v. Macomb	1362, 1375,	v. Vansickle	923, 987, 1985		
	1398, 2098, 2105	v. Venable C. Co.	1530		
v. Marks	1674	v. Warner	1620		
v. Mathias	2008	v. Wary	1195		
v. Miles	2086	v. Watkins	747		
v. Mitchell		v. Whitaker	988		
2 Dall.	194	v. White	923, 1985, 2098		
2 Wash. C. C.	1641,	v. Wiggins	1239, 1677, 1680		
	1674, 2125	v. Williams	2071, 2072,		
3 Wash. C. C.	1641,		2081		
	1674	v. Winchester	4, 1202		
Wharton's St. Tr.	2038	v. Wood			
v. Moses	318, 2374	14 Pet.	342, 2043		
v. Mullaney	2018, 2194,	3 Wash. C. C.	2098		
	2276	v. Woods	1270		
v. Mulvaney	2071	v. Zucker	1398		
v. Musser	398	United States Bank v.			
v. National Lead		Burson	1549		
Co.	1859	United States Brewing			
v. Neverson	108, 987, 1127	Co. v. Ruddy	278, 907		
v. Nott	826, 859, 865	United States Express			
v. Old Settlers	1350	Co. v. Donohoe	2056, 2058		

	Section		Section		Section
Vanauken v. Hornbeck	1198	Van Skike v. Potter	1693	Vernon v. Kirk	1511
Van Bokkelen v. Berdell	987	Van Straaten v. People	2513	v. Tucker	1106, 1109, 1612
Van Buren v. State	833	Van Syckel v. Dalrymple	2425,	Vernon Irrig. Co.	
Van Buskirk v. Mulock	1684		2435	v. Los Angeles	1587
Vance v. Campbell	6	Van Syoc v. State	2089	Vernon S. R. Co. v.	
v. Com.	2512	Van Velsor v. Hughson	2143	Savannah	1640
v. Kohlberg	1219, 1225,	Van Volkenburg v. Bank		Verran v. Baird	451, 792
	1275	of B. N. A.	2319	Verry v. Watkins	210
v. Reardon	1664, 2108	Van Winkle v. Crowell	2434	Verzan v. McGregor	2135
v. Schuyler	2168	v. R. Co.	688	Viberg v. State	987
v. Smith	1086	Van Worden v. Winslow	1951	Vicaro v. Com.	1878
v. State		Van Wyck v. McIntosh	1005,	Vicary v. Farthing	1644, 2352
56 Ark.	1841		2015, 2016	Vick v. Whitfield	73, 209
70 Ark.	519, 1270	Van Wycklen v. Brooklyn	1918,	Vickers v. People	1612, 1842
v. Vance			1921, 1978	Vickery v. Benson	1655
8 Greenl.	2069	Van Zandt v. Ins. Co.	1976	Vickroy v. McKnight	1225,
2 Metc.	1108, 1109	Vardon v. Vardon	1061		1226, 1651
Vancleave v. State	987, 2277	Varicas v. French	1404	v. Skelley	704, 1678,
Van Cleef v. Fleet	1670	Varick v. Briggs	1082, 1257		1991
Van Cort v. Van Cort	2235	v. Jackson	901	Vicksburg & M. R. Co.	
Van Cortlandt v. Tozer	1225,	Varnedoe v. State	784	v. O'Brien	736, 738,
	1651	Varner v. Johnston	1273		747, 1078, 1749,
Vanderberg's Petition	1350	Vass' Case	1442, 1445, 1448		1750
Vandercook v. O'Connor	716	Vasse v. Mifflin	1201, 1208	v. Putnam	1698, 2551
Vander Donckt v. Thelus-		Vastbinder v. Metcalf	736	Vidal v. Duplantier	1239
son	564	Vates v. Cornelius	569	Viellesse v. Green Bay	438, 1158
Vandergriff v. Piercy	1195,	Vaughan v. McCarthy	2429	Vietti v. Nesbitt	439
	1225	v. Martin	735, 759	Vigus v. O'Bannon	1174
Vanderhoven v. Romaine	2437	v. Parker	2410	Vilas v. Downas	463
Vanderpoel v. Gorman	2536	v. Phebe	1605	v. Reynolds	791
Vanderslice v. Philadelphia	463	v. R. Co.		Viles v. Moulton	
Van Derveer v. Sutphin	74, 406	3 H. & N.	456	11 Vt.	1195
Vandervort v. Fouse	285	63 N. C.	93	13 Vt.	1709
Van Dervort v. North-		v. State		v. Waltham	1714, 1727
western F. Co.	1651	58 Ark.	16, 1398, 1404,	Ville de Varsovie, The	520
Vandervoort v. Thompson	1681		1405, 2059, 2098	Villere v. Armstrong	1312
Vanderwerken v. Glenn	1074	3 Sm. & M.	457	Villiers v. Villiers	1193, 1233,
Van Deusen v. Newcomer	675	v. Worrall	586		1268
v. Turner	1567	Vaughan's Case	838	Vinal v. Burrill	1235
Vandeverter v. State	2497	Vaughn v. Clarkson	928	v. Gilman	736, 754
Vandewall v. Tyrrell	1635	v. Griffith	1681, 1684	v. Green	1521, 1561
Vandine v. Burpee	571, 1943	v. Perrine	987	Vincent v. Cole	1179, 2447
Van Duyn v. Thayre	1257	v. State		v. Dixon	406
Vandyke v. R. Co.	1531	130 Ala.	293, 2155	v. State	1821
v. Thompson	1514	88 Ga.	111	Vincent's Appeal	2086
Van Dyne v. Thayre	1313	Vaughton v. R. Co.	4, 285	Viney v. Barss	318
Vane v. Evanston	1164, 1168	Vaulx v. Merriwether	1195	Vining v. Baker	2515
Vane's Case	2239	Vausant v. Runyon	2442	Vinton v. Peck	2005, 2008, 2012,
Van Etten v. Howell	2444	Vaux Peerage Case	1670, 1674		2016, 2024, 2027
Van Eyck v. People	1079	Vawter v. Hultz	64, 581	Violet v. Rose	702
Van Gunden v. V. C. &		Veck v. Holt	1213	Violette v. Rice	2463
I. Co.	2143	Vedder v. Wilkins	1196	Virden v. Dwyer	2235
Van Horn v. Smith	2124	Veerhusen v. R. Co.	1951	Virginia C. C. Co. v.	
Van Huss v. Rainbolt	1880,	Vega S. S. Co. v. Consol.		Kirven	1072
	1938	Elev. Co.	1354	Virginia Coal & I. Co. v.	
Vankoughnet v. Denison	1584,	Veiths v. Hagge	1549, 2118	Keystone C. & I. Co.	2105
	1665	Velott v. Lewis	1408	Virginia & T. R. Co. v.	
Van Lehn v. Morse	2433	Velten v. Carmack	2433	Henry	1640
Van Meter v. People	2595	Venable v. R. Co.	1625	Vischer v. R. Co.	2109
Vann v. Edwards	2518	Venafr v. Johnson	1349	Viser v. Bertrand	2067, 2069
Van Ness v. Bank of U. S.	1679	Vent v. Pacey	2294	Visher v. Webster	
v. Hadsell	1199	Venzke v. Venzke	2046	8 Cal.	1082
Van Nostrand v. Board	2474	Verdier v. Verdier	747	13 Cal.	1086
Van Omeron v. Dowick	1684	Verdin v. Wray	398	Vivian's Appeal	1710
Van Sandan v. Turner	2578	Vergin v. Saginaw	290	Vizard v. Moody	1244
Van Sickle v. Brown	581	Verholf v. Van Houwen-		Voelkel v. Supreme Tent	1073
v. Gibson	1486	lengen	1644	Vogel v. Gruaz	2296, 2374
v. People	2016	Vermillion Co. v. Ver-		v. Osborne	1066, 1067
Vansickle v. Shenk	64, 1086	million	18, 571, 682	Vogely v. Bloom	1460

TABLE OF CASES.

VOG

	Section		Section		Section
Voght v. State	1354	Wagner v. County Com'rs	1681	Walker v. Kendall	2110
Vogt v. Baldwin	1051	v. Haak	1079	v. Kennison	2349
Volant v. Soyer	2307, 2322	v. Jacoby	2027	v. McMillan	783
Volker v. Bank	1521	v. Supreme Lodge	1244	v. Meetze	1362, 1729
Volusia Co. Bank v.		Wagoner v. Ruply	2008, 2016	v. Moors	1609, 1614
Bigelow	749, 753, 944,	v. Terr.	1442, 1445	v. Newhouse	1225
	1556, 1779,	Wagstaff v. Wilson	1063	v. O'Connell	1750
	1856	Wailing v. Toll	2117	v. Ontario	1154
Von Mumm v. Vittemann	2580	Wain v. Warlters	2454	v. R. Co.	
Von Pollnitz v. State	1750	Wait v. Krewson	1541	104 Mich.	1969, 1977
Von Sachs v. Kretz	1083, 1230	v. Pomeroy	2419	71 N. H.	1807
Von Storch v. Griffin	77	Waite v. High	1078, 1195, 1213	v. Rogers	681
Von Tobel v. Stetson & P.		v. Teeters	1415	v. Sanborn	2237, 2336, 2341
M. Co.	912	Waithman v. Weaver	73, 74	v. Sawyer	587
Voorhies v. Hennessy	2437	Wake v. Lock	586	v. State	
Vosburg v. Putney		Wakefield v. Day	1188, 1267,	49 Ala.	278
78 Wis.	688		2105	52 Ala.	1362, 1439
86 Wis.	1976	v. Ross	1817	58 Ala.	1977
Vosburgh v. Thayer	1538, 1552	Wakefield's Case	2199, 2202	97 Ala.	492, 495
Vose v. Mandy	2158	Wakelin v. London &		107 Ala.	1509
Voss v. Bender	1911	S. W. R. Co.	2507, 2510	117 Ala.	759, 2446, 2497
Vowles v. Young	278, 1481,	v. Walthal	2047	134 Ala.	507
	1486, 1489,	Wakeman v. Marquand	1913,	Ala., 35 So.	1442
	1495, 2235		2118	39 Ark.	1445
Vrooman v. King	1082, 1085	v. Smith	2250	6 Blackf.	64, 133, 923,
Vye v. Alexander	278, 697,	Walbridge v. Kennison	1062	927, 987, 1417	
	1185, 2016	v. Knipper	1409	34 Fla.	620
Vyn v. Keppel	1085	Walburn v. Terr.	196	116 Ga.	2276
		Walcott v. Gibbs	2167	102 Ind.	1621
		v. Heath	1560	136 Ind.	851
		v. Keith	1779	7 Tex. App.	2265
		v. Kimball	1064	v. Steele	2008
		Waldele v. R. Co.	1362, 1431,	v. Stilson	719
			1749	v. Walker	
		Walden v. Canfield	2576	34 Ala.	18, 1958
		v. Finch	1026, 1028,	6 Coldw.	1225, 1226
			1031	14 Ga.	1874, 1898,
		v. Grant	1651, 1676		1938
		v. Sherburne	1078, 2118	3 Ill.	1303
		Waldheim v. Miller	2465	117 Ia.	1669
		Waldo v. Russell	1239, 1312	67 Pa.	2141
		v. Spencer	1664	16 S. & R.	1388
		Waldron v. Priest	1539, 1556	v. Westfield	458
		v. Turpin	2165	v. Wildman	2294, 2296,
		v. Tuttle			2317
		3 N. H.	2534	v. Wilsher	1061, 1062
		4 N. H.	1481, 1484,	v. Wingfield	1219, 1487,
			1778, 2138, 2141		1642
		v. Waldron	21	v. Witter	2555
		v. Ward	1911, 2290, 2327	Walker's Case	216, 347
		Waldrop v. State	2086	Walkerton v. Erdman	1388
		Wales v. Wales	398	Walkley v. Clarke	1779, 2103
		Walker v. Bank	1675	Walkup v. Com.	1408
		v. Barron	92, 379	v. Pratt	1081, 1502
		v. Bayers	2139	Wall v. Beedy	1779
		v. Beauchamp	1483	v. Dimitt	1738
		v. Boston	714, 720, 1943	v. Dovey	1540
		v. Brantner	1461	v. Williams	18
		v. Broadstock	1456, 1458	Wallace v. Collins	1267
		v. Com.	1839	v. Cook	1641
		v. Copley	2207	v. Finch	714
		v. Curtis	1230, 1525	v. Goodall	571
		v. Dunsbaugh	770, 1257	v. Grizzard	1126, 1127, 1131
		v. Ebert	2408, 2415	v. Harris	285
		v. Fields	716	v. Oil Co.	663, 681
		v. Fletcher	1862	v. R. Co.	949, 1040, 1896
		v. Forbes	1271	v. Schaub	720
		v. Griffith	1350	v. Small	1062
		v. Hunter	1304, 2049	v. Souther	1051

	Section		Section		Section
Wallace v. State	352, 987, 2271, 2276, 2277	Wandless v. Cawthorne	1258	Warfield v. R. Co.	1106
v. Tumlin	1194	Wanamaker v. Megraw	18	Warfield's Will	1267
v. U. S.	247, 581	Wanek v. Winona	2220	Waring v. Bowles	1313
v. Whitman	1938	Wangner v. Grimm	1085	v. Tel. Co.	1073
v. Wren	457	Wanner v. Landis	2416	v. Warren	1083, 1133, 1779
Wallace M. & Co. v. Leber	1389	Wantlan v. White	1354	Wark v. Willard	1676
Wallbridge v. Jones	2529	Waples v. Burton	73, 209	Warlick v. Peterson	1615
Waller v. Cralle	1213, 1681	Ward v. Apprice	285, 291, 1858	v. White	167, 1151, 1154
v. School District	1194, 1195	v. Beals	1234	Warner v. Barret	2032
v. State	2103	v. Blackwood	2354	v. Beers	1350
Walling v. Com.	1725	v. Brown	68, 528	v. Campbell	1208
v. Morgan Co.	1530	v. Cheney	2525	v. Com. 4,	1680, 2084, 2086,
v. State	1842	v. Colyhan	613		2088, 2505, 2573
Wallingford v. Tel. Co.	1382	v. Dick	406	v. Dyett	603
Wallingford & Oxford v.		v. Dickson	1960, 2241, 2245	v. Hardy	15, 1651, 1676, 1871
Abbott Walkelin	1837	v. Edge	1778		
Wallis v. Beauchamp	1186	v. Fuller		v. R. Co.	
v. Delancey	1309, 1312, 1513	7 Gray	2020	44 N. Y.	65 96
v. Littell	2410	15 Pick.	1225, 1651	31 Oh. St.	1290, 1300, 1651
v. Mease	406	v. Garnons	1705	v. State	1821
v. Murray	1858	v. Henry	2576	v. Warner	64, 1104
v. Portland	2257	v. Herndon	64, 256, 1623	v. Willey	1141
v. White	692	v. Kilpatrick	571, 1951	Warren v. Anderson	694, 2529
Wallop, ex p.	2220	v. Leitch	1548, 1557	v. Com.	987
Walls v. Atcheson	1878	v. Moore	1239	v. Flag	1681
v. Bailey	2464	v. Odell Mfg. Co.	2552	v. Gabriel	916
Walmesley v. Read	1658, 2048	v. People	2270	v. Greenville	1476
Walmesley v. Robinson	1770	v. Pomfret	1476	v. Lynch	2456
Walpole v. Cholmondeley	2474	v. R. Co.		v. McDonald	1240
v. Ewer	1271	19 S. C.	1951	v. Merry	529
Walrod v. Webster Co.	68	53 S. C.	1944	v. Nichols	1362, 1388, 2098
Walrond v. Van Moses	1676, 2165	v. Reynolds	664, 716, 720	v. Spencer Water Co.	2349
Walser v. Wear	1067, 1560	v. Salisbury	1951	v. State	833, 857
Walsh v. Agnew	18, 774	v. Saunders	1085, 2450	v. Warren	95, 2152
v. Ins. Co.	1951, 1976	v. Sharp	2222, 2223	v. Water Co.	561
v. Kattenburgh	1680	v. Shirley	1960	v. Wheeler	463
v. People	232, 238, 1157	v. State		v. Wright	283, 1722
v. R. Co.	664	28 Ala.	923, 1985	v. Younger	1381
v. Rogers	1384	50 Ala.	836	Warriner v. Giles	1661, 1858
v. Sayre	2220	70 Ark.	2339	Warwick v. Foulkes	406
v. Wheelwright	1458	8 Blackf.	1448, 2098, 2349	v. Warwick	607
Walsham v. Stainton	2319	112 Ga.	1877	Warwickshire Case	2081
Walsingham v. Goodricke	2294	2 Mo.	2261, 2271	Wasey v. Ins. Co.	1053, 1073, 1671
Walson v. Moore	2104	v. Stout	2444	Wash v. Cary	1078
Walston v. Com.	1362, 1398, 1431	v. Sykes	1404	Washburn v. Cuddihy	1700
Walt v. Walsh	6	v. Thompson	2349	v. People	506
Walter v. Bollman	1547, 1550	v. Ward	1013	v. R. Co.	463, 1168, 1800, 2570
v. Brown	1257	v. Wells	1312	v. Washburn	64, 2067
Walterhouse v. Walterhouse	1388	v. Wilcox	1304, 2525	Washington v. Bank	1503
Walters v. People	363	v. Young	905	v. Bedford	2336
Walthall v. Walthall	7	Ward's Estate	1541	v. Cole	938
Walther v. Ins. Co.	1073	Warde v. Warde	2317	v. State	
Walthol v. Johnson	1082	Wardell v. Fermour	1290, 1313	63 Ala.	1021, 1045
Walton v. Coulson	1320, 1513	Warden v. R. Co.	461	17 Tex. App.	2242
v. Green	1730	Warder v. Fisher	1018, 1048	Washington Bank v. Prescott	1521
v. Hale	1257, 1664	Wardlaw v. Hammond	1215	Washington C. & A. T.	
v. Shelly	529	Ware v. Allen	2410	v. Case	283, 437
v. State		v. Brookhouse	1567, 1779	Washington Co. v. R. Co.	1678
Ark., 75 S. W.	205, 2511	v. Morgan	1213, 1245	Washington Fire Ins. Co. v. Davison	1126, 1127
41 Tex. Cr.	150, 2277	v. State		Washington Ice Co. v. Bradley	1873
Wambaugh v. Schenck	2032	96 Ga.	1072	v. Webster	1704, 1943
Wambold v. Vick	1267	35 N. J. L.	2235	Washington & G. R. Co. v. Harmon's Adm'r	2507, 2552
		v. Ware	689, 1021, 1026, 1028, 1041, 1124, 1690, 1938		
		Ware Cattle Co. v. Anderson	457		
		Warener v. Kingsmill	1681		

TABLE OF CASES.

WAS

	Section		Section		Section
Washington & G. R. Co. v.		Watson v. Simpson	1727	Webb v. Smith	
McLane	1750	v. St. P. C. R. Co.	2103	4 Bing. N. C.	343, 406
Wason v. Burnham	1062	v. State	1195, 1206	1 C. & P.	2286
v. Walter	2375	v. Tindal	1651	v. St. Lawrence	1312
Wass v. Stephens	2554	v. Twombly	963, 1005	v. State	
Wassels v. State	2595	v. Walker	745, 749, 1271,	100 Ala.	1841, 2100
Wastl v. R. Co.	949		2163	Ala., 34 So.	1254
Waterbury v. Sturtevant	1086	v. Watson	1347	73 Miss.	390, 2497
v. Waterbury T. Co.	283, 900	Watt v. Jones	2572	29 Oh. St.	987, 1106,
Waterford v. Hensley	2054	v. Kilburn	1320, 1513		1108, 1873
Waterhouse v. Schlitz B. Co.	252	v. People	1977	v. Wilcher	1306, 2141
Waterman v. Davis	1206	Wattles v. Conner	1513	Webber v. Eastern	
v. Raymond	1680	Watts v. Fraser	376, 1234, 2150	R. Co.	1947
v. Whitney	228, 233, 1738,	v. Howard	1523	v. Davis	2529, 2535
	1782, 1790	v. Lawson	1062	v. Hanke	923, 928, 1612,
Waters v. Bellamy	2061	v. Owens	1573, 2063		1985
v. Jones	73	v. People	2513	v. Jackson	908
v. Waters	689, 754, 758,	v. Sawyer	754, 763	Weber v. Com.	2281
	1669, 1938, 1951, 2098	v. Smith	529, 2222	v. Kansas City C. R.	
v. State	2575	Waugh v. Fielding	1971	Co.	2496
Waters' Heirs v. Harrison	1379	Wau-kon-chaw-neek-kaw		v. St. P. C. R. Co.	1722
Waterson v. Seat	1377	v. U. S.	1021	Weber Wagon Co. v. Keil	283
Watertown v. Cady	1350	Wax's Estate	689, 1938,	Webster v. Burke	2054
Waterville v. Hughan	1212		2315	v. Calden	1666
Watkins v. Holman	1672, 1684	Way v. Butterworth	2363	v. Clark	736, 745, 747, 748
v. Nash	2408	v. Cross	1558	v. Harris	1651, 2143
v. Paine	1234	v. Harriman	608	v. Hastings	1350
v. Rist	1873	Waybright v. State	276	v. Lee	1890, 2222
v. Smith	1573	Wayland v. Ware	1335, 1641,	v. Little Rock	1350
v. State	928		1678	v. Lumber Co.	1552
v. U. S.	1387, 1398, 1893	Wayman v. Hilliard	1062	v. Mann	1410
v. Wallace	581	Waymire v. State	1219	v. Paul	1456
Watmore v. Dickinson	1982	Weadock v. Kennedy	1890	v. Rees	1684
Watriss v. Trendall	561, 1944	Weakley v. Wolf	1351	v. Smith	1779
Watrous v. Cunningham		Weatherford M. W. &		v. Vickers	529
65 Cal.	1521	N. R. Co. v. Duncan	290, 379	v. Yorty	229, 230, 1302,
71 Cal.	1538, 1552	Weatherhead v. Sewell	1040,		1303
v. McGrew	1573, 2144		1215, 1658	Webster Mfg. Co. v. Mul-	
Watry v. Ferber	62, 75, 200, 212	Weatherby v. Brown	1387	vanny	571
Watson v. Adams	2531	Weathers v. Barkdale	923, 987	Wedgwood's Case	1644, 2529
v. Anderson		Weaver v. B. & O. R. Co.	905	Weed v. People	106, 216
11 Ala.	770	v. Bromley	738	v. Weed	2450
13 Ala.	1938	v. Cone	581	Weeks, re	2375
v. Billings	1676	v. Cryer	2083	v. Argent	2312, 2321
v. Bissell	1779	v. Leiman	1496, 1644	v. Hull	1111
v. Brewster	1493, 1503	v. Meath	2260	v. Lyndon	416, 457, 1951
v. Cheshire	581	v. Pratt	1640	v. McBeth	1737
v. Com.	2276	v. R. Co.	461	v. McNulty	289, 2098
v. Coulson	2141	v. Robinett	1339	v. Maillardet	2410
v. Cowles	969	v. State		v. Smith	1350
v. Cresap	570	77 Ala.	1072	v. Sparke	1584, 1587, 1591,
v. England	2531	43 Tex. Cr.	273, 1072		1623
v. Gilday	1388, 2098	v. Traylor	953	Weems v. Weems	1938
v. Ins. Co.	913	v. Whilden	2005, 2008	Weems' Lessee v. Disney	1564
v. King		Webb v. Atkinson	253, 1072	Weguelin v. Weguelin	1414,
3 C. B.	1063	v. Danforth	529		1415
4 Camp.	1641, 1672	v. Den	1354	Wehrkamp v. Willet	987, 1985
1 Stark	158, 2531	v. Drake	1729	Weidler v. Farmers'	
v. Little	1666	v. Dye	1302, 1511	Bank	38, 40, 1871
v. Lyons	613	v. East	2268	Weidman v. Kohr	1082
v. Miller	760	v. Feathers' Est.	770	v. Symes	2018
v. Mining Co.	1963	v. Holt	1676	Weidner v. Phillips	392
v. Moore	74, 406	v. Kelsey	2578	Weigand v. Refining Co.	2494
v. R. Co.		v. Page	2203	Weigel v. Weigel	2067
53 Minn.	1976	v. Petts	1364	Weigel's Succession	2067
76 Minn.	1387, 2103	v. Plummer	2430	Weightnovel v. State	278, 1072,
57 Wis.	463, 1943	v. Powers	371		1722, 1725
v. Richardson	95, 1492, 1605	v. R. Co.	456	Weil v. Silverstone	913, 1389
v. Roode	1202	v. Richardson	1502, 1778	Weiler v. Monroe Co.	1188

	Section		Section		Section
Weill v. Kenfield	1350	Wells v. Stevens	2450	West Jersey Traction	
Weinburg v. Somsps	2354	v. Tryon	1651	Co. v. Board	1677, 1680
Weinkle v. R. Co.	1750	v. Tucker	2237	West Newbury v. Chase	714
Weinrich v. Porter	1779	v. Walker	1293	West Pub. Co. v. Law-	
Weir v. Hale	1195	v. Wells	1736	yers' Co-op. P. Co.	371, 460,
v. McGee	1031, 1037	v. Wilson	1225, 1651		1230
Weis v. Tiernan	1278	Welman, re	1350	Westall v. Osborne	1750
Weisbrod v. R. Co.	1186	Welsbach I. G. L. Co. v.		Westbrooks v. State	59
Weisham v. Hocker	2437	New Sunlight I. Co.	2218	Westerfield v. Scripps	406
Weisenberg v. Appleton	252	Welsh v. Argyle	2507	Westerfield's Estate	1890
Weiser v. Heintzman	6	v. Barrett	1518, 1521,	Westerman v. Foster	1651
Weitman v. Thiot	2141		1522, 1675	v. Westerman	7, 2245
Welch v. Abbot	1028	v. State		Western Assur. Co.	
v. Com.		96 Ala.	1476	v. Mohlman Co.	1693,
Ky., 60 S. W.	987	Nebr., 82 N. W.	770,		1698
Ky., 63 S. W.	987		1135	v. Ray	763
v. Greene	760	Wendell v. Abbott	1225, 1651,	Western Coal & M. Co.	
v. Ins. Co.	1913, 1978		1710	v. Berberich	1921, 1951
v. R. Co.		v. Safford	2083	Western Gas C. Co.	
176 Mass.	1976	Wendt v. R. Co.	1890	v. Danner	791
182 Mass.	1605	Wenegar v. Bollenbach	1067	Western Home Ins. Co. v.	
v. Ricker	377, 393, 1058	Wenner v. Thornton	1350	Richardson	1943
v. Sackett	2408	Wenning v. Teeple	2506	Western Loan & S. Co. v.	
v. State		Wentworth v. Crawford	1890	Waisman	1347
104 Ind.	276, 1021,	v. Lloyd	2322	Western Mfg. Co. v. Rogers	2435
	1041	v. Read	2475	Western Maryland R. Co.	
Tex. Cr., 46 S. W.	1038	Werbiskie v. McManus	1269,	v. Mauro	1462
Tex. Cr., 60 S. W.	1552		1552	Western R. of Alabama v.	
v. Stipe	770, 1938	Werely v. Persons	1719	Arnett	1951
v. Welch		Werner v. R. Co.	682, 1974	Western Stone Co. v.	
16 Ala.	2067	Wertheim v. Contin.		Whalen	249
9 Rich.	1302	R. & T. Co.	2200	Western Twine Co. v.	
Welcome v. Batchelder	736	Wertz v. May	803, 1108,	Wright	95, 1236,
Weld v. Boston	1784		1387		2154
v. Brooks	1592	Wescott v. Wescott	1133	Western Union T. Co. v. Atl.	
Welden v. Buck	585	Wesley v. State		& Pac. S. T. Co.	1674
Welder v. Carroll	1570	52 Ala.	782, 1750, 1757	v. Bates	1236
Weldon v. Burch	2279	37 Miss.	56, 63, 246, 247	v. Blance	1236
v. State	1135, 1136,	West v. Bank	1623	v. Fatman	1236
	1138, 1821	v. Beck	2526	v. Hopkins	1236
Welland v. Middleton	1640	v. Druff	205	v. Morris	676
Welland Canal Co. v.		v. Lynch	987	Western & A. R. Co.	
Hathaway	1257	v. Price	1778	v. Beason	1750
Wellar v. People	918, 2079, 2080	v. R. Co.	463	v. Bussey	1407, 1415
Wellcome, re	2498	v. Smith	1062, 2556	v. Calhoun	463
Wellford v. Eakin	1312, 1320	v. State		v. Cox	1698, 1807
Wellington v. R. Co.	1672	76 Ala.	1476	v. Denmead	2206
Wellman v. Jones	748	42 Fla.	363	v. Hyer	2566
Wells, re	1302	22 N. J. L.	4, 1244,	v. Morrison	288
v. Adams	1195		2006, 2008,	v. Roberson	2573
v. Burbank	382		2016, 2529	v. Stafford	688, 791
v. Compton	1066	1 Wis.	2084, 2085,	Westfelt v. Adams	1568, 1588
v. Davis	675		2086, 2191, 2192,	Westfield v. Warren	1362, 1420,
v. Eastman	1951		2201, 2205		1503
v. Fisher	2341	v. U. S.	832	Westfield Cigar Co. v.	
v. Fletcher	2230	West Chester & P. R.		Ins. Co.	665, 1246
v. Gress	2536, 2569	Co. v. McElwee	283	Westinghouse Co. v.	
v. Hatch	1541, 1542, 1548	West Chester & W. P. R.		Tilden	1234
v. Ins. Co.	1402, 1409	Co. v. Chester Co.	1640	Westmacott v. Westmacott	1645
v. Iron Co.	770	West Chicago St. R. Co.		Westmore v. Sheffield	1938
v. Jackson I. M. Co.	1269	v. Carr	1719, 1722	Westmoreland v. State	2100
	2168, 2576	v. Dougherty	966	v. Westmoreland	2525
v. McMaster	1225	v. Fishman	684, 1974	Weston v. Barnicoat	1729
v. Martin	1194	v. Kennedy-Cahill	437, 438	v. Foster	1951
v. Mfg. Co.	1388	v. Kennelly	458, 1719	v. Penniman	1647
v. Miller	1195	v. Lieserowitz	1011, 2498	Westover v. Ins. Co.	2329, 2387,
v. State		West Feliciana R. Co.			2391
131 Ala.	987	v. Thornton	1275	Westphal v. R. Co.	905
22 Ind.	1219	West Jersey T. Co., re	2169	v. Westphal	2046

TABLE OF CASES.

WET

	Section		Section		Section
Wetherbee v. Dunn	1890, 2167,	Whipp v. State	2239	White v. McQueen	2554
v. Ezekiel	2168	Whipple v. Preece	1890	v. Merrill	1060
v. Norris	654, 691	v. Rich	1041	v. Murtland	75, 133, 210
Wetherbee's Ex'rs v.		v. Stevens	18	v. Old Dominion S. S.	
Wetherbee's Heirs	672, 678,	v. Walpole	463, 716	Co.	1062
	688	v. Whipple	1943	v. Pease	2553
Wetherell v. Hollister	792	Whitacre v. M'Ilhanev	1275	v. Perry	610, 2235, 2336
Wetherston v. Edgington	1298	Whitaker v. Arnold	1387	v. R. Co.	
Wetmore v. Mell	1750, 1770	v. Brown	1083	142 Ind.	1012, 1013
Weyand v. Stover	1350	v. Campbell	1951	61 Wis.	2220
v. Tipton	1664	v. Hamilton	1938	v. Rosenthal	321
Weyman v. People	321	v. Marsh	1408	c. Ross	1730
Weymouth Case	1712	v. Salisbury	898, 899, 907,	v. Sayward	406
Whaley v. State	276		1302	v. Smita	1778
Whann v. Hall	1320	v. State	142, 276	v. Smith	
Wharam v. Rountledge	2125	v. Wheeler	1086, 1779	A. M. & O.	1898
Wharram v. Wharram	1267	Whitbread v. Gurney	2294,	46 N. Y.	1064
Wharton v. State	2570		2319	v. State	
Wharton Peerage Case	1662	Whitcher v. Davis	2218	103 Ala.	1974
Wheat v. Ragsdale	1240	v. McLaughlin	1644	111 Ala.	276, 293,
v. Smith	1351	v. Morey	2098		988, 1618
Wheatley v. State	2260	v. R. Co.	458	114 Ala.	923
v. Williams	2308	v. Shattuck	253	133 Ala.	561, 851
Wheelden v. Wilson	581	Whitcomb v. Whiting	1077	Ala., 34 So.	568, 1821
Wheeler v. Ahlers	93, 318	Whitcomb's Case	2195	70 Ark.	836
v. Buck	392	White, re	2528	56 Ga.	784
v. Campbell	617, 1777,	v. Allen	762	100 Ga.	93, 1447, 1873
	1971, 2336, 2433	v. Bailey	1890, 1958	3 Heisk.	858
v. Hatch	736, 747	v. Ballou	1951	31 Ind.	279
v. Hill	2311, 2313	v. Beal & F. G. Co.	321,	53 Ind.	581
v. Jenison	1013, 1404		1640	52 Miss.	497, 1840,
v. Le Marchant	2286, 2319,	v. Bird	2306		2056, 2270
	2380, 2394	v. Bisbing	1373	32 Tex. Cr.	499
v. McCorristen	1086	v. Brown	1195	v. Strother	1481
v. McFerron	1404	v. Burney	1195	v. Suffolk & C. R.	
v. Moody	1239	v. Chontean	1461	Co.	2552
v. Packer	392	v. Clay	2110	v. Terr.	105, 111, 247
v. R. Co.	1722	v. Clements	1213	v. Tolliver	704, 2153
v. Smith	1389, 1878	v. Collector	167	v. Tripp	93
v. Standley	2141	v. Collins	1051	v. Tucker	581
v. State		v. Com.		v. U. S.	1633, 1639
112 Ga.	1442	80 Ky.	142, 194, 195,	v. Wansey	6
158 Ind.	106, 2381		460, 1618	v. Wheaton	1086
34 Oh. St.	233, 1671	96 Ky.	506, 1828	v. White	
v. Styles	1066	v. Concord R.	463	82 Cal.	770
v. Thomas	905	v. Corlies	2410	45 N. H.	2067
v. U. S.	505, 506, 507	v. Creamer	1066	5 Rawle	2354
v. West	1067	v. Dowling	1075	v. Whitney	1560
v. Wheeler's Estate	607	v. Dwinel	1651	v. Wilkinson	750, 751, 1530
Wheeler & W. M. Co.		v. Englehard	1675	v. Wilson	2454
v. Barrett	1890	v. Everest	2222	v. Wood	1304
v. Buckhout	2012	v. Farris	2141	v. Woodruff	1086
v. Tinsley	616	v. Flemming	95	White Deer Creek Impr.	
Wheeling v. Trowbridge	613	v. Fox	2089	Co. v. Sassaman	1943
Wheels v. State	2079	v. Fussell	986	White Memorial Home v.	
Wheelock v. Godfrey	689, 2390	v. Graves	233	Haeg	585
Wheelton v. Hardisty	2494	v. Harlow	2211	White S. M. Co. v. Gordon	2008,
Wheelwright v. Dyal	2464	v. Helmes	2048		2015
Whelan v. Lynch	1704	v. Hermann	463	Whiteacres v. Thurland	2250
Whelless v. Rhodes	1966	v. Herrman	1233	Whiteford v. Burckmyer	1005,
Whereatt v. Ellis	1856	v. Hinton	1350		1028,
Whetston v. State	149	v. Holladay	1299, 1301		1272, 1675
Whetstone v. Bank	1966	v. Hutchings	1225, 2143	Whitehall v. Smith	1195
Whicher v. Whicher	803	v. Kearney		Whitehead v. Scott	1249, 1770
Whigenant v. State	1966, 1977	2 La. An.	1680	Whitehouse v. Bickford	1633,
Whilden v. Bank	1213, 1236	9 Rob.	1219		2109, 2139
Whisler v. Whisler	1557	v. Lisle	1592	Whitelaws v. Sims	1938
Whiskey Cases	2280	v. McLean	1010	Whiteley v. China	201, 1943
		v. McPherson	561	v. King	1736

	Section		Section		Section
Whitelocke v. Baker	1482, 1486	Whittier v. Franklin	68, 201,	Wilcox v. Jackson	1239, 2166
v. Musgrove	1513, 2529		1621, 1977	v. Leake	1944
Whiteman v. Whiteman	2477	v. Varney	334	v. Lucas	2418
Whitesell v. Crane	716, 1943	Whittingham v. Bloxham	1873	v. Ray	1678
Whiteside v. Hoskins	1245	v. Burgoyne	2257	v. Smith	2535
v. Lowney	2591	Whittle v. State		v. State	2061
v. Watkins	1195	79 Miss.	2042	v. Wilcox	792, 794
Whitfield v. Aland	761	43 Tex. Cr.	2018	Wild's Case	2462
v. Fausset	1177, 1189	Whitton v. Whitton	1644	Wildberger v. Cheek's	
v. Whitfield		Whittuck v. Waters	1644	Ex'rs	2477
40 Miss.	1943	Whitwell v. Johnson	2153	Wilde v. Armsby	2525
44 Miss.	2336	v. Winslow	1737	Wilder v. De Cou	1955
Whitford v. Tutin	1201, 1212	v. Wyer	2115	v. St. Paul	1651, 1665
Whiting v. Barney	2295, 2312	Whizenant v. State	1966, 1977	v. State	2354
v. Nicholl	2531	Whorley v. Tennessee		Wilder v. R. Co.	461
Whitley v. State		C. Expos. Co.	463	Wiley v. Bean	1312
38 Ga.	1438, 1445, 1447	Whyman v. Garth	1288, 1299,	v. Givens	1257
78 Miss.	855		1301	Wilfong v. Johnson	2442
Whitley Grocery Co. v.		Wiborg v. U. S.	1079	Wilhelmi v. Leonard	1045, 1890
Roach	1530	Wichita v. Stallings	2354	Wilhite v. Barr	1678
Whitman v. Freese	1969	Wichita & W. R. Co. v.		Wilkerson v. Allen	2105
v. Heneberry	2138	Kuhn	616, 1943	v. Eilers	1045
v. Morey	905, 917, 918,	Wick v. Baldwin	1106	v. State	1434, 2339
	1045, 2115	Wickenkamp v.		Wilkes v. Heaton	1877
v. R. Co.	1951	Wickenkamp	15, 1195, 1896	v. Market Co.	1949
v. Shaw	1573, 2139	Wicktorwitz v. Ins. Co.	1078	Wilkie v. Chadwick	2195, 2199
v. State		Wickliffe v. Hill	2167	Wilkins v. Babbershall	1026,
69 Ind.	133	Wicks v. Dean	2306		1028
80 Md.	2577	v. Smalbroke	521	v. Bent	2349
Whitmire v. Napier	1257	Widdifield v. Widdifield	1249,	v. Earle	382, 1013
Whitmore v. Ainsworth	1969		1257	v. Flint	290
v. Ball	1800	Widdows' Trust, re	2528	v. Jones	2473
v. Bowman	1943	Wiedemann v. Walpole	1071,	v. Malone	2252, 2282
v. Johnson	2110		1073, 2061	v. Metcalf	416, 1730,
Whitnash v. George	1077	Wieh1 v. Robertson	1079		1974
Whitner v. Belknap	2575	Wiggin v. Day	321	v. Missouri Valley	1722
Whitney v. Bacon	1567	v. Plumer	89, 224	v. Moore	2327
v. Bailey	285	Wiggins v. Fleishel	1299, 1301,	v. State	1404
v. Boston	714, 1005		1651	v. Stidger	1075, 2593
v. Bunnell	2008	v. Guier	1678	v. Wilmington	1719
v. Com.	855, 857	v. Henson	1977	Wilkinson v. Adam	2463
v. Fox	6	v. Holley	2105	v. Jett	1674
v. Gross	97, 199	v. McLean	2159	v. Moseley	461, 568, 681,
v. Houghton		v. Pryor	1245		1722
125 Mass.	416	v. Utah	111	v. Pearson	233, 1738,
127 Mass.	1072	Wigginton v. Com.	2071		1938, 1958
v. Pierce	2201	Wigglesworth v. Dallison	2440	v. State	791, 1874
v. R. Co.	1976	Wight v. Rindskopf	580	v. Wilkinson	1392
v. Spratt	2572	Wightman v. Providence	1807	Wilkinson's Est.	2518
v. State		Wigley v. Solicitor	1644	Will v. Mendon	438, 1722, 1974
10 Ind.	1182	Wiheh v. Law	1646	Willamette F. C. &	
154 Ind.	950, 987, 1005	Wike v. Lightner	1985	L. Co. v. Gordon	1275
53 Nebr.	2073, 2497	Wikel v. Board	2566	Willard v. Darrah	2474
v. Sterling	1624	Wilber v. Eicholtz	2016	v. Fralick	2097
v. Thatcher	719	v. Goodrich	1681	v. Goodenough	928, 1111,
v. U. S.	2566	Wilberding v. Dubuque	252		1985
v. Wagener	1779	Wilbor, re	2532	v. Harvey	1216, 2450
v. Wheeler	1737	Wilbur v. Flood	987, 1270	v. Mellor	1704
v. Whitman	2349	v. R. Co.	1674	v. Pettitt	1874
Whiton v. Ins. Cos.	1597, 1662,	v. Selden	1404, 1521, 2098	v. State	821
	1684	v. Strickland	1086	v. Sullivan	995
Whitrong v. Blaney	1664	v. Wilbur	1190	Willaume v. Gorges	89
Whitsett v. R. Co.	1976	Wilburn v. Hall	1681	Willcox v. Gottfrey	2061
Whittaker v. Com.	2060	v. State	1194	Willeford p. Bailey	18, 1406
Whittit v. Miller	1644	Wilcocks v. Phillips'		Willett v. Goetz	68
Whittelsey v. Kellogg	1956	Ex'rs	728, 1271	Willett v. Andrews	1195, 1267
Whittemore v. Brooks	1313,	Wilcox v. Cate	2434	v. St. Albans	457, 714
	1316	v. Forbes	792	Willey v. Portsmouth	252, 657,
v. Farrington	2417	v. Hunt	5		771, 1219

TABLE OF CASES.

WIL

	Section		Section		Section
William v. Gwyn	1167	Williams v. Miles	2106, 2523	Williams v. Thorp	1062
v. State	2100	v. Miller	529	v. Turner	1028, 1029, 1391, 2210
William Jarvis, The	6	v. Miner	406	v. U. S., 3 D. C.	
William & Mary Col- lege v. Powell	603, 610, 2237	v. Montgomery	2354	App.	507, 1821
Williams v. Allen	1876	v. Mudie	2294	1 Ind. Terr.	1270
v. Ashton	2525	v. Nally	1158, 1700	Ind. T., 69 S. W.	987
v. Averitt	1878	v. People		168 U. S.	154, 1616
v. Baldwin	2235, 2237, 2336	54 Ill.	111	v. Wager	754
v. Bass	1225, 1651, 2105, 2141	101 Ill.	2071	v. Walbridge	529
v. Benton	1202	166 Ill.	216, 347, 2497	v. Walker	917
v. Blumenthal	2313	196 Ill.	2513	v. Ward	1212, 2098
v. Broadhead	1388	v. Phillips	2337	v. Waters	1268
v. Brooklyn El. R. Co.	1807	v. Poppleton	261, 1951	v. Wetherbee	1225, 1318, 1651, 1676
v. Brown	682, 720, 1944	v. Price	1062	v. Wilcox	18
v. Brickell	1236, 1256	v. Putnam	1675	v. Wilkes	1681, 2164
v. Brummel	1267	v. Quebroda R. L. & C. Co.	2298	v. Williams	
v. Callender	73	v. R. Co.		3 Beav.	1955
v. Cannon	1966	103 Ky.	571	1 Hagg. Cons.	238, 866, 2067, 2081
v. Carpenter	1674	68 Minn.	1719, 1722	108 Ia.	1195
v. Case	1195	155 N. Y.	2495	Ky., 71 S. W.	617
v. Casebeer	258	v. Rawlins	803	L. R. 1 P. & D.	2067
v. Chapman	1028, 1031, 1035	v. Riley	2245	142 Mass.	2051
v. Cheney	1065, 1387	v. Robbins	334	47 Md.	1938
v. Com.		v. Sills	1295	67 Mo.	616
Ky., 50 S. W.	987	v. Smith	1675	102 Wis.	89
Ky., 68 S. W.	580, 2042	v. Southern P. Co.	1750	v. Young	2319
29 Pa.	153, 852	v. Soutter	657	Williamson v. Fischer	791, 794
91 Pa.	2042	v. Spencer	689	v. Mosley	2141
v. Conger	2006, 2016	v. State		v. Nebers	1738
v. Culver	1003, 1076	44 Ala.	2086, 2231	v. People	1034
v. Dewitt	1969, 2442	52 Ala.	1076	v. R. Co.	1756
v. Donaldson	2119	54 Ala.	2086	v. State	2089
v. East India Co.	1339, 2079, 2089, 2534	61 Ala.	2016, 2018	Willies v. Farley	1779
v. Eikenberry	1086	74 Ala.	246	Williford v. State	2079
v. Eldridge	770	81 Ala.	1072	Willingham v. State	
v. Ensign	1778	98 Ala.	2265, 2276	104 Ala.	1219
v. Fambro	63	109 Ala.	506, 1821	130 Ala.	247
v. Farrington	2268, 2279	123 Ala.	1966	Willink v. Miles	2168
v. Fitch	2294	63 Ark.	824, 862	Willis v. Bailey	1858
v. Floyd	1300	69 Ark.	855, 2100	v. Bernard	13, 1730
v. Gilman	15	32 Fla.	1890	v. Gammill	2334
v. Goodall	2450	40 Fla.	2513	v. Jernegan	1073
v. Greaves	1464	42 Fla.	580	v. Louderback	2110
v. Hart	1086	Fla., 34 So.	682	v. Peckham	2203
v. Harter	1082	19 Ga.	1398	v. Quimby	270, 785
v. Hathaway	714	57 Ga.	2071	v. Singer	704
v. Hayes	1877	69 Ga.	1329, 2071, 2236	v. State	
v. Heath	1225	100 Ga.	2183, 2264	134 Ala.	1230
v. Herrick	1603	3 Heisk.	63, 111, 246, 247	67 Ark.	1079
v. Hill	1225	8 Humph.	357	93 Ga.	838
v. Hillegas	2141	16 Ind.	1205	43 Nebr.	933
v. Hollingsworth	75	6 Lea	1350	v. Ward	613
v. Innes	1070	12 Lea	499	v. West	1911
v. Ins. Co.	1206	64 Md.	437, 1976	Willman v. Worrall	694
v. Jarrot	1269, 2158	72 Miss.	833	Willcock v. Wilson	1681
v. Johnson		73 Miss.	1020, 1021, 1038	Willoughby v. Dewey	1186
112 Ind.	2384, 2389	79 Miss.	1124	v. R. Co.	1890
1 Stra.	2235	35 Tex.	1840	Willoughby's Case	2220
v. Judy	1084	42 Tex.	2060	Wills v. Lance	2570
v. Kelsey	736, 745, 747, 2103	v. Stoughton	1234	v. M'Dole	1201, 1281
v. Kerr	1273	v. Suffolk Ins. Co.	2566	v. Russell	1890
v. McKee	1908	v. Taunton	655, 660	v. State	
		v. Taylor	1350	73 Ala.	2595
		v. Tel. Co.	1078	74 Ala.	1263
		v. Thomas	1061, 1062	Wills Point Bank v. Bates	2349

	Section		Section		Section
Willson v. Betts	704, 1311, 1320, 1321, 2130, 2137, 2141	Wilson v. State		Winne v. Lloyd	1281
Wilmer v. Israel	1543	43 Tex.	2081	v. Nickerson	1557, 1558
Wilmington v. Burlington	1501	45 Tex.	2089	Winnepesaukee C. M.	
Wilmot v. Maccabe	1862	12 Tex. App.	2089	Ass'n v. Gordon	2451
v. Vanwart	1921	39 Tex. Cr.	2272	Winner v. Bauman	1543, 1557, 1560
Wilson, ex p.	2264	41 Tex. Cr.	2252	Winnipiseogee Lake	
v. Barnett	66	3 Wis.	1985	Co. v. Young	2572, 2575
v. Bauman	565	v. Stevens	2477	Winona v. Burke	2572
v. Beauchamp	2008, 2016	v. Terry	1784	v. Huff	1198, 1208, 1225, 1267
v. Berryman	2354	v. Thornbury	1859	Winona & S. P. R. Co.	
v. Boerem	1362, 1432	v. Thorpe	2529	v. Denman	1943
v. Bowie	2125	v. Troup	2296	Winsett v. State	2079
v. Brownlee	1487, 1503	v. U. S.		Winship v. Clendenning	1225
v. Calvert	2100	149 U. S.	2272	v. Neale	963
v. Carson	726, 1271	162 U. S.	278, 792, 821, 826, 851, 852, 861, 2513	Winslow v. Morrill	1166
v. Coleman	669	v. Van Leer	694, 695, 1698	v. Newlan	1029
v. Com.		v. Wagar	1890	v. State	1254, 2071, 2072, 2073, 2081
Ky., 54 S. W.	763	v. Waltersville S. Dist.	1661	Winsmore v. Greenback	2239
Ky., 60 S. W.	1439	v. Wilson		Winsor v. Dilloway	1549
Ky., 64 S. W.	1270	1 Halst.	1539, 1546, 1549	v. Regina	580
v. Conine	2110	26 Or.	2444	Winston v. Gwathmey	2141, 2164
v. Derr	907	Prob.	564	v. Moseley	901, 905, 907
v. Granby	458, 1719	v. Woodruff	1779	v. Prevost	1225
v. Harris	1078	v. Woodside	1141	Winter v. Baudel	1640
v. Hays' Ex'r	1873	v. Wright	1225	v. Burt	716
v. Hodges	2531	v. Young	1246	v. Butt	905
v. Hoffman	1680	Wilt v. Bird	1062	v. Judkins	1301
v. Irish	2016	v. Cutler	1651, 1681, 1684, 2159	v. Mixer	1842
v. Kirkland	2008	v. Vickers	1976	v. Montgomery	716
v. McClure	2427	Wilton v. Humphreys	112, 917	v. R. Co.	1719
v. M'Veagh	1664	v. Railroads	1856	Winters v. Earl	2437
v. Markley	1350	v. Webster	1730	v. Laird	1225
v. Mitchell	2086	Wimber v. R. Co.	283, 1951	v. State	2501
v. Noonan	72, 73, 209, 581, 1668	Wimberly v. State	2071	v. Winters	18, 2329, 2391
v. Owens	2573	Wims v. State	394	Winterton v. R. Co.	1873
v. Patrick	1133, 1779	Winans v. Dunham	1215, 2110	Winthrop v. Grimes	1186
v. People	1852	v. R. Co.	1908	v. Ins. Co.	1955, 2463
v. Potter	2537	Winch v. Norman	2012, 2020	Wintle, in re	1646
v. Powers	2410	Winchell v. Edwards	280	Winton v. Saidler	529, 531
v. R. Co.		v. Latham	1896, 2115	Wisconsin Central R. Co.	
31 Minn.	1236	v. Winchell	1873	v. Cornell Univ.	2569
18 R. I.	1951	Winchelsea v. Wauchope	1304	Wisconsin River L. Co.	
52 S. C.	784	Winchester v. Charter	89, 334, 1082, 1086	v. Walker	907, 1213
v. Rastall	2286, 2290, 2294, 2303, 2317, 2321, 2380, 2394	v. Fournier	2290	Wisconsin Trust Co. v.	
v. Robinson	406	Winchester F. Ins. Co. v.		Bank	2531
v. Rowe	1567	Foster	2334	Wisdom v. People	2056
v. Royston	1312, 1320, 1676	Winchester & P. M. Co. v.		v. Reeves	1382, 2140, 2146
v. Runyon	923, 1985	Creary	1086	v. State	852, 2089, 2363
v. Sax	1078	Windom v. Brown	1195	Wise v. Ackerman	458
v. School District	1674, 1680	Windsor Case	1712	v. Bigger	1350
v. Seattle	1335	Wineland v. Coonce	1681	v. Foote	615, 770, 1938
v. Smelser	1770	Winemiller v. Thrash	2110	v. Schloesser	276
v. Smith	1651, 2167	Winfield v. State	857	v. State	246
v. Southern Pac. Co.	1750	Wing v. Abbott	1195, 1267	v. Wakefield	18, 900, 1985
v. Southern R. Co.	720	v. Angrave	2532	v. Wynn	1490, 1491, 1501
v. Spring	1676, 2110	v. Earle	2462	Wiseman v. Green	2477
v. State		Wingo v. Caldwell	1778	v. Risinger	1186
52 Ala.	1839, 1840, 1842	Winklemans v. R. Co.	782	Wisener v. Maupin	1838, 1841
73 Ala.	205, 1966, 2062	Winkles v. Guenther	2525	Wishart v. Downey	291, 1293
110 Ala.	105, 852	Winkley v. Kaime	2477	Wisner v. Wirth	1681
30 Fla.	110, 111	Winn v. Patterson	1195, 1274, 1275, 1311, 1651, 2143	Wiswall v. Ross	1871
16 Ind.	62, 200, 987	v. Swayne	2250	Witcher v. Richmond	406
41 Tex.	568, 2081			Withers v. Fiscus	2349

TABLE OF CASES.

WIT

	Section		Section		Section
Withers v. Gillespy	1391, 2118,	Wood v. Hammerton	986, 1933	Woodruff v. Whittlesey	64, 1086
v. Moore	2125	v. Harrell	1275	Woods v. Allen	571
Withington v. Warren	2440	v. Hickok	2053	v. Banks	1219, 1680, 2109
Withneel v. Gartman	2358	v. Knapp	1678	v. Burke	1213
Withnell v. Gartham	2462	v. Lentz	2239	v. De Figanieri	2219
Witlow v. State	1586	v. McGuire	1897	v. Gevecke	2098
Witmark v. R. Co.	2236	v. Mackinson	1893	v. Gummert	89, 224
Wittenberg v. Molyneux	463, 1978	v. Maguire	2183	v. Keyes	2098
v. Onsgard	1404	v. Mann	1985	v. M'Pheran	1842
Witter v. Cazaletts	682, 2220	v. Matthews	928	v. Miller	2287
v. Latham	1858	v. R. Co.	1978	v. Monroe	1672
Witz v. Fite	1194, 1195	v. Sawyer	228, 657	v. People	62, 200, 398
Wixom v. Goodcell	2442, 2540	v. State		v. Pindall	1198
Woburn v. Henshaw	1890	48 Ga.	923	v. Polhemus	1347
Woeckner v. Motor Co.	2327	92 Ind.	247, 1871	v. R. Co.	571
Woey Ho v. U. S.	199, 1951	58 Miss.	568, 689, 1922,	v. State	
Wogan v. Small	1107, 2066		1935, 1938	76 Ala.	2059, 2236
Wohlford v. People	770, 1958	32 Tex. Cr.	398	101 Ga.	1225
Wolcott v. Heath	581	v. Strickland	4, 1205	63 Ind.	1329
v. Hall	736	v. Swift	1388	26 Tex. App.	521
Wolf v. Carothers	73, 74	v. Trust Co.	530, 991, 1352	v. Woods	
v. Frank	1085	v. U. S.	216, 341	2 Curt. Eccl.	1336, 1832,
v. Goddard	211	v. Wageman	1154		2086, 2088
v. Perryman	1665	v. Weld	842, 843, 852	4 Hare	2294
v. Williams	75, 209	v. Welder	1651	Woodside v. State	1397, 1398
v. Wolf	1960	v. Willard		Woodstock Iron Co.	
v. Wyeth	2268	36 Vt.	794	v. Roberts	1239, 1587,
Wolf's Case	2098	37 Vt.	1565, 1566,		1680
Wolfe v. Hauver	851	v. Wood	1567, 1568	Woodward v. Blue	269, 1492
v. R. Co.	907	v. Zibble	2067	v. Buchanan	377
v. Underwood	2155	Wood River Bank v.	1081	v. Goulstone	1576, 1736
v. Washburn	1246	Kelley	1028, 1029	c. Heist	1669
Wolferman v. Bell	2450	Woodard v. Bellamy	77, 206	v. Leavitt	89, 224, 2349,
Wolf v. Smith	2525	v. Cutler	18		2354
v. Wolf	74	v. Eastman	1021	v. Republic	205
Wolfe v. Minnis	2046	v. Spiller	2016	v. State	657, 728, 1977
Wolford v. Farnham	1807	Woodbeck v. Keller	2042	v. Sullivan	233
44 Minn.	604, 2240	Woodbridge v. Austin	1271	Woodworth v. Barker	1196
47 Minn.	1230	v. Spooner	2444	v. Gorsline	1387
Wolfsen v. Allen B. Co.	1623	Woodburn v. Sterling	1777	v. Thompson	1064, 1067,
v. U. S.	216, 331,	Woodbury v. Anoka	1166		1969
	580	v. District	1890	v. Woodworth	2046
Wolgrave v. Coe	2250	v. Obear	672, 681, 683	Woolacott v. Case	2536
Wollaston v. Hakewill	1256,	v. Woodbury's		Woodlridge v. Wilkins	1239
	1300	Estate	1558	Woolery v. Woolery	1085, 1777
Wolters v. King	2442	Woodcock v. Bennet	2123	Woolfolk v. State	
v. Rossi	1388	v. Houldsworth	95, 2152	81 Ga.	852, 2264
Wolverhampton N. W.		v. Johnson	112, 229, 1938	85 Ga.	2100
Co. v. Hawksford	1256	v. Worthington	1858	v. Woolfork	2067
Wolverton v. Com.	18, 1267	Woodcraft v. Kinaston	1216	Woolley v. R. Co.	2319
v. State	2086	Woodford v. McClenahan	694,	v. State	
Wolverton Mortgaged			702	Tex. Cr., 56 S. W.	2277
Estates, re	2472	Woodford's Case	959	Tex. Cr., 64 S. W.	2273,
Womack v. Dearman	2164	Woodhead v. Foulds	1347		2363
v. Hughes	1649, 1650,	Woodhull v. Holmes	529	Woolner v. Devereux	1858
	1651	Woodin v. People	1976	v. Spalding	682
v. White	1275	Woodman v. Coolbroth	18,	Wools v. Walley	2256
Wood v. Allen	2464		770, 1225	Woolsey v. Bohn	1549, 1558
v. Brewer	658, 1951	v. Dana	700, 709, 2004,	v. Williams	1502, 2529
v. Broadley	613		2005, 2008, 2016	Woolverton v. Van Syckel	2235
v. Carpenter	1081	v. Segar	1309, 1313, 1320	Woolway v. Rowe	1049,
v. Chetwood	2336	Woodnoth v. Lord			1080, 1082
v. Cole	803	Cobham	1518	Wooster v. Butler	1587, 1665
v. Cullen	1213	Woodruff v. Garner	1389	v. State	78, 1620
v. Drury	1316	v. Hundley	1512, 2131	Wooten v. Nall	2125
v. Finson	377	v. Ins. Co.	714	v. Wilkins	1432, 1436
v. Fitz	2158	v. State	736, 1219, 1230,	Worcester v. North-	
v. Graves	1066		1387, 1398, 1662	borough	665, 1635, 1641
				Worcester Case	1712, 1842

	Section		Section		Section
Worcester National Bank		Wright v. State		Yarborough v. Hood	1392
v. Cheney	2577	88 Md.	1182,	v. Moss	1058
Word v. McKinney	1239, 2159		1198, 1750	v. State	414
Worden v. R. Co.	1693, 1698	50 Miss.	1326, 1327,	Yarbrough v. Arnold	1684, 1779
World v. State	203, 1620		1349	v. State	
Wormeley's Case	748, 1028	43 Tex.	2059	105 Ala.	923, 928,
Wormley v. Hamburg	7	9 Yerg.	246, 1476		1128, 1132, 1938
Wormsdorf v. R. Co.	251	v. Tatham	10, 21, 28, 29, 260,	115 Ala.	2497
Worrall v. Jones	2218		267, 1304, 1305,	70 Miss.	2272
Worrell, re	2235		1362, 1370, 1388, 1511,	Yardley v. Arnold	586
Worsham v. Warsham	2048		1583, 1714, 1730, 1773,	Yates v. Carnsew	2104
Worth v. Gilling	201, 251		1774, 1917, 1933	v. Olmsted	2294
v. McConnell	2005	v. Telegraph Co.	2349,	v. People	437
v. Norton	1205, 1208		2353, 2354	v. Pym	2440
v. R. Co.	105, 140	v. Terr.	2512	v. Shaw	1058
Worthen v. Badgett	1350	v. Vernon	2319	v. State	
Worthington v. Mencer	492, 493,	v. Williams' Estate	561	47 Ark.	857, 858
	494, 495	v. Wilkin	770	Fla., 29 So.	521
v. Scribner	2374	v. Woodgate	406	v. Thomson	5
v. State	1432, 1440,	v. Wright		v. Yates	570, 2008,
	1445, 2097	58 Kan.	736, 754, 1960		2012, 2016
Wottrich v. Freeman	564, 610	6 Tex.	2085	Yeager v. Spirit Lake	252
Wray v. Carpenter	2349	Wrigley v. Cornelius	272	v. Weaver	619, 620
v. Doe	1680	Wrisley Co. v. Burke	961	v. Wright	1677
Wren, ex p.	1350	Wroe v. State	987, 1033,	Year Book	
v. R. Co.	905		1270, 1447, 1618	23 Ass. 11	657
Wright v. Abbott	2354	Wrye v. State	2231	44 " 30	2405
v. Bales	6	Wunderlich v. Ins. Co.	2124	20 Edw. I, 258	2426
v. Barnard	1672	Wyatt v. Gore	1243, 2375	20 " 68	2426
v. Beckett	899, 900, 903,	v. State	833, 855	20 & 21 " 20	1177
	905, 907	Wyckoff v. Wyckoff	1198, 1267,	33 & 35 " 331, 547	2426
v. Boston	1784		2052, 2106	13 & 14 Edw. III, 80	
v. Bragg	2102	Wyland v. Griffith	2312	14 " 25	1177
v. Bundy	530, 1678	Wyles v. Berry	1067	41 " 10, 6	2426
v. Bunyard	1200	Wylie v. Wausau	1976	47 " 3, 5	2405
v. Carillo	2132	Wylly v. Gazan	1955	4 Edw. IV, 8, 9	2405
v. Carpenter	1168	Wyman v. Gould	1938	28 " 28, 1	2190
v. Collier	1674	v. R. Co.	463, 1943	7 H. IV, 41, 5	2569
v. Com.	1502	v. Wilcox	1554	8 " 6, 8	2190
v. Crawfordsville	75, 85, 203,	Wymark's Case	1185, 1215,	9 " 24	2190
	1608		1224	7 H. V, 5, 3	1177
v. Cumpsty	1003, 1006, 1388	Wyndham v. Chetwynd	582	9 " 15, 3	2405
v. Deklyne	1126, 1127	v. Wycombe	211	1 H. VI, 7, 31	2426
v. Express Co.	492, 493,	Wynehamer v. People	1354	8 " 26, 15	2426
	2494	Wynn v. Harman	1664, 2168	9 " 16, 8	1917
v. Fort Howard	770	Wynne v. Auburn	1249	9 " 59, 8	2405
v. Gaff	1890	v. Glidewell	1085	10 " 25	2405
v. Hardy	681, 1951	v. Middleton	1223	11 " 43, 46	575, 2190
v. Hawkins	2572, 2575	v. State	457, 1157, 1978	18 " 17, 8	2426
v. Hessey	2016	v. Tyrwhitt	1472, 2145	19 " 11	1650
v. Hicks	1029, 1031	Wyse v. Wyse	1938	20 " 20, 16	657
v. Holdgate	2063	Wytheville B. & I. Co. v.		28 " 6, 1	1364, 2190
v. Howard	568	Teeger	1379	39 " 34, 36	2426
v. Kelly	1350			14 H. VII, 29, 4	1364
v. Littler	1018, 1026, 1033,			20 " 11, 21	1364
	1431			14 H. VIII, 17, 6, and 7	2405,
v. McKee	64				2426
v. Mayer	2290, 2294			14 " 25, 7	2405
v. Morse	1062			27 " 2, 6	575, 2190
v. People	2203			Yearsley's Appeal	1550
v. Sharp				Yearwood's Trusts	2063
1 Browne	1544			Yeates v. Reed	1621
1 Salk.	20			v. Waugh	2027
v. Sherrard	2137	Yaeger v. R. Co.	18	Yeatman v. Armistead	1722
v. Southern Pac. Co.	561,	Yahn v. Ottumwa	1976	v. Dempsey	2195
	1951	Yakima Nat'l Bank v.		Yeaton v. Fry	1389, 1681
		Knipe	2525, 2535	Yeats v. Pim	2430
v. State		Yale v. Comstock	1388	Yellow River R. Co. v.	
136 Ala.	1960	Yanke v. State	1621, 1938,	Harris	1674, 2167
Ala., 34 So.	318		2277		
		Yankee v. Thompson	1188, 1651		

TABLE OF CASES.

YER

	Section		Section		Section
Yerkes v. Northern Pacific R. Co.	581	Young v. Holloway	2319	Z.	
Yetman v. Dey	619	v. Holmes	291, 1199	Zabriskie v. State	205, 2061
Yewin's Case	1022	v. Honner	2015	Zalesky v. Ins. Co.	2451
Yoch v. Ins. Co.	770, 2415	v. Hurst	2336	Zane v. Fink	613, 2240
Yocum v. Barnes	1320	v. Johnson	133, 1106, 1976	v. Onativia	377
Yoder v. Reynolds	18	v. Jones	1549	Zang v. Wyant	1557
Yoe v. People	1700, 1807	v. Makepeace	166, 569, 1154	Zanone v. State	987
Yoes v. State	1013	v. Miller	2500	Zebley v. Storey	1021
Yoki v. First State Bank	1066	v. Montgomery	913	Zeehandelaar, ex p.	2210
Yolo Co. v. Colgan	1350	v. Perkins	1466	Zehner v. Lehigh C. & N. Co.	805
Yordan v. Hess	2304	v. Power	1777	Zelch v. Hirt	392
York v. Gregg	1651	v. R. Co.	2552	Zell v. Com.	1126, 1871
v. Pease	391, 770, 1873	v. Richards	607	Zellerbach v. Allenberg	1213
York Co. v. Central R. Co.	18	v. Ringo	1651	Zerbe v. Miller	334
v. Toronto G. R. & C. Co.	1062	v. Shulenberg	1490, 1573, 2531	Zerby v. Wilson	1300
York & M. R. Co. v. Winans	2576	v. Slaughterford	1821	Zibbell v. Grand Rapids	2098
Yorks v. Mooberg	561	v. State		Zibble v. Zibble	1738
Yost v. Couroy	1921, 1942, 1943, 1960	68 Ala.	824, 826, 833, 861	Zickefoose v. Kuykendall	2349
Yoter v. Sanno	2374	114 Ga.	1442	Zierenberg v. Labouchere	73
Yonmans v. Carney	1890	90 Md.	851	Zimm v. Rice	568
Young v. Bank	1684	36 Or.	1494, 1502	Zimmerman v. Bank	1018, 1041
v. Bennett	73, 1877, 2115	v. Stockdale	1306	v. Brannon	581
v. Brady	1028, 1041, 1873	v. Thayer	1682	v. Helser	1271
v. Chandler	1681	v. Webb City	252	v. Kearney Co. Bank	1021
v. Clapp	95	v. Wood	907, 913, 1389	v. Marchland	581
v. Clark	460	v. Wright	1063	v. State	1254
v. Com.		v. Young	1842	Zimmerman Mfg. Co. v. Dolph	2434
4 Binn.	1680	Young Men's Ch. Ass'n v. Rawlings	987	Zipp v. Colchester R. Co.	1205
6 Bush	247, 923, 928, 987, 1985	Young Women's Christian Home v. French	2532	Zirkle v. Leonard	1938, 2477
8 Bush	826, 830	Younge v. Guilbeau	1226	Zitske v. Goldberg	1666, 1668
Ky., 42 S. W.	111	Younger v. State	1006, 2513	Zitzer v. Merkel	68, 210, 1983
v. Dearborn	2098	Youns v. R. Co.	208, 249, 1616	Zoldoske v. State	363, 2081
v. Doherty	340, 2517	Younie v. Walrod	2434	Zollicoffer v. Turney	2222, 2223
v. Foster	2083, 2505	Yount v. Howell	2163	Zouch v. Parsons	2413
v. Gilman	607	Yrisarri v. Clement	2163, 2566	Zube v. Webber	1951
v. Gregorie	1269	Yuill v. White	1461	Zucker v. Karpeles	782
v. Grote	2419	Yundt v. Hartrumft	1012	Zurawski v. Reichmann	406
		Yung's Estate	1644	Zwicker v. Zwicker	2408

INDEX OF TOPICS

INDEX OF TOPICS

A.		Section
Abortion , procuring of, as evidence of paternity	282	
other offences, as evidence of intent	359	
motive for	391	
dying declarations of woman in	1432	
eye-witness of marriage in	2085, 2086	
who is accomplice in	2060	
marital privilege in	2239	
Absence of entry or record, how proved	1230, 1244, 1678, 1957, 1978	
of maker of regular entries	1521, 1561	
of deponent	1404	
of declarant of facts against interest	1456	
of pedigree declarant	1481	
presumption of death from	2531	
Absent Witness , expected testimony of, received to avoid postponement	807, 1398	
impeached like others	888, 1034	
testimony at a former trial; see FORMER TESTIMONY .		
effect of admission of affidavit of	2595	
Abstract of Title-Deeds , production of original	1223	
as hearsay	1705	
as giving substance of deed	2105	
whether preferred to oral testimony	1273	
Acceptance ; see BILL OF EXCHANGE .		
Accessory ; see ACCOMPLICE .		
Accident ; see NEGLIGENCE ; INTENT ; HIGHWAY ; MACHINE ; PREMISES ; CORPORAL INJURY ; RES GESTÆ .		
Accomplice , as disqualified by his guilt	526	
as disqualified by interest	580	
as impeached	967	
Accomplice (<i>continued</i>).		Section
confession of crime by, as hearsay	1476, 1477	
corroboration required	2056	
restoring credit by consistent statements	1128	
as affected by judgment of conviction of principal	1389	
see also CO-INDICTEE .		
Account , voluminous, proved by summary	1230, 1244	
assented to, as an admission	1070	
rendered, as an admission	1073	
see also BILL OF ACCOUNT .		
Account-books ; see BOOKS OF ACCOUNT .		
Accused ; see DEFENDANT .		
Acknowledgment of deed of married woman; see WIFE .		
of deeds in general, whether certificate is conclusive	1347, 1352	
whether admissible	1676	
Aconite ; see POISON .		
Act , of the Legislature; see STATUTE ; LEGISLATIVE JOURNAL ; RECITAL .		
Adjournment of Court , for a view	1803	
as affecting publicity of trial	1835	
Administrator , admissions of	1076, 1081	
see also WILL ; EXECUTOR .		
Admiralty , rules of evidence applicable in	6	
seal of foreign court of, presumed genuine	1681, 2164	
Admissibility , general theory of	9	
multiple, of the same fact for different purposes	13	
conditional, of a fact not yet appearing relevant	14, 40	
objection to, time and form of	18	
judge to determine	2550	
Admissions of a Party		
1. <i>Whether admissible</i>		
general theory	1048-1058	
death not necessary	1049	

INDEX OF TOPICS.

Admissions of a Party (<i>continued</i>).	Section
prior question not necessary . . .	1051
personal knowledge; infants . . .	1053
made to third persons . . .	1056
not conclusive . . .	1058, 2588
putting in the whole . . .	1058, 2097
implied admissions . . .	267, 1060
offer of compromise . . .	1061
in pleadings . . .	1063
by reference to a third person . . .	1070
by flight, concealment, etc. . .	273-284
by silence . . .	1071
by failure to produce evidence . . .	285-292
in a third person's document . . .	1073
corporation books . . .	1074
depositions used . . .	1075
husband or wife . . .	2232
other parties to the cause . . .	1076
injured person, co-defendant, etc.	1076
privies in obligation . . .	1077-1079
joint promisor . . .	1077
agent, partner, attorney, wife, etc.	1078
co-conspirator . . .	1079
privies in title . . .	1080-1087
decendent, insured, etc. . .	1081
grantor, indorser, etc. . .	1082-1087
producing the original of a doc- ument admitted correct . . .	1235, 1255
made during possession of land	1778, 1779
2. <i>Whether sufficient</i>	
loss of a document . . .	1196
contents of a document . . .	1255
dispensing with the attesting witness	1300
specimens of handwriting . . .	2013, 2021
divorce charge . . .	2067
accused in general . . .	816, 2070
bigamy, adultery, etc. . .	2086
execution of a document . . .	2132, 2596
3. <i>Sundries</i>	
before grand jury, not privi- leged	2363
interpreter as agent to make . . .	668
of genuineness of a writing, as qualifying a witness . . .	700
by plea of guilty, admissible in a civil case	815
distinguished from confessions from judicial admissions . . .	816
of agent, as <i>res gestæ</i> . . .	1797
of a third person, as to facts against interest . . .	1458
in a party's books of account . . .	1557

Admissions of a Party (<i>continued</i>).	Section
of execution of recorded deed . . .	1653
whole must be proved . . .	2097, 2098, 2099
may be proved . . .	2115, 2119
by express stipulation; see JUDICIAL ADMISSION.	
Adultery , character of third per- son as evidence . . .	68
intercourse with third persons, as evidencing paternity . . .	133, 134
venereal disease, as evidence of	168
plan, as evidence of . . .	238, 239
other offences, as evidence of intent or motive . . .	360, 398
privilege of husband or wife in	2235, 2239
against self-crimination in . . .	2257
proof beyond a reasonable doubt	2498
who is accomplice in . . .	2060
confession of respondent in . . .	2067, 2074
Advancement to child	
shown by words accompanying transfer	1777
parol evidence to rebut pre- sumed intent	2475
Adverse possession ; see Pos- SESSION.	
Advertisement , in newspaper, as evidencing knowledge . . .	255
see also NOTICE.	
Affection ; see CRIMINAL CON- VERSATION; ALIENATION OF AFFECTIONS; MENTAL CON- DITION, STATEMENTS OF.	
Affidavit , in interlocutory pro- ceedings	4
whether <i>lex fori</i> is applicable to the taking of	5
excluded at common law . . .	1384, 1708
exceptions	1709
admissible by statute . . .	1710
of a third person, as an admis- sion	1075
of common source of title . . .	1385
of attesting witness to will . . .	1312
of party, to loss of document . . .	1196
filed original required . . .	1216
jurat as evidence of . . .	1676
of juror impeaching verdict . . .	2348
of absent witness' testimony admitted	2595
of denial of document's gen- uineness	2596

INDEX OF TOPICS.

Affidavit (<i>continued</i>).	Section	Agent (<i>continued</i>).	Section
presumed genuine, in official files	2158	admissions by, as <i>res gestæ</i>	1797
from identity of name	2529	notice to produce to	1208
Affirmation ; see OATH.		words accompanying acts as	1777
Against Interest , statements of facts,		privileged communications of	2301, 2317
exception to the Hearsay rule	1455	parol agreement to hold only as	2438, 2443
proprietary interest	1458	see also AGENCY.	
landlord and tenant	1473	Agreement , collateral, shown by	
pecuniary interest	1460	parol	2435, 2442
indorsements, receipts	1460, 1466	see also CONTRACT; ASSENT;	
sundry interests	1461-1463	DOCUMENT.	
penal interest; confession of crime	1476	Alibi , mode of evidencing	136
no motive to misrepresent	1464	failure to prove, as evidence of	
separate entries	1465	guilt	279
time of statement	1466, 1467	burden of proof of	2512
mode of proof	1468, 1469	Alien , disqualification as a wit-	
death or absence of declarant	1456	ness	516
Age , as affecting an infant's dis-		necessity of interpreter	811
qualification	506	qualifications of interpreter	571
as evidenced by appearance	222, 257, 660, 1154, 1168	credibility impeached by his race	936
of a witness, as impeaching him	934, 1005	conclusiveness of immigration-inspector's certificate	1354
of a person incapable of child-bearing	2528	adequacy of cross-examination in foreign language	1393
of a document; see EXECUTION OF DOCUMENTS.		see also RACE; INTERPRETER; OATH.	
as excusing absence of attesting witness	1315	Alienation of affections , expressions of husband or wife	
of deponent	1406	showing feelings	1730
statement of age, as hearsay; see FAMILY HISTORY.		marital privilege in	2239
testimony to one's own	667	see also CRIMINAL CONVERSATION.	
Agency , course of business in, as evidence of a transaction	94, 372, 377, 379	Allegans suam turpitudinem , as excluding testimony	525
proof of, without producing instrument	1249	Almanac , used in evidence	1698
opinion testimony to	1960	judicially noticed	2566
proof of authority to execute ancient deed	2144	Alteration , of entries, fraudulent intent in; see FRAUD.	
presumption of continuance of	2530	expert witness to	570, 2027
see also AGENT.		shown by parol	2441, 2455
Agent , fraud by, as evidence of party's guilt	280	liability on altered document	2419
disqualification of opponent as witness to a transaction with a deceased	578	time of, presumed	2525
wife or husband testifying to acts as agent	616	Ambiguity in a document	2472
offer of compromise by	1061	Ambassador , deposition of	1384, 1407
admissions by, in general	1078	privilege of	2372
		Ancestors , insanity of, as evidence	233
		declarations of, as evidence; see FAMILY HISTORY; ADMISSIONS.	
		Ancient Document , as evidence of possession of land	157
		calling the attesting witness to	1311
		proof of genuineness; see EXECUTION OF DOCUMENTS.	

INDEX OF TOPICS.

	Section		Section
Animal , character of, as evidence . . .	68, 201	Appliances ; see MACHINE .	
trespass of another, as evidence . . .	142	Appointment , to office, produc-	
brands on, as evidence . . . 150, 1647, 2152		tion of original	1228
conduct of, as evidence of own-		of officer, presumed	2535
ership or crime	177	Argument , distinguished from	
as evidence of the animal's		evidence	1
disposition	201	improper statements by coun-	
symptoms of injury, etc., as		sel in	1806
evidence of cause	457	offering evidence after argu-	
fright of, as evidence of dan-		ment begun	1878
gerous object	461	Arbitration , distinguished from	
proof of owner's knowledge of		an admission	1056
viciousness	251, 282	Arbitrator , former testimony be-	
injuries to, as evidencing a		fore, whether admissible . . .	1373
highway defect	458	award in another cause, as rep-	
condition at other times, as		utation	1594
evidence	437	as a witness	1912
produced before the jury . . . 1154, 1161		not to impeach award	2358
disposition or pedigree of, evi-		Arrest , belief of officer as to	
denced by reputation	1621	probable cause	258
printed stock-book, to prove		conduct under, as evidence of	
pedigree	1706	guilt	273, 1072
value of ; see VALUE .		resistance to, as evidence of	
Anonymous crimes, as evidence		guilt	276
of intent	303	submission to, as evidence of	
Answer of Witness , to a lead-		innocence	293
ing question	772	confession made under	851
non-responsive	785	impeachment of a witness by . .	982
prepared beforehand in a depo-		silence under, as an admission . .	1072
sition	787	Arsenic ; see POISON .	
by reference to other testimony . .	787	Arson , threats as evidence of . .	105-109
see also QUESTION ; EXAMINA-		materials and tools, as evi-	
TION ; OBJECTION .		dence of	149, 238
Answer in Chancery , as a		other offences, as evidence of	
party's admission	1065, 1076	intent	354
original's production not re-		motive for, as shown by cir-	
quired	1215, 1216	cumstances	391, 392
giving discovery, scope of ; see		as shown by conduct	396
DISCOVERY .		proof beyond reasonable doubt,	
proof of bill and answer to-		in insurance	2498
gether	2111	see also INSURANCE .	
responsive parts are evidence . . .	2121	Assault ; see also RAPE ; INDE-	
presumed genuine, in official		CENT ASSAULT ; HOMICIDE .	
files	2158	Assent , shown by parol evi-	
from identity of name	2529	dence ; see PAROL EVIDENCE	
Apparatus , possession of, as evi-		RULE .	
dence of a crime	88	see also CONTRACT .	
defects of, as evidence of negli-		Assessment , privilege against	
gence	441-461	disclosure of	2374
Appeal , evidence excluded be-		Assessor's books , production	
cause not transmissible on	1168	of original	1240
Appearance , as evidence of age	212, 257,	admissible as official records or	
	1154	as admissions	1640
as evidence of health	223	copy of whole required	2109
as evidence of competence	1154	Assignment , of patent of inven-	
		vention	1226

INDEX OF TOPICS.

Assignment (<i>continued</i>).	Section	Attesting Witness (<i>continued</i>).	Section
record of	1657	who is an attester	1509, 1510
Assignee in bankruptcy; see		implied purport of attestation	1511, 1512
BANKRUPT.		proof of maker's signature also	1513
Assignor , admissions of, against		attester may be impeached or	
assignee	1082	supported	1514
see also VENDOR.		using the depositions given at	
Assumpsit ; see CONTRACT; BILL		preliminary probate	1417
OF EXCHANGE; LOAN; NOTE.		<i>prima facie</i> effect of	2500
Asylum ; see SANITY.		3. <i>Sundries</i>	
Atheism ; see RELIGIOUS BELIEF.		disqualified by confession of	
Attendance as witness; see WIT-		falsehood	528
NESS, ix.		by interest	581
Attested 'Copy ; see CERTIFIED		testifying without recollection	747
COPY.		may be impeached by pro-	
Attesting Witness		ponent	917
1. <i>Rule requiring attesting wit-</i>		by self-contradiction	1033
<i>ness to be called</i>		opinion to sanity	1936
history of the rule	1287	privilege of attorney, as attester	2315, 2329
kind of document	1290	of physician	2390
who is an attesting witness	1292	parol evidence to explain signa-	
document used for other pur-		ture of	2406
poses	1293	attestation as a required for-	
execution not disputable be-		mality	2456
cause of estoppel, admission,		Attorney , testimony to value of	
etc.	1294-1298	services of	715
attester preferred to maker	1299	improper consultation with	
to admissions	1300	witness before trial	788
to opponent's testimony	1301	offer of compromise by	1061
attester denying or not recol-		pleading drafted by, as an ad-	
lecting	1302	mission	1063
other witnesses not excluded	1302, 1303	admissions by, in general	1062, 1078
number of attesters required		judicial admissions	2594
to be called	1304, 2049	admissibility as a witness	1911
number of signatures to be		notes of testimony taken by	1669
proved		consultation with sequestered	
of attesters	1306	witness	1840
of maker	1320	exclusion from court while a	
proof of signature dispensed		witness	1841
with	1321	office of, judicially noticed	2578
excuses for not calling the at-		power of; see AGENCY.	
tester	1308, 1319	privileged communications of; see	
death	1311	ATTORNEY AND CLIENT.	
ancient document	1311, 2138	see also COUNSEL.	
absence from jurisdiction	1312	Attorney and Client, Com-	
inability to find	1313	munications between,	
name unknown	1314	history and policy of the privi-	
illness, loss of memory, im-		lege	2290, 2291
prisonment	1315	statutes	2292
incompetence by interest, etc.	1316	irrespective of litigation	2294
refusal to testify	1317	non-legal purposes	2296
copy of recorded document	1318	prosecuting attorneys	2296
2. <i>Rule permitting attestation to</i>		conveyancing	2297
<i>be evidence</i>		criminal transaction	2298
exception to the Hearsay rule	1505	persons not attorneys	2300
attester must be deceased, etc.	1506		

INDEX OF TOPICS.

Attorney and Client (<i>continued</i>).	Section	Bank-note, forgery of, as evidence of intent	Section
attorneys' clerks and agents	2301	expert witness to, qualifications of	570, 705
client's belief	2302	person whose name is forged, not a preferred witness	1339
attorney as a friend	2303	Bank-officer, as an expert witness to genuineness of notes	570
time of consultation	2304	not a preferred witness	1339
communications, not conduct documents	2306-2309	<i>prima facie</i> evidence of knowledge of insolvency	1354
relevancy of communication	2310	communications to, not privileged	2286
confidential nature	2311	Bankrupt, admissions of	1081, 1082, 1086
third person present	2311	declarations of intent by	1728, 1783
joint attorney; opponent's presence	2312	privilege of husband or wife of	2235
identity of client	2313	against self-crimination by	2257, 2260, 2282
purpose of suit	2313	Barrator, other acts, to evidence a common	203
execution of will or deed	2314	Bastardy, third person's character, as evidence	68
attorney as attesting witness	2315	third person's intercourse, as evidence	133
communications by third persons	2317	resemblance of child, as evidence of paternity	166, 1154
client's agents	2317	procurement of abortion, as evidence of paternity	282
client's documents	2318	prior intercourse, as evidence of motive	398
attorney's communications	2320	mother's complaint in travail	1141
privilege is the client's	2321	uncorroborated complainant in	2061
who may claim	2321	using the mother's examination	1417
inference from claim	2322	family hearsay as evidence	1492
termination of client's relation	2323	parent's testimony to	2063
indirect disclosure by attorney	2325	proof beyond a reasonable doubt	2498
third person overhearing	2326	presumption of legitimacy in	2527
waiver by testifying	2327	Battery; see HOMICIDE; SCHOOL-MASTER.	
by agent or assignee	2328	Beer, meaning of, judicially noticed	2582
by deceased client's representative	2329	Belief, testifying to one's own belief or intent	581
Authentication of a document; see EXECUTION.		belief as distinguished from knowledge	658
Authority as agent; see AGENCY.		testifying to another person's belief or intent	661
person in, obtaining a confession; see CONFESSION.		belief in genuineness of handwriting	698
of officer, presumed	2535	belief or impression as showing sufficient memory	726
judicially noticed	2576	conduct and circumstances as evidence of; see KNOWLEDGE.	
Autoptic Proference; see REAL EVIDENCE.			
Award; see ARBITRATOR.			
B.			
Bailee, loss by, presumed negligent	2508		
Ballot, production of original	1240		
disclosure of, privileged	2215		
mistake shown by parol	2421		
must be in writing	2452		
Bank, books of, original required	1223		
attested copy admitted	1683, 1710		
incorporation of, proved by repute	1625		
see also BOOKS OF ACCOUNT.			

INDEX OF TOPICS.

Belladonna ; see POISON .	Section	Bill of Exchange (<i>continued</i>).	Section
Beneficiary of insurance; see INSURANCE .		production of original; see ORIGINAL DOCUMENT .	
Best Evidence , history and meaning	1173-1175, 1286	indorsement on, as statement against interest	1460, 1466
rule for producing originals; see ORIGINAL DOCUMENT .		delivery in escrow, shown by parol	2409, 2420
rule for attesting witness; see ATTESTING WITNESS .		collateral agreement, shown by parol	2443-2445
rule against hearsay; see HEARSAY RULE .		signed by mistake	2415-2419
official documents as best evidence	1335	parol acceptance	2451
Bias , impeaching one's own witness by proof of	901	presumption of title from possession of	2516
mode of evidencing, in general	943-948	of payment	2517, 2518
relationship, employment, etc.	949	protest of, as evidence; see NOTARY .	
expressions and conduct	950, 1730	Bill of Lading , assent presumed	2537
details of a quarrel	951	shown by parol	2415
preliminary inquiry	953	terms varied by parol	2432
contradiction by other witnesses	1005, 1022	presumption of excepted loss in	2509, 2537
restoring credit by consistent statements	1128	see also CONTRACT .	
see also INTEREST ; CORRUPTION .		Bill of Legislature ; see STATUTE ; LEGISLATIVE JOURNAL .	
Bible , as evidence of pedigree; see FAMILY HISTORY .		Birth , register of; see REGISTER OF MARRIAGE, BIRTH, AND DEATH .	
Bigamy , other offences, as evidence of intent or motive	360, 398	date of; see AGE .	
disqualifying the wife as witness	605	declaration of, by deceased person; see FAMILY HISTORY .	
eye-witness of marriage required	2085	reputation of	1605
admissions of defendant sufficient	2086	see also RACE .	
proof by husband or wife, privileged	2231	Birthmark , as evidence of events in pregnancy	159
valid marriage presumed	2506	Black ; see RACE .	
Bill in Chancery , as a party's admission	1065	Blackmail , other offences as evidence of intent	352
must be read with the answer	2111	Blank , delivery of document having a	2410, 2419
see also CHANCERY .		interpretation of a	2473
Bill of Discovery ; see DISCOVERY .		indorsement in	2445
Bill of Exceptions , must exhibit grounds of objection	17, 18	Blindness , as disqualifying a witness	500
as evidence of former testimony	1668	as excusing production of attesting witness	1316
Bill of Exchange , evidence of forgery of; see FORGERY .		Blockade by belligerent, evidence of intent to evade	367
authority to accept, other transactions as evidence of	377	Blood , witness' experience with, as qualifying him	568
impeaching one's own instrument	529	opinion testimony to	1975, 1977
admissions of parties to	1084	Bloodhound ; see ANIMAL .	
		Blotter-press copies, as originals	1234
		Bodily Injury ; see CORPORAL INJURY .	
		Body , inspection of	2194, 2220, 2265

INDEX OF TOPICS.

Bona Fides ; see KNOWLEDGE ;	Section	Boundaries (<i>continued</i>).	Section
MOTIVE ; INTENT .		of county or town, judicially	
Bond , proof of execution of; see		noticed	2575
EXECUTION OF DOCUMENT .		Brands on animals, as evidence	
as impeaching the obligor-wit-		of ownership	150, 2152
ness	969	register of	1647
production of original; see		Breach of Promise of marriage,	
ORIGINAL DOCUMENT .		character of plaintiff as in issue	
as part of the court files	1215	or mitigating damages	75, 77
indorsement on, as statement		acts of unchastity, as excusing	
against interest	1460, 1466	or mitigating	206, 213
Bookkeeper , entries of; see		prior relations, as evidence . . .	398
REGULAR ENTRIES .		defendant's wealth, provable	
aiding recollection by entries;		by repute	1623
see RECOLLECTION .		plaintiff's conduct, as <i>res gestæ</i> .	1770
Books of science, used in evi-		uncorroborated complainant in .	2061
dence	1690	circumstantial evidence suffi-	
of history, used in evidence . .	1597,	cient	2090
	1690	Bribery , by a party, as evidence	
see also DOCUMENT ; BOOKS OF		of guilt	278
ACCOUNT ; PRINTED MATTER .		other offences, as evidencing	
Books of Account , wife of party		intent	343
as witness to	612	used to impeach one's own	
used to aid recollection; see		witness	901
RECOLLECTION .		attempt to, as impeaching a	
of a bank, original required . .	1223	witness	960, 962
of parties or deceased persons,		contradiction as to, not col-	
as hearsay; see REGULAR		lateral	1005, 1022
ENTRIES .		Bridge , defective; see HIGHWAY .	
of a corporation or partner-		Brief of Evidence , to prove	
ship, as admissions	1074	former testimony	1668
production of original	1223	Building ; see PREMISES .	
inspection of, before trial; see		Burden of Proof , and Pre-	
DISCOVERY .		sumptions	
putting in the whole	2118	1. <i>General Principles</i>	
making evidence by inspection .	2125	production of evidence by the	
privileged from production .	2193, 2205,	parties	2483
	2286	evidence sought by the judge	
Borrowing ; see LOAN ; DEBTOR .		<i>ex mero motu</i> ; questions to	
Boundaries , evidenced by pos-		witnesses by the judge	2484
session	378	<i>burden of proof</i> ; first mean-	
surveyor's testimony not re-		ing: risk of non-persuasion . .	2485
quired	1339	test for this burden; nega-	
deceased persons' declarations		tive and affirmative alle-	
exception to Hearsay rule .	1563, 1564	gations; facts peculiarly	
death of declarant	1565	within a party's knowl-	
no interest to misrepresent .	1566	edge	2486
declarations on the land . . .	1567	second meaning: duty of	
declarant's knowledge	1568	producing evidence	2487
maps, surveys	1570	test for this burden	2488
opinion testimony to	1963	shifting the burden of proof . .	2489
ancient deed-recital of	1573	effect on inference from failure	
reputation about		to call witness	291
kind of reputation	1583-1591	<i>presumptions</i> ; legal effect of	
form of reputation	1592-1595	a presumption	2490
official surveys, to prove	1665		

INDEX OF TOPICS.

Burden of Proof (<i>continued</i>).	Section	Burden of Proof (<i>continued</i>).	Section
presumptions of law and presumptions of fact	2491	execution and contents of docu- ment: letters and telegrams . .	2519
conclusive presumptions; rebuttable presumptions . . .	2492	execution of deeds (delivery, date, seal)	2520
conflicting presumptions; counter presumptions	2493	ancient documents	2521
<i>prima facie</i> evidence; suffi- cient evidence for the jury; scintilla of evidence	2494	lost grant or other document . .	2522
direction of a verdict, mo- tion for a nonsuit, and demurrer to evidence, dis- tinguished	2495	lost will (contents and revo- cation)	2523
waiver of motion by sub- sequent introduction of evidence	2496	spoliation of documents	2524
<i>measure of persuasion</i> : proof beyond a reasonable doubt; rule for criminal cases	2497	alteration of documents	2525
proof by preponderance of evi- dence; rule for civil cases . . .	2498	gifts (wife's separate estate, child's advancement)	2526
2. <i>Burdens and Presumptions</i> <i>in Specific Issues</i>		legitimacy	2527
sanity: testamentary and other civil causes; suicide	2500	chastity; child-bearing	2528
criminal causes	2501	identity of person (from name, etc.)	2529
undue influence and fraud: tes- tamentary causes	2502	continuity; in general	2530
confidential relations of grantee or beneficiary	2503	life and death	2531
fraudulent conveyances against creditors	2504	survivorship	2532
marriage: consent, from co- habitation or ceremony	2505	seaworthiness	2533
capacity, as affected by in- tervening death, divorce, or marriage	2506	regularity; performance of official duty and regularity of proceedings	2534
negligence and accident: con- tributory negligence	2507	appointment and authority of officers	2535
loss by bailee	2508	similarity of foreign law	2536
defective machines, vehicles, and apparatus	2509	contracts	2537
death by violence	2510	statute of limitations	2538
crimes: innocence, malice, guilt, etc.	2511	malicious prosecution	2539
self-defence, alibi	2512	reduction of agreement to writing	2447
possession of stolen goods . . .	2513	confessions	860
capacity (infancy, intoxica- tion, coverture)	2514	qualifications of witness	484, 497, 508, 560, 584, 654
ownership: possession of land and personality	1779, 2515	Burglary, tools, etc., as evidence of	149, 153, 238
possession of negotiable in- strument	2516	possession of stolen goods, as evidence of	153, 2513
payment: lapse of time	2517	other crimes as evidence of intent	351
possession of instrument	2518	motive for	391
		evidence of identity	413
		Business, course of, as evidence of a transaction	94, 382
		amount of, as evidence of nui- sance, value, etc.	462
		stock of goods in, as evidence of amount of	461
		loss of patronage of, as evi- dence of injury	462
		entries in the course of; see REGULAR ENTRIES.	
		Bystander, exclamations of, dur- ing res gestæ	1755

INDEX OF TOPICS.

C.	
	Section
Calendar , used in evidence	1698
Calling a Witness	
out of the usual order; see	
EXAMINATION , III.	
as preventing impeachment;	
see IMPEACHMENT .	
Canada , conflict of laws of Empire, Dominion, and Provinces	6
Capacity , physical, as evidence	
of an act done	83-85
instances of human conduct, to evidence	220
of a weapon, machine, etc., as shown by its effects	441-461
presumption of, in marriage	2506
in testamentary cases	2500
in criminal cases	2514
mental, of a party; see SANITY ;	
UNDUE INFLUENCE ; TESTATOR .	
testimonial, of a witness; see	
WITNESS , I, <i>Qualifications</i> .	
Capital of a State or county, noticed	2575
Car ; see VEHICLE .	
Carefulness , presumption of	2507, 2510
jury may use general knowledge to determine	2570
opinion as to	1949
see also NEGLIGENCE ; SKILL .	
Carriage ; see VEHICLE .	
Carrier , wife of plaintiff, as witness against	612
loss by, presumed negligent	2508
see also BILL OF LADING .	
Case closed, calling a witness after; see EXAMINATION .	
Cash , regular entry to prove payment of	1539, 1549
Cattle , brands as evidence	150
see also ANIMALS .	
Cattleguard ; see HEIGHT ; SUFFICIENCY .	
Cause of an illness, injury, explosion, accident, etc., as evidenced by its effects	437-461
expert opinion as to	1976
Census , as evidence of population judicially noticed	1671 2577
Ceremony of marriage, presumed valid	2506
Certificate	
admissible when made by authority	
sundry officers	1674

Certificate (continued).		Section
private persons		1674
notary's protest		1675
deed-acknowledgment; oath		1352, 1676
certified copy		1677-1683
printed copy		1684
authenticated by seal or signature		2162
presumed correct		2534
whether conclusive for		
married woman's acknowledgment		1347
election		1351
oath or acknowledgment		1352
of <i>land-grant</i> ; see DEED .		
of <i>entry</i> of land-title; see DEED .		
of <i>location</i> of land-patent; see DEED .		
of <i>marriage</i>		
constitutionality of, as evidence		1398
made evidence by party's possession		268
admissible as a public document		1645
not required in bigamy, etc.		2088
presumed genuine, from custody		2159
Certified Copy		
1. <i>Public Documents</i>		
scope of authority to certify		1677
time and manner of certifying		1677
certificate of effect or non-existence		1678
authentication of certified copy		1679
kinds of documents thus provable,		
sundry public records		1680
judicial records		1681
probate of wills		1681
lost deeds		1682
copy of whole required		2107-2111
attested by seal		2162
whether preferred to sworn copy		1273
excusing from production of attesting witness		1318
2. <i>Private Documents</i>		
bank-books, corporation records, parish registers, etc.		1684
see also COPY .		
Chancery , rules in, distinguished from rules at law		4

INDEX OF TOPICS.

Chancery (continued).		Section	Character (continued).		Section
trials in Federal Courts of		6	mode of evidencing by repu-		
special rule for depositions		1417	tation; see <i>infra</i> , 2.		
for cross-examining to char-			character as to sanity, skill,		
acter		986	etc. ; see IMPEACHMENT.		
for one witness to a bill		2047	attesting witness		1514
bill or answer in, as an admis-			<i>Witness Supported</i>		
sion		1065	good character, in general		1104
proving the whole of a decree . . .		2110	attesting witness		1514
of bill, answer, and deposition . . .		2111	2. <i>Mode of evidencing by Con-</i>		
responsive parts of answer as			<i>duct</i>		
evidence		2121	of an accused in a criminal		
history of subpoena in		2190	case		192-197,
discovery from opponent in		1856, 1857,			215-218
		2218, 2219	privilege not to disclose		
Character, distinguished from			crimes		2268-2277
reputation		52, 1608	of a deceased in homicide		198
1. <i>As evidence or in issue</i>		52	of a negligent party in a		
<i>Accused's character</i> as rele-			civil case		199
vant to show an act done			of a complainant in rape		200
or not done		55	of an animal		201
good character always ad-			of a party, to show character		
missible for him		56	in issue		202-208
presumption of		290	of a party, to mitigate dam-		
bad character not admis-			ages		209-213
sible against him		57	of a witness, in impeach-		
prosecution may rebut		58	ment		
kind of character		59	by other witnesses		979
time and place of character		60	by conviction of crime		980
accused as witness		61	by cross-examination to		
failure to prove, as evidence			misconduct		981
of bad character		290	privilege for disgracing		
<i>Animal</i>		68	answers		985
<i>Complainant in rape</i> and sim-			privilege for crimes		2268, 2277
ilar crimes		62	rumors of misconduct		988
for chastity, presumption of . . .		2528	contradiction by other		
<i>Deceased</i> in homicide, to evi-			witnesses		1005
dence aggression		63	of a witness, in support		
<i>Parties in civil cases</i> in gen-			good character		1104
eral		64	impeaching the impeach-		
in negligence		65	ing witness		1111
in defamation		66	explaining away bad re-		
in malpractice		67	pute		1112
<i>Plaintiff, in mitigation of dam-</i>			denial of crime		1116
<i>ages</i>		70-76	consistent statements		1124
in issue for sundry purposes . . .		77-80	3. <i>Mode of evidencing by Repu-</i>		
<i>Third persons</i> in general		68	<i>tation</i>		
<i>Witness Impeached</i>			general principle of repu-		
one's own witness		900	tation		1608-1610
actual character		920	extent and place of repu-		
kind of character		922	tation		1612-1616
other traits than veracity		924	time of reputation		1617, 1618
time of character		927	kind of character that may		
place of character		930	be thus proved		
mode of evidencing by con-			chastity, common offender,		
duct ; see <i>infra</i> , 2.			etc.		1620

INDEX OF TOPICS.

Character (continued).	Section	Chattel (continued).	Section
sanity, temperance, etc.	1621	inspection or production of,	
animals	1621	compellable	2194, 2221,
solvency	1623		2264
sundry facts	1624-1626	Cheat, other acts. to evidence a	
limitation of number of wit-		common cheat	203
nesses	1908	to evidence intent	321
qualifications of a witness		see also FALSE REPRESENTATIONS.	
to repute	691	Check, evidence of forgery of;	
4. Mode of evidencing by Per-		see FORGERY.	
sonal Opinion		parol transaction collateral to	
defendant's moral character	1981, 1983	instrument	1235, 1245,
witness' moral character;			2443
belief on oath	1982, 1985	see also BILL OF EXCHANGE;	
skill, care, competence	1984	PAYMENT; DOCUMENT.	
Charge to Jury, right of judge		Chemical Matters, witness' ex-	
to give	2495, 2557,	perience as qualifying him	568
	2559	opinion testimony to	1975
party offering evidence after	1879	Chief, case in; see EXAMINATION,	
Charge and Discharge state-		III.	
ments taken together	2117	examination in; see DIRECT	
Chastity, character of complain-		EXAMINATION.	
ant in rape, etc., to show con-		Child, resemblance of, to show	
sent	62	paternity	166, 1154
character of the woman in se-		appearance of, to evidence age . .	222, 1154
duction, etc., as mitigating		capacity to testify	505-509
damages or in issue	75-80	to take the oath	1820, 1821,
conduct, to evidence rape-com-			1825
plainant's character for	200	to testify, though not capable	
mitigation of damages, as af-		of perjury	1832
fected by lack of	210-213	corroboration required as wit-	
character in issue, as involving		ness	2066
acts of unchastity	204-206	presumption of advancement	
provable by reputation	1620	to	2526
presumption of	2528	of gratuitous services by	2526
of a witness, in impeachment;		see also ADVANCEMENT; AGE; INFANT.	
see IMPEACHMENT.		Childbearing, presumption against	2528
Chattel, possession of stolen;		Chinese as witness; see RACE.	
see STOLEN GOODS.		Chose in action, admissions of	
failure to produce, as evi-		assignor	1082
dence	291	Church, register of; see REGIS-	
value, as evidence of price		TER OF MARRIAGE, BIRTH,	
agreed	392	AND DEATH.	
marks, as evidence of identity . .	150, 413	law of; see ECCLESIASTICAL	
sales of other goods, as evi-		LAW.	
dence of value	463	Circumstantial evidence, de-	
condition or quality of, as		defined	25
shown by effects, etc.	437-461	relative value of	26
qualifications of a witness to		general theory of	38
value; see VALUE.		classification of	43
whether production in court is		may be proved by the same	
necessary	1181, 1182	kind	41
words accompanying delivery		criminal's identity as evi-	
of	1777	denced by traces	148
inspection of, before trial	1862	sufficiency for <i>corpus delicti</i> . . .	2081
obtained by illegal search	2183	proof beyond reasonable doubt . .	2497

INDEX OF TOPICS.

	Section		Section
City charter, ordinance, bound- ary, etc., judicially noticed . . .	2575	Co-obligee, admissions of	1081
ordinance proved by printed copy	1684	Co-obligor, admissions of	1077
Civil cases, parties in, character of	63	Co-party, admissions of	1076
Claim of Title, as part of <i>res gestæ</i>	1778	see also CO-DEFENDANT; CO-INDICTEE; PARTY.	
Classification of the rules of evidence	3	Co-promisee, admissions of	1081
of the rules of admissibility	11	Co-promisor, admissions of	1077
of circumstantial evidence	43	Co-tortfeasor, admissions of	1079
of the rules of relevancy	24	Cohabitation, as evidence of marriage	268, 2083
of prospectant evidence	51	as evidence of adultery, etc.; see ADULTERY; INCEST; MARRIAGE.	
Clergyman, confession to, not excluded	840	presumption of marriage from	2505
privileged communications to entries of; see REGULAR EN- TRIES; REGISTER.	2394	Coin, evidence of counterfeiting; see COUNTERFEITING.	
Clerk using an entry to aid recol- lection; see RECOLLECTION.		expert witness to genuineness of	570
entries of a deceased; see REGULAR ENTRIES.		Collateral evidence, admitted to rebut other collateral evi- dence	15
of public officer or court; see CERTIFIED COPY.		inadmissible when irrelevant	39
of an attorney, admissions of	1063	of crimes, to show intent, etc.	216, 300
signature presumed genuine	2164	contradiction of witness by; see CONTRADICTION; SELF- CONTRADICTION.	
communications to, not privi- leged	2286, 2301, 2317	privilege of a witness against disgrace by	986
Client; see ATTORNEY; PARTIES.		contents of a document col- laterally in issue	1252
privileged communications of; see ATTORNEY AND CLIENT.		attesting witness to a docu- ment collaterally in issue	1291
Close of Case, evidence offered after; see EXAMINATION, III.		Collision, other instances, as evi- dencing a defect	458
Clothing, as evidence of identity . .	413, 660	see also NEGLIGENCE.	
testimony to value of; see VALUE.		Color, as impeaching a witness or evidencing race; see RACE.	
exhibition to jury	1157	Color of Title, deed admitted as	1653, 1655, 1778, 2132
Co-conspirator, admissions of, in general	1079	Commerce, facts of, judicially noticed	2580
as part of <i>res gestæ</i>	1797	Commercial Agency, commu- nications to, not privileged	2286
Co-defendant, impeached	967, 968	Commercial Lists used in evi- dence	1702
admissions of	1076	Commission, mode of taking tes- timony on; see DEPOSITION.	
husband or wife of, privileged	2236	former testimony before, whether admissible	1373
accused's failure to call	2273	certificate of; see CERTIFICATE.	
see also DEFENDANT; CO-INDICTEE.		Commitment to an insane asy- lum; see SANITY.	
Co-indictee, disqualification as witness	580	Common Carrier, loss by, pre- sumed negligent	2508
wife of, disqualification as a witness	609		
impeachable when called by co-party	916		
impeached by his situation	967		
admissions of	1076		
see also ACCOMPLICE.			

INDEX OF TOPICS.

Common Carrier (<i>continued</i>).	Section	Conclusiveness (<i>continued</i>).	Section
bill of lading by, burden of proof for	2537	of judicial notice	2567
Common law , trials at, in Federal courts	6	of judicial admission	2590
see also CHANCERY .		of ordinary admission	1058
Common Offender , other acts to evidence character	203	distinguished from parol evidence rule	2453
prior conviction, to increase sentence	196	Condition , of a human being as to health, etc.; see HEALTH ; SANITY .	
provable by reputation	1620	of a highway, machine, place, weapon, etc., as evidenced by effects, etc.	437-462
Communications , privilege for; see PRIVILEGE , II.		Condition Precedent , shown by parol evidence	2408, 2420
Comparison of Hands ; see HANDWRITING .		burden of proof of performance of	2537
Competence , of evidence; see ADMISSIBILITY .		Conditional admissibility	14, 40
of employee; see EMPLOYEE .		Conduct , as evidence; see CHARACTER ; CONSCIOUSNESS OF GUILT , OF INNOCENCE ; INTENT ; DESIGN ; IDENTITY ; KNOWLEDGE ; SANITY ; MARRIAGE ; DEMEANOR .	
of physician; see PHYSICIAN .		Confession of Crime , rules of, applicable to accused persons only	815
of persons in general; see SKILL ; NEGLIGENCE .		history of the rules	817-820
of witnesses in general; see WITNESS , I, <i>Qualifications</i> .		what is a confession	821
Complaint , of rape; see RAPE . admissions in pleading	1063	principles of exclusion	822-826
failure to make, as an admission	284	person in authority	827-830
Compromise , offer to, as an admission	1061	nature of the inducement	831-841
Compulsory Process . to obtain witnesses		under arrest or on examination by magistrate	842-852
history	2190	time and ending of the inducement	853-855
constitutional guaranty	2191	confirmation by subsequent facts	856-859
use against Executive	2369	burden of proof	860
exemptions from; see PRIVILEGE .		judge and jury	861, 862
to compel answers; see PRIVILEGE .		sundry rules	863
to compel bodily exposure	2194, 2216, 2220, 2265	value of confessions	866
confession obtained by; see CONFESSION .		of perjury, as impeaching a witness	959
Compurgation ; see WAGER OF LAW .		of judgment, as an admission	1061
Concealment , as evidence of guilt	276	of principal or co-conspirator	1079
of a document	291, 1198, 1199	report of prior testimony used as	1328
Conclusiveness , of official certificates or records	1345-1352	of crime by a third person, as hearsay	1476
of magistrate's report of testimony	1349	whether alone sufficient to convict respondent in divorce	2067
of enrolled statute	1350	accused in general	2070
of certificate of election	1351	bigamy, etc.	2086
constitutionality of statutes declaring	1353	whole must be proved	2097, 2099
of presumption	2492	may be proved	2115, 2119

INDEX-OF TOPICS.

Confession of Crime (<i>continued</i>).	Section	Constitutional Rules (<i>continued</i>).	Section
distinguished from self-crimination	2266	validity of admission of absent witness' testimony.	2595
to a priest, privilege for	2394	effect of waiver by judicial admission	2592
Confidential Communication , confession not privileged as privileged kinds; see PRIVILEGE .	823, 841	Construction of other machines , buildings, etc., as evidence of danger, etc.	437, 451, 461
Confidential Relations of grantee, presuming fraud from	2503	of a document; see PAROL EVIDENCE RULE, D .	
Conflict of Laws , rule of evidence applicable, in general	5	Consul , privilege of	2372
between U. S. and State laws of evidence	6	certificate of	1674
stamped documents and certified copies	1680, 1681, 2184	Contempt , for not obeying compulsory process	
between Dominion and Provincial laws of evidence in Canada	6	power of officer summoning	2195
between Imperial and Canadian laws of evidence	6	excuse of witness	2204
Conflict of Presumptions	2493	refusal to disclose irrelevant matter	2210
Confrontation , right of; see HEARSAY RULE, I .		exemption of executive from process	2369
Congress , privilege of member of	2375	proof beyond a reasonable doubt	2493
see also LEGISLATURE .		Contents , of a document; see WILL; DOCUMENT .	
Consciousness of guilt , as evidence, general theory	173	Continuance , absent witness' testimony admitted to avoid	2595
conduct, as evidence of	265-293	Continuity , presumption of	2530
see also KNOWLEDGE .		of physical or external condition	225, 437
Consciousness of innocence , as evidence	174, 293	Contradiction of a witness , to impeach him	
Consent , presumption of, to marriage	2505	one's own witness	907
see also CONTRACT; BILL OF LADING .		general theory	1000
Consideration , words as <i>res gestæ</i> , to show	1777	collateral facts excluded	1001
recital of, varied by parol	2433	material facts	1004
presumption of	2520	facts of bias, skill, etc.	1005
Consistent statements by a witness; see WITNESS, III .		cross-examination	1006
Conspirator ; see CO-CONSPIRATOR .		supporting the witness	1007
Constitutional Rules , in general	7	of an explanatory statement	952, 1046
affecting legislative power to alter the law of evidence	7	<i>falsus in uno</i> , as a rule for rejecting testimony	1008
forbidding <i>ex post facto</i> laws	7	falsity must be wilful and material	1013, 1014
requiring formalities for enacting a bill	1350, 2592	Contributory Negligence , not presumed	2507, 2510
whether testimony may be declared conclusive	1353	see also NEGLIGENCE .	
sanctioning right of confrontation	1397	Contract , course of business as evidence of	94, 372
requiring full faith and credit to State records	1681	intention as evidence of	112
for compulsory process	2191	belief as evidence of	272
		other transactions, as evidence of terms of	377, 379
		value of goods or services, as evidence of price agreed in	392
		utterances of, as <i>res gestæ</i>	1770
		meaning of, by opinion evidence	1969, 1971

INDEX OF TOPICS.

Contract (continued).	Section	Conviction of Crime (continued).	Section
putting in the whole	2105, 2115	of principal, used against ac- cessory	1079
discharge by parol	2441, 2455	of third person, to exonerate accused	142
condition precedent, shown by parol	2408, 2410, 2420	of accused, to increase sentence . .	196
of warranty, shown by parol . .	2434	Copy of a Document	
burden of proof in	2536	1. <i>When must the original be produced; see ORIGINAL DOCUMENT.</i>	
jury or judge to interpret . . .	2556	2. <i>Rules for proof of copy, when original's non-production is excused</i>	
calling the attesting witness; see ATTESTING WITNESS.		nature of copy-testimony	1264
production of original; see ORIGINAL DOCUMENT.		copy preferred to recollec- tion of contents	1268-1271
interpretation of; see PAROL EVIDENCE RULE, D.		party's admission	1255
Conversation, by an interpreter, testimony to	668	witness' admission	1259
by telephone, testimony to . . .	669	public record	1269
meaning of, proved by opinion evidence	1969	record of conviction	1270
whole must be proved	2097, 2099	foreign statute	1271
may be proved	2115, 2119	duplicate, distinguished from copy	1231
Conversion; see TROVER.		kind of recollection-wit- nesses	1272
words accompanying the tak- ing, as <i>res gestæ</i>	1777	examined and sworn copies . . .	1273
Conveyance, of property, as evi- dence of a weak case	282	copy of a copy	1274
privilege for advice in drafting .	2297	personal knowledge of cor- rectness	1278
record of; see RECORDED CON- VEYANCE.		cross-reading	1279
Conviction of Crime		press-copies, etc.	1280, 2019
<i>Disqualification by</i>	519	photographic copies	797, 2019
general principles	519	calling the copyist	1281
kind of crime	520	3. <i>Official or certified copy</i> when admissible; see CER- TIFIED COPY.	
judgment controls	521	not preferred to sworn copy . . .	1273
conviction in another juris- diction	522	4. <i>Sundries</i>	
removal of disqualification by pardon, etc.	523	copy of printed matter, as a sample to identify	440
statutory changes	524	of paper used to aid recollec- tion	749, 760
proving by cross-examina- tion without copy	1270	of lost document judicially established	1347
whole of the record	2110	of lost ancient deed	2143
<i>Impeachment by</i>		of printed decisions and statutes	1684
general principle	980, 987	proving the whole of the origi- nal	
asking on cross-examination .	980, 1270	lost documents	2105-2107
producing a record-copy	1270	public records	2108, 2109
restoring credit after	1106, 1116, 1117	judicial records	2110
identifying by name	2529	furnished on demand before trial; see DISCOVERY.	
<i>Sundries</i>		authentication by seal or signa- ture	2162
of witness, excusing absence of a deponent	1409		
of an attesting witness	1316, 1506		
of a declarant of facts against interest	1456		

INDEX OF TOPICS.

Copyright, infringement of,	Section
other acts showing intent . . .	371
summary of contents, to prove infringement	1230
Coroner, confession made on examination before	852
report of former examination of witness before, whether preferred	1326, 1349
whether admissible	1667
former testimony before, without cross-examination	1374
inquest of death, as evidence testifying before, as a waiver of privilege	1671
	2276
Corporal Injury, repairs of premises after, as evidence of negligence	283
appearance of a wound, as indicating distance of assailant . .	457
speculative testimony to	663
qualifications of witness to . . .	688
exhibition to the jury, whether allowable	1157,
	1158
whether compellable	2220
expressions of pain caused by . .	1718
<i>res gestæ</i> statements after	1747
inspection of, before trial	1862
privilege against inspection of	2194, 2220,
	2265
opinion testimony to	1975
inspection of, compellable	2194, 2220,
	2265
privilege for communications to physician	2380
presumption of negligence from	2507-2510
See also NEGLIGENCE; ILLNESS; DAMAGES.	
Corporation, disqualification of opponent as witness to a transaction with a deceased officer of	578
books and records of, as admissions	1074, 1076
as official records	1661
as regular entries	1542, 1547
original books not produced . .	1223
conclusive proof of proceedings	1346, 2451
inspection before trial	1858
copy of whole required	2109, 2116
proved by certified copy	1683, 1710
certificate or charter of incor-	

Corporation (continued).	Section
poration, proved by certified copy	1680
proved by reputation	1625
seal, presumed genuine	2169
privilege against self-crimination	2259
officer liable to subpoena <i>duces tecum</i>	2200
discovery from	2218
negotiable instrument signed by officer of	2444
Corpus delicti, as negated by survival of the alleged deceased	138
proof required, to corroborate confession	2070
direct testimony required	2081
Correspondence, acquaintance with, as qualifying a witness to handwriting	702
putting in the whole	2104, 2120
reply-letter presumed genuine . .	2153
Corroboration of a Witness	
1. <i>Modes of supporting an Impeached Witness; see WITNESS, III, RESTORATION OF CREDIT.</i>	
2. <i>Kinds of witnesses required to be Corroborated though unimpeached</i>	
treason	2036
perjury	2040
sundry crimes	2044
divorce	2046
chancery	2047
wills	2048-2052
usage or custom	2053
sundry civil cases	2054
accomplice	2056
prosecutrix in rape, bastardy, etc.	2061
parent bastardizing issue	2062
surviving claimant	2065
children, Chinese, etc.	2066
confessions	
divorce respondent	2067
accused	2070
3. <i>Sundries</i>	
confession, corroborated by subsequent facts	856
utterances identifying a time or place	416
Corruption of a witness, as impeaching him	956-964
of one's own witness	901

INDEX OF TOPICS.

Corruption (<i>continued</i>).	Section	Creditor , of partnership, repute	Section
willingness or offer to testify		as evidence of knowledge of . . .	254
falsely	957-958	of an insolvent, transfers as	
confession of false testimony . . .	959	evidence of intent to defraud . . .	333
attempt at subornation	960, 962	debtor's admissions used	
receipt of money	961	against	1081, 1082, 1086
sundry corrupt conduct	963	indorsement of payment by, as	
preliminary inquiry to witness . . .	964	statement against interest . . .	1460, 1466
contradiction by other wit-		utterances showing to whom	
nesses	1005, 1022	credit was given	1777
Counsel , comment of, on failure		possessor's utterances, used	
to produce evidence	285-291	against	1779
cross-examination by more		presumptions applicable to sale	
than one	783	in fraud of	2504
statements by, as admissions . . .	1063, 1066	Crime , by a third person, as ex-	
notes of testimony taken by . . .	1669	onerating an accused	139-142
reading scientific books to jury . . .	1700	evidence admissible, though it	
stating facts in argument	1806	involves	215
in offering evidence or ques-		other crimes, as evidence of in-	
tioning witness	1808	tent, knowledge, or design . . .	300-367
taking the stand as witness	1911	constitutionality of statute de-	
claiming privilege for witness . . .	2270	fining	1354
authority to make judicial ad-		privilege not to disclose; see	
missions	2594	SELF-CRIMINATION.	
See also ATTORNEY AND CLIENT;		confession of, by a third person . . .	1476
ATTORNEY.		see also CONVICTION OF CRIME;	
Counter-claim , agreement of,		CRIMINAL TRIAL; INTENT;	
shown by parol	2436	DEFENDANT.	
Counterfeiting , possession of		Criminal Conversation , charac-	
materials, as evidence of	153, 238	ter of plaintiff as mitigating	
other crimes, as evidence of		damages	75, 76
intent	309	conduct of plaintiff as mitigat-	
Counterpart , as equivalent to		ing damages	210
original	1232	conduct of defendant at other	
County ordinance, boundary,		times, to show motive	398
etc., judicial notice of	2575	expressions of husband or wife	
Course of business, as evidence		showing feelings	1730
of an act done	92	eye-witness of marriage re-	
Court , record of; see JUDICIAL		quired	2085
RECORD.		marital privilege in	2239, 2338
adjournment of, as affecting		Criminal Intent ; see INTENT.	
publicity	1835	Criminal Trial , rules of evi-	
exclusion of witnesses from	1837	dence in, the same as in civil	
seal of, presumed genuine	2164	trial	4
officers and rules of, judicially		in Federal courts, rules appli-	
noticed	2578	cable in	6
see also VIEW; TRIAL; JUDGE.		injured person's admissions in	
Coverture , presumption of coer-		exhibition of weapons or	
cion during	2514	wounds to jury	1157
see also MARRIAGE.		history of rule for original	
Credibility of a witness; see		documents in	1177
IMPEACHMENT; WEIGHT;		notice to produce original in . . .	1205
WITNESS, III.		right of confrontation in	1397
Credit , knowledge of falsity of		list of witnesses to the accused	
representations as to, evi-		in	1850
denced by repute	256		

INDEX OF TOPICS.

Criminal Trial (continued).	Section
eye-witnesses of crime required	2078
proof of <i>corpus delicti</i>	2070, 2081
tender of witness' expenses in	2201
marital privilege in	2239
patient's privilege in	2385
proof beyond a reasonable doubt in	2497
burden of proof in general	2511-2514
see also DEFENDANT; CHARACTER; CRIME.	
Cross-examination	
I. <i>Right to a Cross-examination</i>	
theory and art of	1362, 1365, 1367, 1368
constitutional guarantee of	1397
exclusion of testimony or deposition not subjected to cross-examination; see HEARSAY RULE, I.	
admission of testimony or deposition of absent person already cross-examined; see HEARSAY RULE, I.	
exceptional admission of hearsay statements made out of court; see HEARSAY RULE, II, III.	
testimony excluded for insufficiency of	1390-1393
testimony excluded for non-responsive answers	1392
right to cross-examine to admissibility of a confession	861
showing document to opponent before	1861
what witnesses may be subjected to	
witness sworn by mistake	1893
called but not sworn	1893
sworn but not questioned	1893
producing or proving a document	1893, 1894
one's own witness	914
<i>voir dire</i>	1384
of a deposition, excluded	
if direct answers are excluded	1893
or not offered	1893
of non-taker using the whole	1893
II. <i>Mode of interrogation</i>	
theory and art of	1367, 1368
putting hypothetical questions on	686
specifying grounds of recollection on	730

Cross-examination (continued).	Section
use of a memorandum of recollection on	753, 762, 764
use of a deposition to refresh recollection	761
leading questions on	773
misleading questions on	780
intimidating and annoying questions on	781
repetition of questions on	782
multiple cross-examiners	783
length of	783
non-responsive answers on	785
improper offer of evidence on	1808
III. <i>Order of Topics and Witnesses (Cross and Direct)</i>	
order and time of examination	1867
postponement and waiver	1884
offering documents	1884
putting in one's own case	1885-1891
who may be cross-examined; see <i>supra</i> , I.	
stating the purpose of a question on	1871
re-cross-examination	1897
recall for re-cross-examination	1899
see also EXAMINATION.	
IV. <i>Methods of Using for Impeachment</i>	
to impeach rape-complainant as to chastity	200
to impeach a witness	
general theory	878
one's own witness	914
broadness of scope	944
bias or quarrels	951
conviction of crime	980, 1270
other misconduct	981-983
rumors of misconduct	988
testing a witness' grounds of knowledge	994
testing a witness' recollection	995
manner of questioning	780, 781
leading questions	773
repetition of questions	782
collateral facts	1006
self-contradictions	1023
by preliminary warning	1025
expert witness, to value	463
to handwriting	2015
to scientific books	1700
experts in general	991

INDEX OF TOPICS.

Cross-examination (<i>continued</i>).	Section
restoring credit after . . .	1106, 1117, 1131
privilege not to criminate . . .	2268, 2277
to impeach a party as witness accused	889, 2277
civil opponent	916
account-books	1554
V. Sundries	
to contents of a document . . .	1255, 1259
prior deposition	1262
Crossing of railway; see HIGHWAY; NEGLIGENCE; REPAIRS.	
Cross-reading of a document copied	1279
Cruelty , other persons' conduct, as a standard of	461
by husband to wife; see HOMICIDE.	
Cumulative witnesses excluded . . .	1907
Curative admissibility	15
Custodian's certified copy; see CERTIFIED COPY.	
Custom , as evidence of doing an act	92
other instances, as evidence of tenor	376, 379
in other factories, etc., as evidence of safety, etc.	461
witness' experience in	565
concerning land-rights; see REPUTATION.	
proved by opinion	1954
by one witness	2053
judicially noticed	2580
see also HABIT; USAGE.	
Customers , names of, as privileged	2212
Customs Dues ; see IMPORTATION.	

D.

Damages , character of plaintiff in mitigation of	70-76
conduct, to prove character in mitigation of	209-213
opinion testimony to	1942
impeaching a verdict determined by average	2354
amount of, as evidenced by other transactions; see CONTRACTS; VALUE.	
other defamatory utterances, to increase; see DEFAMATION.	

Danger , of machine or place, evidence of owner's knowledge of	252
other instances of injury, etc., as evidence of	451-461
opinion as to	1949
risk of fire; see INSURANCE.	
Date ; see TIME.	
Daughter ; see SEDUCTION.	
Daybook of regular entries . . .	1548, 1558
Deaf-mute may be a witness . . .	498
interpreter's qualifications . . .	571
necessity of interpreter	811
impeachment of	934
Death , as evidenced by lack of news	158
of opponent, not necessary for using admissions	1049
of attesting witness	1811
of declarant of facts against interest	1456
of pedigree-declarant	1481
of maker of regular entries . . .	1521, 1561
statement of time or place of; see FAMILY HISTORY.	
reputation of	1605
register of; see REGISTER OF MARRIAGE, BIRTH, AND DEATH.	
as excusing lack of cross-examination	1390
as allowing use of deposition . .	1403
provable by coroner's inquisition	1671
as affecting marital privilege . .	2237, 2341
patient's privilege	2387, 2391
client's privilege	2323, 2329
presumed, to validate a marriage	2506
negligence presumed from . . .	2510
absence raises presumption of	2531
De bene esse ; see DEPOSITION.	
Debt , prior indebtedness, as evidence	382
as evidence of motive	392
see also PAYMENT; CONTRACT; CREDITOR.	
Debtor , indorsement of payment by, as statement against interest	1460, 1466
utterances in possession, used against creditor	1779
see also CREDITOR.	
Deceased Declarant ; see DYING DECLARATION.	

INDEX OF TOPICS.

	Section		Section
Deceased by Homicide , character of, to evidence self-defence	63, 246	Deed , execution or delivery of, as evidenced by possession of it	157
threats of, to evidence self-defence	110, 247	mode of proving forgery of; see FORGERY.	
survival of, to negative <i>corpus delicti</i>	138	impeaching one's own	529
suicidal plans of, to evidence an accused's innocence	143	possession under, as evidence of boundaries	378
acts of violence by, to evidence self-defence	198, 248	original must be produced; see ORIGINAL DOCUMENT.	
Deceased Person in General , disqualification of surviving opponent as witness	578	calling the attesting witness; see ATTESTING WITNESS.	
disqualification of wife of	610	recitals in, as admissible; see RECITALS.	
✓ admissions of	1081	land-grant of government	1225, 1239
character of, to prove negligence	65	certificate of acknowledgment of, whether conclusive	1349, 1352
use of account-books for or against	1554	registration of, whether conclusive	1352
hearsay statements of, admissible		contents of lost deed, recited in another	1573
dying declaration; see DYING DECLARATION.		as showing reputation of boundary	1592
facts against interest; see AGAINST INTEREST.		execution of, proved by certificate of acknowledgment	1676
pedigree; see FAMILY HISTORY.		words accompanying gift by	1777
attesting witness; see ATTESTING WITNESS.		location of description in, by opinion	1965
regular entries; see REGULAR ENTRIES.		substance of contents of lost	1957, 2105
private boundaries; see BOUNDARIES.		thirty years old, presumed genuine	2137-2146
ancient deed-recitals; see RECITALS.		filed in official records, presumed genuine	2159
disinterested persons in general	1576	privilege for title-deeds	2211
see also DEATH.		recital of consideration in, varied by parol	2433
Deceased Witness , former testimony of; see FORMER TESTIMONY.		condition precedent, shown by parol	2408, 2420
Decision ; see JUDICIAL DECISION.		absolute in form, shown by parol to be security only	2437
Declaration , of intent, used to interpret a document	2471	interpretation of	2458
of deceased person; see DECEASED PERSON.		burden of proof of capacity of grantor	2500
Dedication		presumption from confidential relations	2503
words accompanying, as <i>res gesta</i>	1777	presumption of delivery, date, seal, etc.	2520
opinion evidence of intent of	1967	of lost grant	2522
Dedimus Potestatem ; see DEPOSITION.		of alteration before execution	2525
		of identity of grantor or grantee	2529
		see also DOCUMENT; EXECUTION; HANDWRITING; RECORDED CONVEYANCE.	

INDEX OF TOPICS.

De facto officer, document made by	Section 1633	Defendant (<i>continued</i>).	Section
celebrant of marriage	2505	wife of, as witness	609
appointment presumed	2535	testifying to his own intent	581
Defamation , character of plaintiff, to evidence innocence	66	confessions of; see CONFESSIONS .	
character of plaintiff, to mitigate damages	70-74	admissions of; see ADMISSIONS .	
acts of plaintiff, to justify or to mitigate damages	207, 209	impeachable like other witnesses, when called for himself	890
other acts, to evidence intent	367	when called for the opponent	916
other utterances, to evidence malice	403-406	may impeach a co-defendant	916
other persons' libels, as a standard of criticism	461	admissions of a co-defendant	1076
meaning of, by opinion evidence	1971	statements when found with stolen goods	1777, 1781
whole of an utterance to be proved	2097, 2115, 2119	silence of, as an admission	1071
proof of charge beyond reasonable doubt	2498	prejudice to, by exhibition of wounds, etc.	1157
testimony before grand jury, not privileged	2363	magistrate's report of examination of	1326, 1349
official reports, privileged	2375	expressions of intent or motive	1732
Defect ; see NEGLIGENCE .		right to be present at a view	1803
presumption of, from accident	2509	opinion testimony to capacity of confession of accused, sufficiency of	1958
Defendant		examination of accused before magistrate; see DEPOSITION ; FORMER TESTIMONY .	2070
character of accused, as evidence	55-57	privilege against self-crimination	2276
time of character	60	see also CO-INDICTEE .	
kind of character	57-59	Definition , of evidence	1
accused as witness	61	Degree of probative value required for relevancy	38
character of a civil defendant	64-67	of evidence; see BEST EVIDENCE ; COPY .	
threats of accused, to prove crime	105	Delay , in complaining or suing, as evidence	284
mode of evidencing character by conduct	192-196	Delivery by mail, express, or telegraph	95
of accused	199	of a deed, as evidenced by possession of it	157
of civil party negligent	198	of a document, proved without production	1248
of deceased in homicide	202	of a deed, shown conditional by parol evidence	2408, 2420
of character in issue	209	Demand for a document; see NOTICE TO PRODUCE .	
mode of evidencing skill or strength	220, 221	Demeanor , of accused, as evidence of guilt	273, 274
sanity	228, 231	under the right of confrontation	1395, 1399
mental capacity	228	of a witness, as affecting credibility	946
knowledge or belief; see KNOWLEDGE .		Demurrer to evidence	2495, 2589
consciousness of guilt; see CONSCIOUSNESS OF GUILT .		to claim barred by statute of limitations	2538
history of accused's disqualification as witness	575		
statutory abolition of the same	579		
co-defendants as witnesses	580		

INDEX OF TOPICS.

Dentist, privileged communication to	Section 2382
Deposition	
I. <i>Right of Cross-examination of Deponent</i>	
notice required	1377-1383
plural depositions	1379
issues and parties the same	1386-1388
either party may use	1389
non-responsive answers	1392
sweeping interrogatories	1392
II. <i>Right of Confrontation of Deponent</i>	
constitutional guarantee	1397
excuses for non-attendance (death, illness, non-residence, imprisonment, etc.)	1402-1413
proof of the excuse	1414
witness present in court	1415
opponent's deposition	1416
deposition used to impeach deponent	1416
malicious prosecution	1416
chancery depositions	1417
probate and bastardy examinations	1417
chancery and <i>dedimus potestatem</i>	1417
<i>perpetuam memoriam</i>	1412, 1417
III. <i>Sundries</i>	
objection to, time of making	18, 486
used to aid recollection	761, 764
mode of interrogation in; see QUESTION.	
prepared beforehand to suggest answers	787
officer taking, not to be party's agent or kinsman	803
transcription of answers to be literal	804
reading over and signing	805
used to refresh the recollection of one's own witness	904
used by opponent, as preventing impeachment	912, 913
discrediting its mode of preparation	996
impeachment by self-contradiction	1031
annexing a copy of a document to	1185
producing original	1215
cross-examination on a prior deposition	1262
taking an attesting witness' deposition	1312

Deposition (continued).	Section
magistrate's report of examination preferred	1326, 1349
written deposition required to be used	1331
mode of taking	1376, 1380, 1401
statement in, to evidence pedigree	1495
certificate of taking of	1676
certified copy of; see CERTIFIED COPY.	
liability of deponent for perjury	1832
cross-answers excluded	
when direct answers are	1893
when taker does not offer	1893
non-taker using may not impeach	1893
putting in the whole	2103, 2111, 2115
power of officer to compel answer	2195
persons privileged to testify by attendance from a distance not required	2205, 2206 2207
see also DISCOVERY; EXAMINATION.	
Deputy Officer, document made by	1633
Description, in deed, interpretation of; see PAROL EVIDENCE RULE, D.	
Design, as evidence of an act done	102-113
conduct, preparation, etc., as evidence of	237-240
other crimes, as evidence of	300-367
statements of	1725, 1735
Destruction of evidence, as indicating guilt	278
of document, as evidence of contents	291
as excusing production	1193
of other property, as evidence of a nuisance	451
Detective, impeached by his interest or bias	949, 969
confession made to; see CONFESSION.	
De ventre inspicendo, writ of	2220
Devisee, admissions of	1081
see also WILL; EXECUTOR.	
Diagram, as a mode of testifying	790
Dictionaries, used in evidence	1699
judicially noticed	2582
Difficulty, of work, etc., as shown by instances	460

INDEX OF TOPICS.

Diligence in search for lost document	Section 1194	Discovery (<i>continued</i>).	Section
in search for attesting witness	1313	from opponent in chancery at the trial	2218
Diplomatic Officer ; see AMBASSADOR; CONSUL.		under statutes	2218
Direct Evidence , defined	25	under client's privilege	2318
Direct Examination		Discretion of the trial Court; see JUDICIAL DISCRETION.	
specifying grounds of knowledge on	655	Disgracing Answers , privilege against 984, 987, 2216, 2255
specifying grounds of recollection on	730	Disease ; see ILLNESS.	
leading questions on; see QUESTION.		Disinheritance , as evidence of testator's insanity	229
contradicting answers made on	1007	parol evidence of intent	2475
struck out, if cross-examination is not had	1390	Disorderly house ; see HOUSE OF ILL-FAME.	
order of topics on	1883	Distance , of a weapon, as shown by effects	457
putting in documents on	1883	of a person, sound, sight, etc., as shown by instances	460
irrelevant matters, conditionally received on	1871	as excusing absence of an attesting witness	1312
what constitutes calling a witness on	1892	of a deponent	1407
cross-examination to facts asked for on	1885-1891	opinion testimony to	1977
see also EXAMINATION; CROSS-EXAMINATION.		of witness' residence exempting from attendance	2207
Directing a verdict	2495	judicially noticed	2581
Disbarment , proof beyond reasonable doubt	2498	Divorce , as qualifying wife as witness	610
Discharge of contract, shown by parol	2441, 2454	as affecting marital privilege	2237, 2341
charge and discharge entries	2117	one witness to a charge	2046
Discovery		corroboration required	2066
general principle as to discovery		confession of respondent	2067
common law	1845	eye-witness of marriage	2085, 2086
chancery	1846	inspection of party, on charge of impotency	2220
policy of the rule	1847	presumed, to validate a later marriage	2506
exceptions to the rule		Docket , original's production required	1215, 1217
list of witnesses in criminal cases	1850-1855	certified copy allowed	1681
discovery in chancery	1856	conclusive	2450
statutory interrogatories to opponent	1856	Document , possession of, as evidence of payment	156
names of witnesses in civil cases	1856	execution or delivery, as evidenced by possession of it	157
documents inspected before trial	1857-1860	possession of, as evidence of knowledge	260
shown on cross-examination	1861	failure to produce, as evidence of contents	291
inspection makes evidence	1861	marks on, as evidence of identity	415
exclusion for failure to allow inspection	1210	impeaching one's own	529
premises, chattels, and body, inspected before trial	1862	execution of, witness' personal observation of	666

INDEX OF TOPICS.

Document (<i>continued</i>).	Section
proof of genuineness by handwriting; see HANDWRITING .	
of predecessor, as qualifying a witness to handwriting	704
third person, as party's admission	1073
used to aid recollection; see RECOLLECTION .	
showing to opponent before cross-examination	1861
to witness on cross-examination	1185
original must be produced; see ORIGINAL DOCUMENT .	
dying declaration reduced to writing	1445, 1450
kinds of copy allowed or preferred; see COPY ; CERTIFIED COPY .	
execution proved by attesting witness; see ATTESTING WITNESS .	
by other methods, see EXECUTION .	
putting in on direct or cross examination	1883, 1884
impeachment of witness who proves	1893
discovery of, before trial; see DISCOVERY .	
taken to jury-room	1913
expert testimony to	
ink, paper, spelling	2024
decipherment	2025
imitations, forgeries	2026
erasures, alterations, date	2027
putting in the whole	
sundry instances	2102, 2116
depositions	2103, 2111, 2115
separate documents	2104, 2120
lost deeds, etc.; abstracts	2105
lost wills	2106
public records	2107
judicial records	2110
bill and answer in chancery	2111
account-books	2118
chancery answer, responsive parts	2121
answers to interrogatories	2124
document inspected by opponent	2125
obtained by illegal search	2183
lacking revenue-stamp	2184

Document (<i>continued</i>).	Section
privilege for title-deeds, trade-secrets	2211, 2212
production by opponent at trial	2219
by witness	2193, 2200
under self-crimination privilege	2264
under client's privilege	2307, 2318
parol evidence to vary terms; see PAROL EVIDENCE RULE .	
possession of, as presuming payment	2518
spoliation of, as creating a presumption	2524
execution of, presumed	2519
delivery, date, seal, consideration; signature presumed	2519
alteration of, presumption as to interpretation of	2525
for the Court	2556
by expert testimony to technical words	1955, 1956
by parol evidence; see PAROL EVIDENCE RULE, D .	
see also CONTRACT ; DEED ; EXECUTION ; JUDICIAL RECORD ; PUBLIC DOCUMENT ; RECORDED CONVEYANCE .	
Dog , character of, as evidence	68
conduct of, in tracing an accused	177
as evidencing disposition	201
see also ANIMALS .	
Domain , inquisition of	1670
Domicil , declarations of	
by a voter	1712
by other persons	1727, 1784
presumed to continue	2530
Doubt , proof beyond a reasonable	2497
Dramatic expression by a witness	789
Drawee , parol agreement collateral to instrument	2443
see also BILL OF EXCHANGE .	
Drawing , used to illustrate testimony	790
Drinking ; see INTOXICATION ; INTEMPERANCE ; LIQUOR ; LIQUOR-SELLING .	
Driving a vehicle ; see VEHICLE ; NEGLIGENCE .	
Drug ; see POISON ; PHARMACIST ; OPIMUM .	
Drunkenness ; see INTOXICATION ; INTEMPERANCE ; LIQUOR ; LIQUOR-SELLING .	

INDEX OF TOPICS.

Duces tecum , see SUBPENA .	Section
Duplicate original document, production of	1232
Duress making acts voidable	2423
see also CONFESSION .	
Dying Declaration	
constitutionality of admitting	1398
history and principle	1430, 1431
restricted to certain criminal cases	1432
death must be declarant's	1433
subject of declaration	1434-1436
consciousness of speedy and certain death	1438-1442
theological belief	1443
recollection, leading questions, etc.	1445
impeachment	1033, 1446
opinion rule	1447
producing the whole	1448
the original	1449
written report of magistrate	1450
judge and jury	1451
accused may use	1452

E.

Ecclesiastical Courts , rules of evidence in	2032, 2045, 2067, 2250
Effect of a machine, place, weapon, experiment, etc., as evidencing the cause or ori- gin	437-461
Ejectment ; see DEED ; TITLE ; POSSESSION .	
Election , offences against, other acts evidencing intent	367
certificate of, conclusive	1351
books of, as evidence	1640
results of, judicially noticed	2577
see also VOTE ; BALLOT .	
Electric Wires ; see NEGLI- GENCE ; MACHINE ; HIGH- WAY .	
Elevator , defective; see NEGLI- GENCE ; OWNER ; MACHINE .	
Embezzlement , possession of money, as evidence of	154
other embezzlements, as evi- dence of intent	329
motive for	392
Embracery ; see BRIBERY .	
Eminent Domain , view by jury in	1168

Employee , character of, to evi- dence negligence	Section 65
character of, as affecting em- ployer's liability	80, 249
intemperance of, as constitut- ing incompetence	96
acts of negligence, to evidence character	199, 208
to evidence employer's knowledge	250
on vehicles, bridges, etc., standard of conduct of	461
as a biased witness	949, 969
appearance of, as indicating competence	1154
presumption of negligent in- jury to	2509
Engine ; see SPARKS ; MA- CHINE ; SPEED .	
Enlistment , register of, as evi- dence	1641
Enrolment , of a statute, whether conclusive	1350
of a deed; see RECORDED CONVEYANCE .	
of a judicial proceeding; see JUDICIAL RECORD .	
Enticement for prostitution, character of complainant to show consent	62
other offences as evidence of intent	349, 360
Entry , in a book, to aid recol- lection; see RECOLLECTION . made by a public officer; see PUBLIC DOCUMENT . in docket or minutes; see JU- DICIAL RECORD . as a statement of facts against interest; see AGAINST IN- TEREST . made in the course of business; see REGULAR ENTRIES .	
Equivocation in a document	2472
Equity , rebutted by declarations of intent	2475
procedure in; see CHANCERY .	
Erasure , expert testimony to	2027
Error , impeaching a witness; see CONTRADICTION . of ruling, as ground for new trial	21
Escape , as evidence of guilt	276
refusal to, as evidence of inno- cence	293

INDEX OF TOPICS.

	Section
Escheat , inquisition of	1670
Escrow , shown by parol evidence	2408, 2420
Estoppel , distinguished from an ordinary admission	1056, 1058
from a judicial admission	2589
Evidence , defined	1
rules of, whether alterable by the Legislature	7
distinguished from argument	1
admissible for one purpose but not for another	13
admissible conditionally on other facts being shown	14
inadmissible, when received, is not to justify other inadmissible evidence	15
offer of and objection to, mode of making	17, 18
ruling upon an objection to	19
circumstantial and testimonial, distinguished	25
fabrication of, as indicating guilt	278
failure to produce, as indicating a weak case	285-291,
	2273
<i>prima facie</i>	2494
sufficient for jury	2494
preponderance of	2498
demurrer to	2495
judge's right to determine sufficiency and admissibility	2550
order of topics of, in trials; see EXAMINATION.	
primary; see BEST EVIDENCE; ORIGINAL DOCUMENT.	
conclusive; see CONCLUSIVE-NESS.	
Examination of Premises , chatels, etc.; see DISCOVERY; PARTY'S PRIVILEGE; REAL EVIDENCE.	
Examination of Witness	
I. <i>Before a Magistrate</i>	
magistrate's report of former testimony, whether required	1326, 1349
whether admissible	1667
former testimony before, without cross-examination	1375
dying declaration under oath	1450
testimony proved by magistrate's report	1667
by stenographer's notes	1669
see also DEPOSITION.	

Examination of Witness (<i>continued</i>). Section	
II. <i>Right of Cross-examination</i> ; see CROSS-EXAMINATION, I.	
III. <i>Order of Examination at Trial</i>	
trial Court's discretion controls	1867
length of time immaterial	1864
<i>putting in the case at large</i>	
case of proponent in chief	
order of topics	1870
party testifying first	1870
facts conditionally relevant	1871
reading documents	1883
case of opponent in reply	1872
case in rebuttal	1873
case in surrebuttal	1874
later stages	1875
<i>after case closed</i>	
one case closed	1876
both cases closed	1877
argument begun	1878
charge given	1879
jury retired	1880
verdict rendered	1881
<i>examination of a witness on the original call</i>	
direct examination	1883
putting in documents	1883
cross-examination	1884
postponement	1884
offering documents	1884
putting in one's own case	1885-1891
see also CROSS-EXAMINATION.	
whose is the witness	1892
re-direct examination	1896
re-cross-examination	1897
later stages	1897
<i>recall</i>	
for re-direct examination	1898
for re-cross-examination	1899
IV. <i>Sundries</i>	
effect of death or illness preventing cross-examination	1390
refusal to answer on cross-examination	1391
non-responsive answer	1392
of opponent or witness before trial; see DISCOVERY.	
at a former trial, used to aid recollection; see RECOLLECTION.	
mode of putting questions on; see QUESTION.	

INDEX OF TOPICS.

Examination of Witness (<i>continued</i>). Section	
specific topics on direct examination; see DIRECT EXAMINATION .	
specific topics on cross-examination; see CROSS-EXAMINATION .	
confession made under oath on; see CONFESSION .	
of a party as witness; see WITNESS .	
admissibility of prior examination; see DEPOSITION ; FORMER TESTIMONY .	
Examined Copy ; see COPY .	
Exception to a ruling upon evidence, mode of taking	20
bill of, as evidence of testimony	1668
Exclamations of pain or suffering	1719
as <i>res gestæ</i> of violent injury	1745
Execution of Document	
general principle	2129-2139
proof not needed when execution admitted	2131
whether signature or contents is involved	2134
rule of presumption	2135
I. <i>Modes of proving execution by age</i>	
thirty years old	2138
natural custody	2139
unsuspicious appearance	2140
possession of the land	2141, 2142
recorded deeds and old copies	2143
authority to execute	2144
kinds of documents	2145
presumption; statutory denial	2146
attesting witness dispensed with	1311
by <i>contents</i>	
in general	2148
illiterate's letter; typewriting	2149
printed matter	2150, 2151
postmark; brand	2152
reply-letter by mail	2153
reply-telegram	2154
reply-telephone	2155
identity of name	2156, 2529
by <i>official custody</i>	
judicial records and files	2158
sundry official records	2159
by <i>seal</i>	
general principle	2161

Execution of Document (<i>continued</i>). Section	
statutory regulation	2162
seal of State	2163
seal of court or clerk	2164
seal of notary	2165
sundry official seals	2166
official signatures	2167
official title	2168
corporate seal	2169
by <i>other modes</i>	
by handwriting; see HAND-WRITING .	
by possession	157
by parties' belief	271, 272
by opponent's admission	2132, 2596
spoliation	2132
by sundry circumstantial evidence	2131
by presumption	2135
by attesting witness; see ATTESTING WITNESS .	
by certificate of acknowledgment; see CERTIFICATE .	
by certified record-copy; see CERTIFIED COPY ; RECORDED CONVEYANCE .	
of a will, by testator's belief	271
by testator's expressions	1734
by record of probate	1658, 1681
II. <i>Sundry rules</i>	
production required, even though execution is presumed	1187
execution must be proved, though original is lost	1188
order of proof as between execution and loss	1189
execution provable, without producing original	1248
calling the attesting witness; see ATTESTING WITNESS .	
writer not a preferred witness	1339
written statements against interest	1472
pedigree entries	1496
showing document to opponent before cross-examination	1861
Execution of Judgment ; see JUDICIAL RECORD ; SHERIFF .	
Executive	
acts of, proved by certified copy	1680
by printed copy	1684
privilege of, in substantive law	2368
as witness	2370

INDEX OF TOPICS.

	Section
Executor, admissions of . . .	1076, 1081
rebutting intention of gift to	2475
waiver of client's privilege by	2329
of patient's privilege by	2391
Ex parte proceedings, rules in, distinguished	4
see also AFFIDAVIT ; DEPOSITION .	
Expediente ; see DEED .	
Expenses of witness, tender of . . .	2201
amount of	2202
expert witness	2203
Experiment , as evidence of planning crime	238
of the quality or condition of a thing	445
to test a witness' knowledge or skill	993
as allowable in court	1154, 1160
Expert Witness	
1. <i>Qualifications</i>	
general requirements	555-561
stating the grounds of opinion	562, 655
foreign law	564, 690
custom and usage	565
value	567, 711
medical matters (sanity, blood, etc.)	568, 687
handwriting and paper money	570, 693
.	1991-2027
sundry topics of testimony . .	571
mode of securing unbiassed experts	562
see also KNOWLEDGE .	
2. <i>Impeachment</i>	
by another expert	562, 1984
by cross-examination to instances of unskilfulness	991
by contradiction on particular facts	1005, 1022
by reputation	1621
see also IMPEACHMENT .	
3. <i>Sundries</i>	
failure to call, as evidence of a weak case	290
cross-examination to other sales as evidence of value . . .	463
improbabilities in scientific testimony	662
proving voluminous records by summary	1230
testimony to forgery of bank-note	1339
<i>ex parte</i> investigations out of court	1385

Expert Witness (<i>continued</i>).	Section
hypothetical questions to; see HYPOTHETICAL QUESTION .	
testimony by quotation of scientific books	1700
tested on cross-examination	1700
inspection of injured person by	2220
limitation of number of	1908
amount of fee demandable by	2203
see also OPINION RULE .	
Explanation , logical principle of . . .	32
of flight as evidence of guilt . .	277, 281
Ex post facto law, prohibition of, as affecting rules of evidence	7
Express package, delivery of, as evidenced by course of business	95
Extortion , other offences as evidence of intent	352
Extrinsic Testimony , rule for, as distinguished from cross-examination	878
to prove bias of a witness	943
to prove crimes or other misconduct of a witness	979
to prove errors	1001
to prove self-contradiction	1020
Eye-witness , called by the State, may be impeached	918
of a crime, required to be called .	2077

F.

Fabrication of evidence, as indicating guilt	278
Fact , presumption of	2491
jury or judge to determine . . .	2549
Factory ; see EMPLOYEE ; NEG-LIGENCE ; PREMISES ; MACHINE .	
Factum probandum , distinguished from <i>factum probans</i>	2
Failure to prosecute or complain . .	284
to produce evidence	285-291
to object to evidence	18
to speak or claim, as a self-contradiction	1042
as an admission	1071
to reply to a letter, as an admission	1073

INDEX OF TOPICS.

	Section
Falsa demonstratio non nocet . . .	2476
False Arrest ; see ARREST .	
False Claim , of cause of action, mode of evidencing intent . . .	340
as impeaching a witness . . .	963
False Pretences ; see FALSE REPRESENTATIONS .	
False Representations , repute as evidence of knowledge . . .	256
other false representations as evidence of intent . . .	320
Falsehood , as evidence of guilt . . .	278
as impeaching a witness . . .	963, 1008
Falsity , as impeaching a wit- ness; see CONTRADICTION ; FALSUS IN UNO ; PERJURY ; SELF-CONTRADICTION .	
Falsus in uno , general principle . . .	1008
falsity must be wilful and ma- terial	1013, 1014
Family , insanity of, as evidence . . .	232
Family History , statements about exception to the Hearsay rule . . .	1480
death of declarant	1481
<i>ante litem motam</i>	1483
declarations by non-relatives . . .	1487
by neighborhood-reputation . . .	1488
by different sorts of relatives . . .	1489
proof of relationship	1490, 1491
illegitimate child	1492
own age	1493
identification by	270, 413, 1494
form of declaration (Bible, will, etc.)	1495
proving the writing	1496, 1497
place of birth or death, etc. . . .	1500
issue of pedigree	1503
age, other modes of proving; see AGE .	
ancient deed's recital of pedi- gree	1573
Family Relationship , as bias- ing a witness	949
as raising presumption of gra- tuity	2526
Father , reputation of, as miti- gating damages in seduction . . .	75, 210
presumed instead of son, from identity of name	2529
statements of, to evidence ped- igree; see FAMILY HISTORY .	
testimony to bastardy	2063
see also BASTARDY ; LEGITIMACY ; MOTHER .	

	Section
Federal Law , conflict between . . .	6
State law and	6
judicially noticed	2573
requiring full faith and credit . . .	1681
Feelings , expressions of . . .	1718, 1730
see also BIAS .	
Fees of witness, tender in advance . . .	2201
amount of	2202
expert witness	2203
Fellow-servant ; see EMPLOYEE .	
Felony , as disqualifying or im- peaching a witness; see CON- VICTION OF CRIME .	
Files ; see JUDICIAL RECORDS ; PUBLIC DOCUMENTS .	
Fire ; see ARSON ; SPARKS ; PREMISES .	
Fire Insurance ; see INSURANCE .	
Flight , as evidence of guilt . . .	276, 281
Flowage of water, other in- stances as evidence	451
Food , effect of, as indicating nature or quantity	457, 460
Footprint , as evidence of identity . . .	413
compelling defendant to make . . .	2265
Foreign Language ; see INTER- PRETER ; ALIEN .	
Foreign Law , when applicable . . .	5
in its rules of evidence	564, 690, 1953
proved by expert witness	1697
proved by treatises	1271
statute proved without copy . . .	1271
proved by official printed copy	1684
crime by, not privileged	2258
similarity of, presumed	2536
judge or jury to determine	2558
not judicially noticed	2573
Foreign Officer , document made by	1633
Foreman , entries of, to aid recol- lection; see RECOLLECTION . character and conduct of, as employee; see EMPLOYEE .	
Forfeiture , privilege not to dis- close	2256
Forgery , of a will, character of a third person as evidence of . . .	68
skill in handwriting, as evi- dence of	87
possession of materials, as evi- dence of	153, 238
of evidence, as indicating guilt	278

INDEX OF TOPICS.

Forgery (<i>continued</i>).	Section	Frauds, statute of ; see STATUTE OF FRAUDS.	Section
other forgeries, as evidence of		Fraudulent Transfers, other transactions as evidence of	
intent	309	intent	333
evidence of a motive for	392	admissions of debtor or creditor	1082
of identity	413	opinion evidence of intent	1967
proof of, without producing document	1249	presumptions applicable to	2504
notice to produce original document	1205	Fright of horses, as evidence of dangerous object	461
testimony of person whose name is forged, not required	1339		
of bank-notes, incorporation proved by repute	1625		
affidavit of bank-officer	1710		
expert testimony to handwriting of	2026		
Former Testimony offered in impeachment, as a self-contradiction	1030, 1032		
death, absence, etc., as allowing the use of	1403-1418		
used as an admission	1075		
magistrate's report preferred	1330, 1349		
issues and parties the same	1386		
mode of proving			
judge's notes	1666		
magistrate's report	1330, 1349, 1667		
bill of exceptions	1668		
stenographer's notes	1669		
juror's or attorney's notes	1669		
printed report	1703		
memorandum to aid recollection; see RECOLLECTION.			
whole must be proved	2098, 2103		
may be proved	2115		
Fornication ; see ADULTERY ; CRIMINAL CONVERSATION ; PROSTITUTION.			
Foundation, laying a, for impeaching by self-contradiction ; see IMPEACHMENT.			
for using a copy of a document ; see ORIGINAL DOCUMENT.			
Fraud, by a party, as evidence of a weak case	280		
as evidence of intent	344		
confession obtained by	841		
as impeaching a witness	963		
privilege against self-crimination in	2257		
making acts voidable	2423		
under the parol evidence rule	2432, 2439		
degree of proof of	2498		
presumed from grantee's confidential relations	2503		
		G.	
		Gaming, other acts as evidence of intent	367
		conclusive evidence of, under statute	1354
		Gas, see NUISANCE ; EXPERT WITNESS.	
		Genealogy proved by family hearsay ; see FAMILY HISTORY.	
		proved by reputation of community ; see REPUTATION.	
		General Character ; see CHARACTER.	
		General Interest, matters of ; see REPUTATION.	
		Genuineness, of a document ; see DOCUMENT.	
		Gestation, intercourse within the time of, in bastardy	133
		Gesture, as a mode of expression for a witness	789
		Gift, plans, as evidence of	112
		words accompanying	1777
		presumption of	2526
		see also DEED.	
		Girl ; see CHILD ; RAPE ; SEDUCTION.	
		Good Faith, see KNOWLEDGE ; MOTIVE ; INTENT.	
		Goods ; see CHATTELS ; BUSINESS ; VALUE.	
		Government, land-grant of ; see DEED.	
		records of ; see PUBLIC DOCUMENT.	
		privilege for communications to	2374
		Grand Jury, witnesses before, indorsed on indictment	1850
		right to compel answers	2252
		testifying before, as a waiver of privilege	2276

INDEX OF TOPICS.

Grand Jury (<i>continued</i>).	Section
privilege for vote and opinion . . .	2360
for witness' testimony . . .	2362
not to impeach indictment . . .	2364
Grant , presumption of lost . . .	2522
see also DEED; GRANTOR; GRANTEE.	
Grantee , from an insolvent, luna- tic, thief, etc., repute as evi- dencing knowledge of . . .	253-255
grantor's admissions, used against . . .	1082
producing original deed of . . .	1224
utterances in possession, used against creditor . . .	1779
deed delivered in escrow to . . .	2408, 2420
presuming fraud from confi- dential relations of . . .	2500
presuming identity from name . . .	2529
Grantor , admissions of . . .	1082
opinion testimony to capacity of . . .	1958
burden of proof of sanity of . . .	2500
see also GRANTEE.	
Guardian , admissions of . . .	1076
Guilt , see DEFENDANT; CON- SCIOUSNESS OF GUILT.	
Gun ; see WEAPON.	

H.

Habeas Corpus <i>ad testificandum</i> . . .	2199
Habit , as evidence of doing an act . . .	92
as evidence of marriage . . .	268
other instances, to evidence a habit . . .	376
of other persons, as evidence of care . . .	461
as a source of aiding recollec- tion of a witness . . .	747
see also CUSTOM.	
Habitual criminal , prior convic- tions as increasing sentence . . .	196
Handwriting	
I. <i>Style of</i> , to evidence author- ship of a document	
general theory . . .	99, 383
jury's perusal of specimens	
kinds of documents . . .	2016-2018
press-copies . . .	2019
photographic reproductions . . .	797, 2019
mode of proving genuine . . .	2020, 2021
II. <i>Qualifications of Witness to</i> by experience, in general . . .	570

Handwriting (<i>continued</i>).	Section
by seeing the person write . . .	694-697
number of times . . .	694
how long beforehand . . .	695
quantity of writing . . .	696
after-acquired knowledge . . .	697
impression or belief . . .	698
by seeing known genuine docu- ments . . .	699-708
express or implied admis- sions . . .	700, 701
acting on the document . . .	702
correspondence seen . . .	702
clerks seeing accounts, etc. . .	703
custodian seeing records, etc. . .	704
bank-notes and paper money . . .	705
number and time of speci- mens seen . . .	707
by expert comparison of hands	
general principle . . .	709
history . . .	1991-1994
lay witness excluded . . .	1997, 2004
exception for act of writ- ing seen . . .	2005
exception for ancient documents . . .	2006
refreshing the memory . . .	2007
expert testimony, whether admissible . . .	2008
selection of specimens . . .	2009
photographic copies . . .	797, 2010
studying the specimens . . .	2011
kind of skill required . . .	2012
mode of proving specimens . . .	2013
giving the grounds of belief . . .	2014
testing on cross-examina- tion . . .	2015
III. <i>Sundry topics</i>	
ink, paper, spelling, etc. . .	2024
deciphering illegible writing . . .	2025
imitations, forgeries . . .	2026
erasures, alterations, etc. . .	2027
defendant's skill in imitating, as evidence of forgery . . .	87
reference to, in aid of recollec- tion; see RECOLLECTION.	
effect of proving attesting wit- ness, or maker's hand; see ATTESTING WITNESS.	
Health , as evidenced by appear- ance . . .	223
prior condition of . . .	225
witness' experience as qualify- ing him . . .	568
Hearing a sound, instances of . . .	460

INDEX OF TOPICS.

Hearsay , as the basis of a witness' knowledge	Section 657, 688	Hearsay Rule (<i>continued</i>).	Section
nature of	1361	attesting witness; see ATTESTING WITNESS .	
Hearsay Rule		entries in the course of business; see REGULAR ENTRIES .	
I. <i>General principle</i>	1361-1363	private boundaries; see BOUNDARIES .	
history	1364	ancient deed-recitals; see RECITALS .	
<i>cross-examination</i> , right of		deceased persons in general; see DECEASED PERSONS .	
theory and art	1367, 1368	reputation; see REPUTATION .	
opportunity, equivalent to actual cross-examination . . .	1371	public documents, official statements; see PUBLIC DOCUMENTS .	
sundry tribunals	1373	scientific books; see LEARNED TREATISES .	
coroner	1374	price-lists, directories, etc.; see COMMERCIAL LISTS .	
committing magistrate	1375	affidavits; see AFFIDAVIT .	
deposition	1376-1383	voter's statements; see VOTER .	
notice	1378	mental condition, physical pain; see MENTAL CONDITION .	
plural taking	1379	<i>res gestæ</i> ; see RES GESTÆ .	
statutes	1380-1383	III. <i>Rule not applicable</i> (<i>Res Gestæ</i>)	1768-1797
affidavit	1384	<i>words a part of the issue</i>	
<i>ex parte</i> investigations, etc. . .	1385	contract, libel, etc.	1770
issues and parties the same	1386-1388	<i>words a verbal part of an act</i> . .	1772-1786
either party may use deposition	1389	general principle	1772-1776
insufficiency of cross-examination	1390-1393	payment, sale, loan, gift, entry, etc.	1777
witness' death or illness . . .	1390	possession, in prescriptive title	1778
witness' refusal or party's default	1391	possession, in presumption of ownership	1779
non-responsive answer	1392	accused found with stolen goods	1781
sundries	1393	testator revoking a will . . .	1788
<i>confrontation</i> , right of		bankrupt evading creditors . .	1782
absent witness' testimony, in general	1395	domicil	1784
constitutional requirement . . .	1397	accused's intent	1785
witness unavailable in court	1401-1418	<i>words used as circumstantial evidence</i>	1788-1792
deceased	1403	in proving search for lost document	1196
out of jurisdiction	1404	third person's knowledge, good faith, reasonableness, etc.	1789
not found	1405	speaker's state of mind	1790
ill	1406	identifying a time, place, or person	1791
imprisoned	1407	impeaching a witness by self-contradiction	1018, 1792
privileged	1407		
beyond statutory distance . . .	1407		
insane	1408		
disqualified	1409		
statutes	1410-1413		
proving the excuse	1414		
witness present in court	1415		
rule not applicable	1416		
exceptions to the rule	1417		
II. <i>Exceptions to the Rule</i> , general principle of	1420-1426		
dying declarations; see DYING DECLARATIONS .			
facts against interest; see AGAINST INTEREST .			
pedigree statements; see FAMILY HISTORY .			

INDEX OF TOPICS.

Hearsay Rule (<i>continued</i>).	Section
<i>res gestæ</i>	1795-1797
history and meaning of the term	1795
agent's and conspirator's admissions	1797
IV. <i>Rule applied to Court Officers:</i> see JUROR; JUDGE; COUNSEL; INTERPRETER.	
Height , as evidenced by other conditions or effects	438, 451, 461
Heir , admissions used against	1081
Heredity of illness, as evidence of insanity	223 232
Highway , evidencing owner's knowledge of danger of repairs, as evidence of negligence	252 283
condition at another time or place, as evidence of defect	437
injuries of other persons, as evidence of defect	458
similar precautions, as evidence of safety	461
see also DEDICATION.	
History of the rules of evidence in general	8
of interest as a disqualification	575
of rule for confessions	817, 865
of rule for producing documentary originals	1177
of attesting-witness rule	1287
of hearsay rule	1364
of dying declarations	1430
of statements against interest	1476
of statements of pedigree	1480
of regular entries	1518
of statements about boundaries	1563
of use of record-copy of deed	1650
of <i>res gestæ</i> phrase	1795
of the oath	1815
of separation of witnesses	1837
of opinion rule	1917
of handwriting testimony	1991-1994
of rules of number	2032
of compulsory process	2190
of party opponent's privilege of marital privilege	2217 2227, 2333
of privilege against self-crimination	2250
of confidential communications	2285
of client's privilege	2290

History (<i>continued</i>).	Section
of patient's privilege	2380
of penitent's privilege	2394
of parol evidence rule intent and mistake	2405
varying the terms	2426
interpretation	2462, 2470
History, Books of , used in evidence	
as representing reputation	1597
as scientific treatises	1693, 1699
judicially noticed	2580
Homicide , character of deceased in, to evidence self-defence	63, 246
accused's threats, as evidence of	102-105
deceased's threats, as evidence of aggression	110, 247
survival of alleged deceased, as negating <i>corpus delicti</i>	138
threats of a third person, as evidencing innocence of the accused	140
suicidal plans of deceased, as evidencing innocence of the accused	143
possession of booty or tools, as evidence of	154, 238
traces of blood, etc., as evidence of	149
acts of violence, on an issue of self-defence	198, 248
conduct as evidence of accused's sanity	228
other acts of violence, to show defendant's intent	363
circumstances showing a motive	390
conduct as evidence of malice	396, 397
weapon, clothing, etc., as evidence of identity	413
dying declarations in	1432
marital privilege in	2239
burden of proof of self-defence in	2512
Horse , character of, as evidence of behavior	68
fright of, as evidence of dangerous object	461
see also ANIMALS.	
House ; see PREMISES; PROPERTY.	
House of Ill-fame , character of	78
character of inmates of	78
other acts, as evidencing character	204

INDEX OF TOPICS.

House of Ill-fame (<i>continued</i>).	Section	Idiot ; see SANITY ; INTERPRETER ; WITNESS ; OATH .	Section
other acts, as evidencing intent . . .	367	Illegality in obtaining evidence, not to exclude it.	2183
provable by reputation	1620	Illegible document, production of original	1229
Husband ; see also CRIMINAL CONVERSATION ; HOMICIDE .		expert testimony to	2025
testimony of, as disqualified or privileged; see MARITAL RELATIONSHIP .		Illegitimacy , character of third person as evidence	68
notice to, as evidence of wife's knowledge	261	adultery, as evidence of	134
admissions of, against wife	1078, 1086	non-access, as evidence of	137
statements of, to evidence pedigree; see FAMILY HISTORY .		as evidenced by family hearsay; see FAMILY HISTORY .	
expressions of affection or dislike	1730	by neighborhood-reputation	1605
communications by or to, as privileged; see MARITAL RELATIONSHIP .		see also LEGITIMACY ; BASTARDY .	
presumption of coercion by	2514	Ill-fame , house of; see HOUSE OF ILL-FAME .	
Hypothetical Question		Illiterate , signature by mark, whether identifiable	693
general theory	672	as attesting witness	1512
when allowed or required	674-680	Illness , as evidenced by appearance	223, 437
form and scope	681-683	prior and subsequent condition of	225, 437
on cross-examination	684	insured's knowledge of, as evidenced by declarations	266
		symptoms, as indicating cause of	457
I.		witness' experience in, as qualifying him	568, 687
Ice , as a highway defect; see HIGHWAY ; NEGLIGENCE .		as impeaching a witness	934, 1005
Identity , mistaken, as evidence	142	as excusing absence of attesting witness	1315
of accused or other party, as evidenced by traces	148, 149	of deponent	1406
by other crimes	218, 414	of declarant of facts against interest	1456
by family history or hearsay	270, 1494	of maker of regular entries	1521
by voice, stature, etc.	660	of witness summoned	2205
by witness' former recognition	744, 1130	as excusing lack of cross-examination	1390
by photograph	790, 1154, 1156	expressions of suffering in	1718
of voice, as shown by utterance	222	privilege for communications to physician	2380
of person, place, chattel, etc., in general	410-416	see also PHYSICIAN ; POISON ; HEALTH .	
of brand or mark on stock or timber	150	Imbecile ; see IDIOT .	
of maker of attested document	1513	Immateriality of evidence, cured by other immaterial evidence	15
of a time or place, as shown by utterances	1791	see also IRRELEVANCY .	
opinion testimony to	1977	Impeaching one's own instrument, forbidden	529
of document, shown by ink, paper, etc.	2024	Impeachment of a Witness	
original required	1244	general principles	875-881
presumption of, from identity of name	2529	<i>persons impeachable</i>	884-918
from traces, tools, etc.	2529	hearsay witnesses (dying	

INDEX OF TOPICS.

Impeachment of a Witness (cont'd).	Section	Impeachment of a Witness (cont'd).	Section
declarant, attesting-witness, etc.)	884-888, 1446, 1514	interest, in criminal cases	967, 968
accused as witness	889-892	rewards, employment, etc.	969
impeaching an impeaching witness	894	<i>moral character</i> , evidenced by	
one's own witness	896-918	misconduct	977-988
general principles	896-899	general principles	977, 978
by moral character	900	extrinsic testimony	979
by bias, interest, or corruption	901	record of conviction	980, 1270
by prior self-contradiction	902-906	cross-examination	981-983
by contradiction with other witnesses	907, 908	privilege against disgracing answers	984
who is one's own witness	909-918	rumors, on cross-examination	988
necessary witness	917, 918	by reputation	1608-1621
using opponent's deposition	913	by personal opinion	1980
book of regular entries by clerk or party	1531, 1557	belief on oath	1985
expert witness and scientific books	1700	<i>skill, memory, knowledge</i> , as tested on cross-examination	990-996
<i>moral character</i> in general	920-940	expert to handwriting	2015
general principles	920, 921	<i>contradiction by other witnesses</i>	1000-1015
kind of character	922-926	collateral matters	1000-1007
time of character	927-929	bias, corruption, skill, knowledge, memory	1005
place of character	930	<i>falsus in uno</i>	1008-1015
<i>insanity</i> , etc.	931-936	of an explanatory statement	1046
insanity	932	<i>self-contradiction</i>	1017-1046
intoxication	933	general principles	1017
disease, age, etc.	934	collateral matters	1020-1023
religious belief	935	bias, corruption, skill, knowledge	1022
race	936	preliminary warning necessary	1025-1039
<i>experience</i>	938	what is a self-contradiction	1040-1043
<i>bias, interest, and corruption</i> , modes of evidencing	943-969	opinion	1041
general principles	943	silence, omission to claim or speak	1042, 1043
cross-examination	944	explaining the contradiction	1044
demeanor as evidence	946	putting in the whole	1045, 2098
<i>bias</i> from circumstances and conduct	948-950	joining issue	1046
details of a quarrel	951, 952	showing the writing to the witness	1259-1263
preliminary inquiry to witness	953	distinguished from admissions	1051
opinion as to another's bias	1963	party's admissions; see ADMISSIONS .	
<i>corruption</i>	956-964	testimony before grand jury, not privileged	2363
willingness or offer to swear falsely	957, 958	<i>sundry modes</i>	
confession of false testimony	959	by annoying questions	781
attempt at subornation	960, 962	by repetition of questions	782
receipt of money	961	Implied admissions	1060
sundry corrupt conduct	963	self-contradictions	1042
preliminary inquiry to witness	964	Importation , other transactions as evidence of fraud in	341
<i>interest</i> , in civil cases	966	Impression , as distinguished from knowledge	658

INDEX OF TOPICS.

Impression (<i>continued</i>).	Section	Industry , facts of, judicially noticed	Section
as sufficient for a hand-writing-witness	698	Infamy , disqualifying a witness . .	519
as sufficient in point of memory . .	726	privileged from disclosure	984, 2216, 2255
as opinion testimony	1969	see also CONVICTION OF CRIME.	
Imprisonment , as excusing absence of an attesting witness . .	1315	Infant , disqualification as a witness	505
of a deponent	1407	admissions of	1053
see also CONVICTION OF CRIME.		dying declarations of	1445
Inadmissible evidence, as justifying other inadmissible evidence	15	presumption of incapacity for crime	2514
Incest , other offences, as evidence of intent or motive	360, 398	see also AGE; CHILD.	
who is accomplice in	2060	Inference , modes of	30, 476
eye-witness of marriage	2085, 2086	from failure to produce evidence	285-291
Incompetent evidence; see ADMISSIBILITY; IRRELEVANCY.		Infidel ; see RELIGIOUS BELIEF.	
employee; see EMPLOYEE.		Information , list of witnesses indorsed on	1850
physician; see PHYSICIAN.		received by a person; see KNOWLEDGE.	
persons in general; see SKILL; NEGLIGENCE.		Informers , privilege for communications by	2374
Inconsistency , as impeaching a witness; see SELF-CONTRADICTION.		Infringement ; see COPYRIGHT; PATENT.	
Indecency , of exhibition to jury . .	1159	Inheritance , proof of; see FAMILY HISTORY.	
as ground for exclusion	2180	Injury , repairs after, as evidence of negligence	283
Indecent Assault , plaintiff's character, as mitigating damages	75, 212	see also CORPORAL INJURY; ILLNESS; NEGLIGENCE; HIGHWAY; MACHINE; PREMISES.	
see also RAPE.		Ink , expert witness to nature of	570
Indecent Exposure , other offences, as evidence of intent . .	360	identification of document by . .	2024
Indemnity against self-crimination	2281	Innocence , consciousness of, as evidence	174, 293
Indians , as witnesses; see RACE.		presumption of	2511
Indictment , as disqualifying a co-indictee	580	applied to bigamy	2506
as impeaching a witness	949, 980, 982, 987	see also DEFENDANT.	
list of witnesses indorsed on	1850	Inquisition .	
privilege for grounds of	2364	of domain, by the homage	1670
for assent of grand jurors to	2364	of escheat, by the crown	1670
Indorsement , of witnesses on the indictment	1850	of title, by the sheriff	1670
of bill of exchange; see BILL OF EXCHANGE.		of pedigree, by the heralds	1670
Indorser , parol agreement collateral to instrument	2443	of lunacy, by commission	1671
see also BILL OF EXCHANGE.		of death, by the coroner	1671
Inducement to a confession; see CONFESSION.		of population, by the census . . .	1671
Inductive form of inference	30	in Europe, history of	2250
		Insanity .	
		see SANITY.	
		Insolvency , as evidence of non-payment	89, 224
		purchaser's knowledge of, evidenced by repute	523

INDEX OF TOPICS.

Insolvency (<i>continued</i>).	Section
as a motive for crime or fraud . . .	392
debtor's admissions . . .	1081, 1082, 1086
opinion testimony to . . .	1959
<i>prima facie</i> evidence of bank- er's knowledge of . . .	1354
as evidenced by reputation . . .	1621
see also FRAUDULENT TRANSFERS.	
Inspection , of memorandum used to aid recollection . . .	753, 762
of corporal injury, by jury or witness . . .	2194, 2220, 2265
of document of opponent, as making it evidence . . .	2125
at trial, not privileged . . .	2193, 2219, 2264
of chattels or premises, not privileged . . .	2194, 2221, 2264
trial by . . .	2555
of document, premises, chat- tels, as permissible; see REAL EVIDENCE.	
of documents, premises, chat- tels of opponent before trial; see DISCOVERY.	
Instruction to the jury, where a fact is in part inadmissible . . .	13
directing a verdict . . .	2495
Instrument ; see DOCUMENT.	
Insurance	
insured's declarations, to show knowledge of illness . . .	266
as evidence of motive for neg- ligence . . .	282, 392
as evidence of bias or interest . . .	949, 969
other fraudulent acts as evi- dence of intent . . .	340
proofs of loss in, as an admis- sion . . .	1073
as <i>res gestæ</i> . . .	1770
as coroner's official state- ment . . .	1671
admissions of insured against beneficiary . . .	1081
inspection of policy before trial . . .	1858
materiality of risk or represen- tations . . .	1946, 1947
privilege for communications to physician . . .	2389, 2390
application signed by mistake . . .	2415
burden of proof of conditions in policy of . . .	2537
policy in a single document . . .	2452

Insurance (<i>continued</i>).	Section
proof of arson beyond reason- able doubt . . .	2498
presumption of accident, from death . . .	2510
see also ARSON.	
Intemperance , as evidence of	
misconduct . . .	96, 203
as impeaching a witness . . .	934
proved by reputation . . .	1621
see also INTOXICATION; LIQUOR- SELLING; NEGLIGENCE.	
Intent , criminal, general theory	
of . . .	242, 302
other crimes, as evidence of . . .	309-367
forgery and counterfeiting . . .	309
false pretences . . .	320
possession of stolen goods . . .	324
embezzlement . . .	329
fraudulent transfers . . .	333
sundry frauds . . .	340
larceny and kidnapping . . .	346
robbery, burglary, and extor- tion . . .	351
arson . . .	354
rape, abortion, incest, etc. . . .	357
homicide and assault . . .	363
miscellaneous offences . . .	367
civil cases . . .	370
declarations, as hearsay evi- dence of; see MENTAL CON- DITION, DECLARATIONS OF.	
testifying to one's own intent . . .	581, 1965
testifying to another person's intent . . .	661, 1964
presumption of, in criminal cases . . .	2511
jury to determine, in libel . . .	2557
of party to a document; see PAROL EVIDENCE RULE.	
proof of, by parol evidence; see PAROL EVIDENCE RULE.	
information or notice, as evi- dence of; see KNOWLEDGE. see also MOTIVE.	
Intention , see DESIGN; INTENT; MOTIVE.	
Intercourse ; see BASTARDY; RAPE; SEDUCTION; INCEST.	
Interest	
as <i>disqualifying</i> a witness	
history . . .	575
general principle . . .	576
civil parties . . .	577
survivors . . .	578
accused . . .	579

INDEX OF TOPICS.

Interest (continued).		Section	Interpreter (continued).		Section
co-indictees		580	must be sworn		1810, 1824
testimony to one's own in-			form of oath for		1818
tent		581	Interrogation , mode of; see		
attesting witness of a will		582	QUESTION; EXAMINATION.		
<i>voir dire</i>		583	Interrogatory , mode of framing;		
mode of proving interest		584-587	see QUESTION.		
time of interest		583	to opponent before trial; see		
husband and wife; see MARI-			DISCOVERY.		
TAL RELATIONSHIP.			notice of deposition; see DEPO-		
husband or wife of co-defend-			SITION.		
ant		609	order of topics; see ORDER OF		
dying declarant		1445	EXAMINATION.		
<i>as impeaching a witness</i>			non-responsive answer to		785, 1392
one's own witness		901	sweeping interrogatory		1392
parties and others in civil			Intimidation of witness, as evi-		
cases		966	dence of guilt		278
accomplices and co-indictees		967	on cross-examination, forbid-		
accused		968	den		781
bonds, rewards, employ-			Intoxication , as evidence of an		
ment, etc.		969	act done		85
restoring credit by consist-			other instances, as evidencing		
ent statements		1128	a common drunkard		203
<i>as excusing absence of an attest-</i>			conduct, as evidence of		235
ing witness		1316	prior condition, as evidence		
of a deponent		1409	of		235
of a deceased declarant		1456	as disqualifying a witness		499
Interest, statements against			qualifications of witness testi-		
<i>party's admissions</i> ; see ADMIS-			fying to		571, 660
SIONS			confession made during		841
<i>hearsay exception</i> ; see AGAINST			of a witness, in impeachment		933, 993,
INTEREST.					1005
Interlocutory proceedings, rules			as shown by appearance		1154
in, distinguished		4	presumption of incapacity for		
International affairs, privileged			crime during		2514
against disclosure		2375	see also INTemperance; LIQUOR;		
not judicially noticed		2574	LIQUOR-SELLING; NEGLIGENCE.		
Interpretation			Invalidating one's own instru-		
<i>judge's function</i>		2556	ment, forbidden		529
<i>opinion rule</i>			Invention , privilege against dis-		
expert interpretation of tech-			closure of		2374
nical words		1955	see also PATENT; TRADE SECRET.		
location of deed-descriptions		1956	Irrelevancy of evidence, cured		
<i>by parol evidence</i> ; see PAROL			by offering other irrelevant		
EVIDENCE, RULE D.			evidence		15
Interpreter , qualifications of			distinguished from multifari-		
testimony to conversation			ousness		42
with		571, 668	not the subject of privilege		2210
proof of former testimony			Issue , facts not in, distinguished		
given through		751	from facts not admissible		2
necessity for		811	Issues , offering former testimony		
adequacy of cross-examination			on the same		1386
without		1393	of pedigree, to admit family		
admissions of, as agent		1077	hearsay		1503
sworn translation of deposi-			proving character in; see		
tion		1710	CHARACTER.		

INDEX OF TOPICS.

J.	Section	Judicial Admission (<i>continued</i>).	Section
Jail ; see CONVICTION OF CRIME ; IMPRISONMENT .		distinguished from other admissions	1057, 2588, 2589
Joint defendant, etc.; see CO-DEFENDANT, ETC.		of contents of a document	1257
Journal ; see BOOKS OF ACCOUNT ; LEGISLATIVE JOURNAL ; NEWSPAPER .		of execution of a document	2132, 2595
Judge to determine qualifications of witness	487, 497, 587	effect as conclusive upon the party making	2590
to determine admissibility of a confession	861	exclusive of evidence by the party benefiting	2591
questions to a witness by a judge	784	validity as a waiver of unconstitutionality or other illegality	2592
witness called by, may be impeached	910, 918	effect on subsequent trials	2593
decree in another cause, as reputation	1594	form and tenor of the admission; who is authorized	2594
testimony by a	1805, 1909	testimony of an absent witness, admitted to avoid a continuance	2596
privilege for	2372	Judicial Decision	
notes of testimony taken by	1666	report of, mode of proof	
evidence offered after charge given by	1879	by official printed copy	1684
power to determine privilege-claim	2271, 2322, 2376	by private printed copy	1703
admissibility of evidence	2550	judicially noticed	2579
negligence	2552	Judicial Discretion , scope of	16
reasonableness	2553	ruling upon objections	18
malicious prosecution	2554	admitting experiments, etc.	444
construction of documents	2556	determining a witness' qualifications	496, 507, 561, 660
criminal intent	2557	allowing leading questions	770, 776
foreign law	2558	admitting a confession	862
<i>nul tiel record</i>	2555	controlling the scope of cross-examination	944, 983
may seek evidence	2484, 2569	search for a lost document	1194
may not use private knowledge	2569	admitting testimony after the proper time	1867
may take judicial notice; see JUDICIAL NOTICE .		limiting the number of witnesses	1908
see also JUDICIAL DISCRETION ; MAGISTRATE .		relieving from stipulation	2593
Judgment of conviction of crime, as affecting a witness; see CONVICTION OF CRIME .		Judicial Notice	
offer to confess, as an admission	1061	general theory	2565
theory of conclusiveness	1347	anomalous meanings	2566
of conviction of crime, used against accessory	1389	mode of proceeding	2557-2569
sheriff's recital of contents	1664	specific facts noticed	
proving the whole	2110	domestic and foreign law	2572, 2573
see also JUDICIAL RECORD .		international affairs; seal of State	2574
Judicial Admission , as affecting inference from failure to produce evidence	291	official and judicial seals	2161-2169
		boundaries, capitals, counties, etc.	2575
		official authority and identity	2576
		elections, census, etc.	2577
		officers and rules of court	2578
		judicial proceedings	2579
		commerce, industry, history, science, etc.	2580

INDEX OF TOPICS.

Judicial Notice (<i>continued</i>).	Section
times, distances	2581
meaning of words	2582
Judicial Record , what consti- tutes	2450
original admissible instead of a copy	1186
custody presumes genuineness	2158
original need not be produced	1215, 1249
<i>nul tiel</i> record, perjury	1216, 2555
dockets	1217
copy of, preferred to recollec- tion	1267, 1268
certified copy	1273
copy of a copy	1274
sealed attestation of copy	2162
conclusive proof of the facts adjudged	1346, 1347, 2450
of contents of lost document re-established	1275, 1347, 1660, 1681
answer in chancery; see ANSWER.	
provable by certified copy	1681
by inspection	2555
whole must be proved	2110, 2116
Jurat , as evidence of oath taken	1676
see also CERTIFICATE OF OATH; PUBLIC DOCUMENT; NOTARY.	
Jurisdiction , conviction of crime in another; see CONVICTION OF CRIME.	
absence from, as presuming death	2531
document out of	1213
attesting witness out of	1312
subpoena to witness out of	2207
Jury , fraud in packing, evidence of intent	367
determination of witness' qual- ifications	497, 587, 1187
memorandum of recollection shown to	754, 763
determination of admissibility of confession	861
of dying declaration	1451
withdrawal during arguments of admissibility	861, 1808
improper sampling of liquor by verdict admitted as reputation, in another cause	1593
not to be impeached by juror	2348
notes of former testimony taken by	1669

Jury (<i>continued</i>).	Section
view by, evidence not to be received at	1802
defendant's presence at	1803
general rules for	1162-1168
evidence not to be offered to, after retirement	1880
after verdict	1881
documents taken to jury-room	1913
juror may be witness	1910
must be sworn	1800
showing specimens of writing to	2001, 2016
privilege for communications between	2346
sufficient evidence for	2494
right to determine law	2558, 2559
to construe documents	2556
to determine intent	2557
negligence	2552
reasonableness	2553
admissibility of evidence	861, 1451, 2550
right to use general knowledge	2570
see also BRIBERY; GRAND JURY; JUDGE.	

Justice of the Peace , docket of, original required	1215, 1217
certified copy allowed	1681
seal not presumed genuine	2164
examination of accused or wit- ness; see EXAMINATION.	
record conclusive	2450
office judicially noticed	2578
see also PUBLIC OFFICER; JUDGE.	

K.

Kidnapping , other offences as evidence of intent	349
King , testimony of, admitted without calling	1384, 1674
without being sworn	1825
privilege of	2368-2372
Knife ; see WEAPON.	
Knowledge, or Belief <i>Circumstances or Reputation as evidence of</i> of accused, as to deceased's aggression	245
of employer, as to employee's incompetence	249
of owner, as to animal's vice	251
of owner, as to defect of place or machine	252

INDEX OF TOPICS.

Knowledge, or Belief (<i>continued</i>).	Section
of purchaser, as to seller's insolvency	253
of possessor, as to stolen goods	254, 259
of creditor or debtor, as to partnership	255
of maker of representations, as to falsity	256
of liquor-seller, as to buyer's condition	257
of prosecutor or arrester, as to probable cause	258
of utterer, as to forged paper	259
of possessor, as to contents of sundry persons	260 261
information or reputation, as <i>res gestæ</i>	1789
<i>Conduct, as evidence of</i>	
of sundry facts known or believed	266, 267
of consciousness of guilt	273-291
of consciousness of innocence	293
<i>prima facie</i> evidence defined by statute	1354
<i>Declarations, as evidence of</i> ; see MENTAL CONDITION, DECLARATIONS OF	
<i>Other crimes, as evidence of</i>	
general theory	301
sundry crimes (forgery, embezzlement, etc.)	309-367
<i>Testimony to a third person's</i>	661
<i>Qualifications of a witness as to</i> ; see WITNESS, I. <i>Qualifications.</i>	
<i>Impeachment of a witness as to</i> ; see IMPEACHMENT.	

L.

Land , words during possession or entry, as <i>res gestæ</i>	1777, 1778
public divisions of, judicially noticed	2575
possession of, as evidenced in various ways; see POSSESSION.	
contracts or customs concerning; see CONTRACTS; CUSTOM.	
declarations or reputation about boundaries of; see BOUNDARIES.	

Land (<i>continued</i>).	Section
parties' admissions of title to; see ADMISSIONS.	
testimony to value of; see VALUE.	
see also PROPERTY; PREMISES.	
Land-grant of government; see DEED; LAND-OFFICE.	
Landlord , tenant disputing title of	1473
Landmark ; see BOUNDARIES.	
Land-office , producing original of documents in	1239
conclusiveness of rulings of	1347
records of, in general	1659
register of, to prove a deed's execution	1651
certificates of	1674, 1678
reports of title	1672
surveys of	1665
copy of whole required	2109
Language ; see INTERPRETER; INTERPRETATION.	
Lapse of Time , as presuming loss of document	1196
as presuming payment	2517
Larceny , possession of stolen goods as evidence of	152, 2513
possession of money, as evidence of	154
other crimes as evidence of intent	346
motive for	391, 392
evidence of identity of goods	413
owner's complaint after	1142
accused's explanations after	1143
notice to produce original document in	1205
proof of, without producing document stolen	1249
words accompanying the taking, as <i>res gestæ</i>	1777, 1781
testimony of owner to non-consent	2089
presumption from possession of goods	2513
Latent Ambiguity in a document	2472
Law , distinguished from fact	1, 2549
foreign statute proved without copy	1271
by expert	564, 690, 1953
<i>prima facie</i> evidence of, under statute	1354
proved by official printed copy	1684

INDEX OF TOPICS.

Law (<i>continued</i>).	Section	Legitimacy (<i>continued</i>).	Section
proved by private printed copy	1703	valid marriage presumed, to assist	25
by treatises	1697	presumption of	2527
presumption of	2491	see also BASTARDY ; ILLEGITIMACY ;	
judicially noticed	2572, 2573	MARRIAGE.	
judge or jury to determine	2549, 2558, 2559	Length of a witness' examination	783
Laws, conflict of; see CONFLICT OF LAWS.		of a hypothetical question	683
Lawsuit; see LITIGATION.		of a trial	1864
Leading Questions		Lessee, declarations of, made during possession	1778
allowable only in discretion	770, 776	see also LEASE.	
kinds of questions that are leading	771	Letter, delivery of, as evidenced by mailing	95
exceptions to the rule	776	third person's, as evidence of sanity	228
on cross-examination	773	receipt of, as qualifying a witness to handwriting	702
impeaching one's own witness	915	failure to reply to, as an admission	1073
Learned Treatises, used in evidence	1690-1700	of husband or wife, showing feelings	1730
Lease, course of business as evidencing terms of	94, 372, 377	putting in other letters in answer	2104, 2120
ancient, to show seisin	157	received by mail in reply, as genuine	2153
production required, in proving tenancy	1246	see also DOCUMENT.	
see also DEED ; POSSESSION.		Letter-press copies, as originals	1234
Ledger, as a book of regular entries	1548, 1558	Lex fori, rule of evidence in, applicable	5
Legatee, admissions of	1081	Liability, facts of civil liability as privileged	2223
Legislative Journal, whether original's production is required	1219	of criminal liability	2250
whether receivable to overthrow enrolment of statute	1350	Libel; see DEFAMATION.	
admissible to prove facts recorded	1662	License to sell liquor, as evidence of sale	238
provable by printed copy	1684	refusal to produce, as evidence of non-possession	291
judicially noticed	2577	to practise medicine, as qualifying a witness	569
Legislature, power of, to alter rules of evidence	7, 1353	to marry; see MARRIAGE.	
power to compel answer from witness	2195, 2252	Lie; see FALSEHOOD; PERJURY.	
privilege of member of	2375	Lien, privilege for documents held under	2211
see also STATUTE ; LEGISLATIVE JOURNAL ; CONSTITUTIONAL RULES.		Life, presumption of continuance of	2531
Legitimacy		of survivorship	2532
birth during marriage, as evidence of	164	Life Insurance; see INSURANCE.	
resemblance of child, as evidence of	166	Life Table, used in evidence	1698
as evidenced by parents' conduct	269	judicially noticed	2566
by parents' statements; see FAMILY HISTORY.		Light, distance or quality of, as shown by instances	460
by reputation	1605	Limitations; see STATUTE OF LIMITATIONS.	

INDEX OF TOPICS.

Line of survey; see BOUNDARIES ; SURVEY .	Section	Loss of a document; see ORIGINAL DOCUMENT .	Section
Liquor , effect of, as indicating nature	457	of a ship, as evidenced by lack of news	158, 2531
sample of, as indicating nature	439	Lost Grant , presumption of	2522
improperly used as sample by jurors	1159	not to excuse from proof of loss of specific deed	1196
selling to a minor; see AGE .		Lottery , other acts as evidence of intent	367
meaning of terms, judicially noticed	2582	Lunacy , inquisition of	1671
see also INTOXICATION ; LIQUOR-SELLING .		see also LUNATIC ; SANITY .	
Liquor-selling , possession of liquor, as evidence of	153	Lunatic , knowledge of purchaser from, as evidenced by repute	253
other sales as evidence of common selling	203	disqualification of opponent as witness	578
as evidenced by license or tax-payment	238	admissions of	1053
to minor or intemperate, evidence of knowledge of	257	capacity to take the oath	1822
other sales, as evidence of intent	367	to be a witness	492
other keeping, as evidence of continuous keeping	382	see also SANITY .	
burden of proof of license for privilege not to produce license for	2312		
for	2375	M.	
inference from refusal to produce	291	Machine , evidencing owner's knowledge of danger of	252
presumption from possession of liquor	2513	repairs of, as evidence of negligence	283
see also INTOXICATION ; LIQUOR .		condition at another time or place, as evidence	437
List , of witnesses before trial	1850	other instances of operation, as evidence of condition of	451
Litigation , fact of, as biasing a witness	949	similar injuries, as evidence of defect in	458
pleadings in other, as admissions	1065-1067	similar precautions, as evidence of safety of	461
kind of, in pedigree hearsay	1503	negligence presumed from accident at	2509
Loan , words accompanying, as <i>res gestæ</i>	1777	see also EMPLOYEE ; NEGLIGENCE .	
fact of, shown by possession of money	89, 224	Magistrate , confession made to	842-852
lack of money, as evidence of motive for	392	examination of accused or witness; see EXAMINATION .	
see also CONTRACT ; CREDITOR ; PAYMENT .		see also PUBLIC OFFICER .	
Locomotive ; see MACHINE ; SPARKS ; SPEED .		Magnifying-lens , used by witness or jury	795, 1152
Log , marks on, as evidence of ownership	150, 2152	Mail , course of, as evidence of an addressed letter's delivery	95
register of	1647	of a reply-letter's genuineness	2153, 2519
Log-book of ship, as a book of regular entries	1523	fraud in, other acts as evidencing intent	341
as an official register	1641	proof of loss of letters sent by	1201, 1203
Logical theory of relevancy	30	Maker , parol agreement collateral to instrument	2443
		see also BILL OF EXCHANGE ; NOTE .	

INDEX OF TOPICS.

Malice , as evidenced by an accused's threats	Section 105
as evidenced by other assaults, etc.	363
as evidenced by hostile expressions or conduct	396
as impeaching a witness; see BIAS .	
presumption of, in criminal cases	2511
see also MALICIOUS MISCHIEF ; MALICIOUS PROSECUTION ; INTENT ; MOTIVE .	
Malicious Mischief , evidence of intent in	367
Malicious Prosecution , character of plaintiff as mitigating damages	75, 209
evidence of prosecutor's belief	258
conduct as showing 'malice'	396
former testimony in	1416
testimony before grand jury, not privileged	2363
burden of proof in	2539
judge or jury to determine probable cause	2554
Malpractice , character of defendant in	67
other persons' conduct, as standard of care, etc.	461
party's skill proved by reputation	1621
by particular instances of its exercise	208
by opinion	1984
privilege for communications to physician	2385, 2389
see also NEGLIGENCE ; ABORTION ; HOMICIDE .	
Map , used to illustrate testimony	790
as an official survey	1665
as a declaration of boundary	1570
as reputation of boundary	1592
see also BOUNDARIES ; SURVEY .	
Marital Relationship	
I. <i>Disqualification of husband or wife as witness for the other</i>	
history and general principle	600-604
who is excluded	605
on whose behalf excluded	606-610
exceptions to the rule	612-617
statutory abolition	619, 620
impeachment of witness by	949
bastardizing the issue	2063

Marital Relationship (<i>continued</i>).	Section
II. <i>Privilege not to be witness against the other</i>	
history and policy	2227, 2228
paramour, bigamist, disputed marriage	2230, 2231
agent's admissions	2232
production of documents	2233
what testimony is prohibited	
husband or wife not a party	2234, 2235
co-indictee, co-defendant	2236
person deceased or divorced	2237
exceptions by necessity	2239
by statute	40
whose is the privilege	2241
waiver	2242
inference from claiming it	2243
statutory abolition	2245
III. <i>Privilege for communications</i>	
history and policy	2332, 2333
statutes	2334
scope of the privilege	2336-2338
third persons	2339
who may claim; waiver	2340
death and divorce	2341
see also HUSBAND ; WIFE ; MARRIAGE ; DIVORCE ; LEGITIMACY .	
Mark , illiterate's signature by; see ILLITERATE .	
on logs, as evidence	150
register of	1647
Market Reports , admissible in evidence	1704
Market Value ; see VALUE .	
Marksman ; see ILLITERATE .	
Marriage , breach of promise of; see BREACH OF PROMISE .	
birth during, as evidence of legitimacy	164
prior coverture, as evidence	382
certificate of, as evidence	268, 1645
habit and repute, as evidence	268, 2083
reputation, as evidence	1602, 2083
utterances of the parties as <i>res gestæ</i>	1770
proof of marriage in fact	2082
admissions	2086
register of, as evidence; see REGISTER OF MARRIAGE , BIRTH , AND DEATH .	
contracted in jest	2414
statement concerning, as hearsay; see FAMILY HISTORY .	
presumption of consent	2505
of capacity	2506

INDEX OF TOPICS.

Marriage (<i>continued</i>).	Section	Mental Condition (<i>continued</i>).	Section
presumption of legitimacy	2527	intent in domicil	1727
of coercion	2514	intent in bankruptcy	1728
of identity	2529	motive or reason	1729
husband or wife privileged by; see MARITAL RELATIONSHIP.		bias, malice, affection, etc.	1730
privileged communications in; see MARITAL RELATIONSHIP.		opinion and belief	1731
see also FOREIGN LAW; LEGITIMACY; HUSBAND; WIFE.		accused person's statements	1732
Married Woman ; see MARITAL RELATIONSHIP; WIFE; BAS- TARDY; MARRIAGE.		<i>Testator</i>	
Master ; see EMPLOYER; SCHOOLMASTER; CAPTAIN.		ante-testamentary state- ments of intent	1735
Materiality , distinguished from admissibility	2	post-testamentary state- ments of contents, etc.	1736
Mayhem , ascertained by inspec- tion	1152	intent to revoke	1737
Meaning ; see INTERPRETATION.		undue influence or fraud	1738
Means of action, as evidence of an act done	83	intelligence or sanity	1739, 1740
Measures , false, other acts evi- dencing intent	341	<i>Sundries</i>	1790
Medical Books , used in evi- dence	1690-1700	see also KNOWLEDGE; INTENT; MALICE; MOTIVE; SANITY.	
Medical Matters , witness' ex- perience or knowledge as qualifying him	568, 687	Microscope , used by witness or jury	795, 1152
see also PHYSICIAN; EXPERT WITNESS; OPINION RULE.		Midwife as a witness; see EX- PERT WITNESS; OPINION RULE.	
Medical Treatment ; see MAL- PRACTICE; PHYSICIAN; SKILL.		Military records , as evidence	1641
Memorandum to aid recollec- tion; see RECOLLECTION.		privilege against disclosure of secrets	2375
Memory , modes of refreshing or aiding; see RECOLLECTION.		Mill ; see MACHINE; SPARKS.	
discrediting a witness by his his lack of; see IMPEACH- MENT.		Mine ; see PREMISES.	
Mental Capacity		Minister Plenipotentiary ; see AMBASSADOR.	
see SANITY; WILL.		Minister of Religion ; see PRIEST.	
Mental Condition		Minor ; see CHILD; LIQUOR- SELLING; AGE.	
see SANITY; INTENT; MALICE; MOTIVE; KNOWLEDGE.		Minutes of clerk of court; see JUDICIAL RECORD.	
Mental Condition, Declara- tions of		Miscarriage ; see ABORTION; PERSONAL INJURY.	
exception to the Hearsay rule	1714	Misconduct of a juror	2354
<i>Pain and Suffering</i>		Mistake , proof of, by parol evi- dence; see PAROL EVI- DENCE RULE.	
to a physician or layman	1719	by circumstantial evidence; see INTENT.	
before litigation	1721	Mistress ; see PARAMOUR.	
past events	1722	Mob , violence by, other acts as evidencing intent	367, 1790
<i>Design, Intent, Motive, etc.</i>		Model , used to illustrate testi- mony	790
design or plan to act	1725	Money , possession of, as evi- dence of loan or pay- ment	89, 224
		as evidence of larceny	154
		lack of, as evidence of motive	392
		evidence of counterfeiting; see COUNTERFEITING.	

INDEX OF TOPICS.

Money (<i>continued</i>).	Section
testimony to genuineness of; see PAPER MONEY; HAND- WRITING.	
receipt of, as impeaching a wit- ness; see CORRUPTION.	
payment of, mode of proving; see PAYMENT.	
see also VALUE.	
Morphine , use of, as disqualify- ing a witness	499, 500
as impeaching a witness	934
Mortality Table , used in evi- dence	1698
judicially noticed	2566
Mortgage , other transactions as evidence of debtor's intent; see FRAUD, FRAUDULENT TRANSFERS, FALSE REPRESENTATIONS.	
agreement to hold deed as, shown by parol	2437
admissions of mortgagor or mortgagee	1082, 1779
production of original; see ORIGINAL DOCUMENT.	
see also DEED; SALE.	
Mother , statements of, to evi- dence pedigree; see FAM- ILY HISTORY.	
insanity of, as evidence	232
testimony to bastardy	2063
see also LEGITIMACY; BASTARDY.	
Motion , for a nonsuit or verdict . .	2495
to exclude all evidence	2495
to produce documents, on trial; see ORIGINAL DOCUMENT.	
before trial; see DISCOVERY.	
see also OBJECTION.	
Motive , in general, as evidence of an act	117-119
1. <i>Circumstances creating a motive</i>	
general principle	389
motive for murder	390
motive for other acts and crimes	391
pecuniary circumstances as a motive	392
legal liability as a motive	393
2. <i>Conduct exhibiting a motive in general</i>	394
3. <i>Prior and subsequent motive</i>	
hostility	396, 397
sexual passion	398-402

Motive (<i>continued</i>).	Section
malice in defamation	403-406
4. <i>Sundries</i>	
third person's motive, to evi- dence accused's innocence	141
testifying to another person's motive	661
to one's own motive	581
proof by opinion testimony	1962
by declarations; see MEN- TAL CONDITION, DECLA- RATIONS OF.	
by reputation or informa- tion; see KNOWLEDGE.	
Multiple admissibility	13
Municipal Corporation ; see CORPORATION; PUBLIC DOC- UMENT.	
ordinance or charter of, judi- cially noticed	2572
Murder ; see HOMICIDE.	
Mutual Mistake , under parol evidence rule	2417
clear proof of	2498

N.

Name , as evidence of identity . .	270, 413
use of false, as evidence of guilt	276
testimony to knowledge of	667
identity of, as raising pre- sumption	2529
Nationality , as evidenced by corporal traits	167
as disqualifying a witness	516
Naval register , as evidence	1641
Necessity , opinion testimony to . .	1960
Negative instances , as evidenc- ing cause or condition	448
observation, as showing that a thing did not occur	664
Negligence , character for, to evidence an act	65
character for, as in issue	80
habit of, as evidence	93, 97
particular acts, as evidence of character	199, 208
employee's acts and repute, as evidencing employer's knowledge	249, 250
other instances as evidence of habit of	376
other spark-emissions, as evi-	

INDEX OF TOPICS.

Negligence (<i>continued</i>).	Section	Notary (<i>continued</i>).	Section
dence of a defective locomotive	452	power to compel testimony	2195
other persons' conduct, as evidencing a standard	461	see also PUBLIC OFFICER .	
constitutionality of statute making liable without negligence	1354	Note, Promissory , forgery of; see FORGERY .	
making <i>prima facie</i> evidence of negligence	1354	payment of; see PAYMENT .	
proved by opinion evidence of conduct	1949	agent's authority to make; see AGENCY .	
of character	1984	impeaching one's own	529
presumption of	2507-2510	presumption of title from possession of	2516
judge or jury to determine	2552	of payment	2517, 2518
jury may use general knowledge to determine	2570	admissions of assignor, indorser, etc.	1084
see also REPAIRS .		production of original; see ORIGINAL DOCUMENT .	
Negotiable Instrument ; see BILL OF EXCHANGE ; NOTE ; PAYMENT .		indorsement on, as statement against interest	1460, 1466
Negro ; see RACE .		protest of, as evidence	1675
Newspaper , notice in, as evidencing knowledge	255	signed by mistake	2415
quotations of prices, as evidence of value	719, 1704	delivery in escrow, shown by parol	2409, 2420
affidavit of publication of notice in	1710	collateral agreement, shown by parol	2443-2445
communications to, not privileged	2286	Note or memorandum, of testimony; see FORMER TESTIMONY .	
see also PRINTED MATTER .		of a transaction, used to aid recollection; see RECOLLECTION .	
New trial , motion for, as confirming an exception	20	Notice (a state of mind); see KNOWLEDGE .	
error of ruling as ground for validity on, of former judicial admission	2593	Notice (a communication) to produce a document as permitting use of copy notice to opponent	1202
Night , evidence of power of vision at	460	when not necessary	1203
Noise ; see SOUND .		when sufficient	1204-1206
Non-access , as evidence of illegitimacy	137	exceptions to the rule	1207
parent's testimony to	2063	procedure of giving notice	1208
see also BASTARDY .		notice to third person	1212
Nonsuit , motion for a	2495	as compelling opponent's production of original	2219
Notary , using an entry to aid recollection; see RECOLLECTION .		as obtaining discovery before trial	1858
record of protest, producing the original of	1240	to fix liability for dishonor of bill, evidenced by mailing	95
whether conclusive	1352	to quit, as an admission of tenancy	1072
regular entries of transactions by; see REGULAR ENTRIES .		notice to produce a	1206
personal knowledge required	1635	to take deposition	1378
certificate of protest	1675	sundries publication of, proved by affidavit	1710
of deed-acknowledgment	1676	giving of, as <i>res gestæ</i>	1770, 1789
seal presumed genuine	2165	Novation , shown by parol	2441

INDEX OF TOPICS.

Nuisance , provable by other instances	Section 451
provable by reputation	1620
Nul Tiel Record , original required in	1216
tried by inspection	2555
Number of witnesses ; see WITNESSES , VII.	
Nuncupative Will , proved by two witnesses	2050
Nurse , as a witness; see EXPERT WITNESS ; OPINION RULE .	

O.

Oath

1. <i>At Common Law</i>	
history	1815
theory	1816
kind of belief	1817
form of oath	1818
time of administration and of objection	1819
capacity	
mode of ascertaining	1820
infants	1822
lunatics, idiots	1821
distinguished from testimonial capacity	1823
persons subjected to	
interpreters, peers, etc.	1824
whether a witness merely sworn is impeachable	1893
2. <i>Under Statutes</i>	
abolition or dispensation	1827
form, capacity, proof, etc.	1829
3. <i>Sundries</i>	
history of, in parties' disqualification	575
confession made on examination under	842
statement out of court under oath, excluded	1362, 1364
belief on, by witness to character	1985
Objection to evidence , time and form of	18
to witness' qualifications	486, 586
by party, claiming privilege for witness	2196, 2270
renewal of, at close of case	2496
Obligor impeaching his own obligation	529
admissions of co-obligor	1077
Obscenity of pictures , standard of	461

Obscenity (<i>continued</i>).	Section
proof of	793
Offence ; see CRIME .	
Offender , habitual; see HABITUAL CRIMINAL ; COMMON OFFENDER .	
Offer of evidence , form and tenor	17
improper statements of counsel in	1806
to compromise, as an admission	1061
Office	
production of original appointment to	1228
presumption of title to	2168, 2534
of duty performed in	2534
Office Copy ; see CERTIFIED COPY .	
Officer , public; see PUBLIC OFFICER .	
of a corporation, testifying on the faith of records	665
see also CORPORATION .	
Official ; see PUBLIC OFFICER .	
Official Gazette , as evidence of a law	1684
Official Record ; see PUBLIC RECORD .	
Omission , to speak or claim, as a self-contradiction	1042
as an admission	1072
of child by testator intentionally	2475
Opinion	
of value, as based on other sales	463
stating the grounds of, by an expert	561
knowledge, as distinguished from	658
as sufficient in point of memory	726
hypothetical question; see HYPOTHETICAL QUESTION .	
as evidence of handwriting; see HANDWRITING .	
impeachment by inconsistent statements of political views	1041
religious, privilege for	1732
political, privilege for	2214
judicial; see JUDICIAL DECISION .	2215
see also EXPERT TESTIMONY ; OPINION RULE .	
Opinion Rule	
distinguished from rule for expert qualifications	557

INDEX OF TOPICS.

Opinion Rule (<i>continued</i>).	Section	Opium, use of, as disqualifying	Section
history	1917	a witness	500
theory	1918-1922	as impeaching a witness	934, 1005
practical tests	1923-1927	Opponent , called as witness,	
hypothetical questions	672-684	whether he may be im-	
<i>rule applied to specific topics</i>		peached	916
insanity	1933-1938	destruction of a document by	1198, 1199, 1207
value and damages	1940-1944	deposition of, when absent	1416
insurance risk	1946-1947	taking but not using a wit-	
care, safety, prudence, duty,		ness' deposition	1389
skill, or propriety of human		see also ADMISSIONS; DEFEND-	
conduct or a place, machine,		ANT; PARTIES.	
or apparatus	1949-1951	Opportunity in general, as evi-	
law		dence of a crime or other	
foreign law	1953	act	181-184
trade usage	1954	Oral admission of a party; see	
technical words in docu-		ADMISSIONS.	
ments	1955	Order of topics of testimony;	
location of deed-descriptions	1956	see EXAMINATION, III.	
contents of a lost document	1957	Ordinance , judicial notice of	2572
testator's or grantor's ca-		certified copy of	1680
capacity	1958	printed copy of	1684
accused's capacity	1958	Original Document	
solvency	1959	history of the rule requiring	
possession, ownership, neces-		production	1177
sity, authority, etc.	1960	general principle	1179
state of mind		<i>scope of the rule, as to writings</i>	
intent, motive, purpose, in		uninscribed chattels	1181
general	1963	inscribed chattels	1182
another person's intention	1964	all kinds of writings	1183
one's own intention	1965, 1966	books of account or regular	
intent in dedication, voting,		entry	1532, 1558
etc.	1967	<i>production required</i>	
meaning of a conversation,		what is production	1185
etc.	1969	original always usable	1186
impression or understanding	1970-1971	proving execution also	1187, 1188
sundry topics		order of proof	1189
corporal appearances	1974	copy also offered	1190
medical and surgical matters	1975	<i>excuses for not producing</i>	
probability and possibility	1976	loss or destruction	1193-1198
capacity and tendency	1976	detention by opponent; no-	
cause and effect	1976	tice to produce	1199-1210
distance, time, speed, size	1977	possession by third person	1211-1213
weight, direction, form, iden-		irremovable documents	1214
tity	1977	judicial records (pleadings,	
miscellaneous topics	1978	wills, etc.)	1215-1217
character		other official documents	1218-1222
moral of a defendant	1981, 1983	books of banks, abstracts,	
of a witness	1982-1985	etc.	1223
care, competence, or skill	1984	of regular entry	1532, 1558
handwriting; see HANDWRITING.		recorded conveyances	1224-1227
rule enforced for dying declara-		appointments to office	1228
tions	1447	illegible documents	1229
for books of regular entry	1533	voluminous records, etc	1230
for declarations about bound-		absence of entries	1320
aries	1569		

INDEX OF TOPICS.

Original Document (<i>continued</i>).	Section
<i>what is the original</i>	
duplicates and counterparts . . .	1232
printed matter . . .	1234, 1237
copy acted on as original . . .	1235
telegraphic dispatches . . .	1236
wills, etc.	1238
land-grants, etc.	1239
tax-lists, ballots, etc. . . .	1240
records, accounts, etc. . . .	1241
memorandum to aid recollec- tion	749, 760
handwriting shown by pho- tograph	797
ledger and day book	1558
<i>not applicable where contents are not in issue</i>	
document read aloud, etc. . . .	1243
identity or effect of a docu- ment	1244
payment, receipts	1245
ownership, tenancy, sale, gift	1246, 1247
execution, delivery, publica- tion	1248
conversion, forgery, larceny, agency, etc.	1249
miscellaneous instances	1250
dying declarations	1449
pedigree statements	1497
<i>exceptions to the rule</i>	
collateral facts	1252-1254
opponent's admission of con- tents	1082, 1255-1256
deed-recitals, disclaimer of title	1257
witness' admission on <i>voir- dire</i>	1258
witness' admission on cross- examination	
self-contradictory docu- ment	1259
record of conviction	1270
foreign statute	1271
<i>rules for proof of copy</i>	
copy preferred to recollection . . .	1268
preferable kinds of recollec- tion	1272
preference for examined or sworn copy	1273
copy of a copy	1274
personal knowledge of cor- rectness	1278
loss proved by affidavit	1709
whole must be copied	2105

Original Document (<i>continued</i>).	Section
proof of lost will	2052
of lost ancient deed	2143
see also COPY; CERTIFIED COPY.	
Overruling an objection	18
Overt Act ; see HOMICIDE; TREASON.	
Owner of an animal, mode of evidencing knowledge	251
of a dangerous place or ma- chine, mode of evidencing knowledge	252
admissions by; see ADMIS- SIONS.	
complaint by, after robbery or larceny	1142
declarations of, about bound- aries; see BOUNDARIES.	
testimony in larceny required . . .	2089
Ownership by adverse posses- sion; see POSSESSION.	
as evidenced by prior ownership . . .	328
admissions of; see ADMIS- SIONS.	
production of deed, in proof of fact of	1246
opinion testimony to	1959
presumption of, from posses- sion	2515
continuity of	2530
possessor's declarations to confirm	1779
see also TITLE.	
Oyer and Proferet	
when excused	1192
as a means of inspection be- fore trial	1858, 1859

P.

Pain , expressions of	1718
Paper to aid recollection; see RECOLLECTION.	
see also DOCUMENT; NEWSPAPER.	
Paper Money , expert qualifica- tions of witness to	570, 705
Paramour , as furnishing a mo- tive; see MOTIVE.	
as qualified to testify	605, 2230
Pardon , promise of, as exclud- ing a confession	834
as restoring a witness' credit . . .	1116
a witness' competency	523
as removing privilege against self-crimination	2280

INDEX OF TOPICS.

Parentage ; see LEGITIMACY ; PATERNITY ; FAMILY HISTORY .					
Parish Register ; see REGISTER OF MARRIAGE, BIRTH, AND DEATH .					
Parol Evidence Rule					
<i>Introduction</i>					
not a rule of evidence	2400				
<i>lex fori</i> not applicable to	5				
rules defining the constitution of legal acts	2401				
A. <i>Creation of Legal Acts</i>					
general principle; intent and expression; subject, tenor, and delivery	2404				
history of the principle	2405				
1. <i>Subject, tenor, delivery, in general</i>					
transactions of jest, friendship, charity, and pretence	2406				
terms must be definite; document void for uncertainty	2407				
act must be final; delivery, as applied to deeds; conditions precedent; escrows	2408				
delivery as applied to negotiable instruments	2409				
delivery, as applied to contracts in general; conditions precedent and subsequent; assent of third persons; blanks; dates	2410				
publication as applied to wills	2411				
2. <i>Intent and mistake</i>					
intention and mistake in general; test of reasonable consequences	2413				
intent not to be bound at all	2414				
terms of an act; (a) signing a completed document; individual mistake, not known to or induced by the second party	2415				
individual mistake known to or induced by the second party	2416				
mutual mistake; general principle	2417				
mutual mistake as affecting <i>bona fide</i> holders for value	2418				
Parol Evidence Rule (continued).					
(b) signing a document having blanks or capable of alteration; writing one's name not as a signature	2419				
delivery of a document; escrow; deeds or negotiable instruments delivered to <i>bona fide</i> holders, contrary to intent of maker	2420				
unilateral acts; foregoing principles applied to wills and ballots	2421				
3. <i>Voidable acts</i>					
motive as making an act voidable; mistake, fraud, duress, infancy, and insanity	2423				
B. <i>Integration of Legal Acts (varying the terms of an instrument).</i>					
general theory of the rule against varying the terms of an instrument	2425				
history of the rule	2426				
1. <i>Unilateral Acts</i>					
official documents (surveys, appointments, assessments, etc.)	2427				
2. <i>Bilateral Acts</i>					
no integration at all; casual memoranda	2429				
partial integration; general test for applying the rules; "collateral agreements"	2430				
incorrect tests; fraud, in Pennsylvania	2431				
receipts and releases; bill of lading	2432				
recital of consideration in a deed	2433				
warranty in a sale; insurance warranties	2434				
agreements not to sue, or not to enforce, or to hold conditional only	2435				
agreements of counterclaim, set-off, renewal, or mode of payment	2436				
agreement to hold a deed absolute as conditional only; agreement to hold in trust	2437				
agreement to hold as agent or surety only	2438				
fraud	2394				

INDEX OF TOPICS.

Parol Evidence Rule (continued).	Section	Parol Evidence Rule (continued).	Section
trade usage and custom	2440	usage of trade or locality, when to apply	2464
novation, alteration, and waiver; subsequent agree- ments	2441	parties' mutual understand- ing; identifying a descrip- tion	2465
miscellaneous applications of the rule to admit or ex- clude "collateral" agree- ments	2442	individual party's meaning; deeds and contracts	2466
rule applied to negotiable instruments; general prin- ciple	2443	wills	2467
agreements affecting the ex- press terms of the docu- ment	2444	2. <i>Sources of Interpretation</i> general principle: all extrin- sic circumstances may be considered	2470
agreements affecting the im- plied terms	2445	exception for declarations of intention	2471
rule binding upon the par- ties to the document only	2446	exception for equivocation or latent ambiguity	2472
burden of proof; who must produce the document	2447	blanks and patent ambigu- ities	2473
3. <i>Writing Required by Law</i> at common law: judicial records	2450	exception for erroneous de- scription	2474
corporate acts and records; negotiable instruments	2451	exception for rebutting an equity (legacies and ad- vancements)	2475
under statutes; wills; bal- lots; insurance policies	2452	<i>falsa demonstratio non nocet</i> ; general principle	2476
conclusive certificates, dis- tinguished	2453	application to deeds and wills	2477
C. <i>Solemnization of Legal Acts</i> writing as a formality; stat- ute of frauds	2454	sundry rules; interpretation of statutes	2478
discharge and alteration of specialties, etc.	2455	Particular Instances, of conduct as evidencing human char- acter, etc.; see CHARACTER; STRENGTH; HEALTH; NEG- LIGENCE. of injury, work, speed, etc., as evidencing cause or condi- tion of a thing	447-461
other formalities than writ- ing; signature, seal, at- testation, registration, stamp	2456	Parties character of to prove an act in criminal cases	55-61
D. <i>Interpretation of Legal Acts</i> general nature of interpreta- tion; standard and sources of interpretation	2458	in civil cases	64-67
"Intention" and "Mean- ing," distinguished	2459	in issue	70-80
1. <i>Standard of Interpretation</i> general principle; four standards, — popular, lo- cal, mutual, individual	2461	to mitigate damages	70-76
rule against "disturbing a plain meaning," or, forbid- ding explanation except of ambiguities; history and general principle	2462	conduct of, to evidence char- acter	192-213
application of the rule to wills, deeds, etc.	2463	to evidence consciousness of weak case	277-291
		failure to testify or produce evidence	285-289
		common law disqualification as witnesses	577
		testifying to their own in- tent	581
		admissions by; see ADMIS- SIONS.	

INDEX OF TOPICS.

Parties (<i>continued</i>).	Section	Patent of Invention (<i>continued</i>)	Section
books of account of; see BOOKS OF ACCOUNT.		infringement of, privilege for trade secret	2212, 2374
agent or kinsman of, not to take deposition	803	Patent of Land ; see DEED; LAND-OFFICE.	
impeachment of their own wit- ness; see IMPEACHMENT.		Paternity , other intercourse as evidence of	133
whether impeachable, when tes- tifying for themselves	890	child's resemblance, as evi- dence of	166, 1154
when called by the opponent . .	916	see also BASTARDY; NON-ACCESS.	
exhibiting injuries to jury . . .	1158	Patient , physician's testimony to illness of	688
affidavit of, to lost document .	1196, 1225, 1709	expressions of pain by	1718
former testimony of same . . .	1388	privilege for communications to physician	2380
books of account kept by; see REGULAR ENTRIES.		Payee , parol agreement of, col- lateral to instrument	2443
exclusion from court during testimony	1841	see also BILL OF EXCHANGE; NOTE.	
disclosure of documents or tes- timony before trial; see DIS- COVERY.		Payment , possession of money, as evidence of	89, 224
testifying first on their own side	1869	possession of instrument, as evidence of	156
answer to interrogatories as evidence	2124	offer of, as an admission . . .	1061
claiming privilege for witness .	2196, 2270	production of receipt for . . .	1245, 1254
privileged not to testify . . .	2217	indorsements of, as statements against interest	1461, 1466
discovery; statutes	2218	books of account as evidence of	1539, 1549
production of documents . . .	2219	words accompanying, as <i>res</i> <i>gestæ</i>	1777
premises, chattels, bodily ex- posure	2220, 2221	agreement as to mode of, shown by parol	2436, 2444
parol evidence rule, restricted to	2446	presumption of	2517, 2518
understanding of, to affect a document; see PAROL EVI- DENCE RULE.		see also CONTRACT; MONEY.	
burden of proof upon; see BURDEN OF PROOF.		Pedigree , hearsay statements of; see FAMILY HISTORY.	
Partner , admissions of	1077	of an animal, proved by reputa- tion	1621
Partnership , knowledge of, as evidenced by repute	254	by registry	1706
books of, as evidence	1074	inquisition of, by the heralds .	1670
proof of, without producing instrument	1249, 1257	Peer , whether required to be sworn	1825
provable by reputation	1624	Penalty , privilege not to disclose .	2257
Passengers , behavior of, as evi- dence of danger	461	Penitent , privilege for commu- nications to priest	2394
Pastor ; see CLERGYMAN.		Perambulations as evidence of boundary	1563
Patent Ambiguity in a docu- ment	2472	Performance of official duty, presumed	2534
Patent of Invention , producing original of assignment	1226	of contract, burden of proof of .	2537
execution of assignment of, proved by record	1657	Perjury , other falsities, as evi- dencing intent in	342
inspection of machine before trial	1161, 1862	confession of, as disqualifying a witness	527
		as impeaching a witness . . .	959

INDEX OF TOPICS.

Perjury (<i>continued</i>).	Section	Plaintiff , character of, as evidence	Section 64-67
producing original of chancery answer in	1216	character of, as in issue or as mitigating damages	70-80
penalty for, as a requirement	1831	mode of evidencing character by conduct	192-213
two-witness rule	2040	see also PARTIES .	
testimony before grand jury, not privileged	2363	Plan , used to illustrate testimony	790
see also FALSEHOOD .		see also DESIGN ; SURVEY .	
Perpetuum memioriam ; see DEPOSITION .		Plat , used to illustrate a witness' testimony	790
Personal Injury ; see CORPORAL INJURY .		see also SURVEY .	
Pharmacist , privileged communications to	2382	Platform ; see PREMISES .	
Photograph , of a person, as used to identify him	660	Plea of truth as evidence of malice; see DEFAMATION .	
used by a witness to illustrate testimony	790-797	Pleading , distinguished from evidence	2
of handwriting	797, 2010	from judicial admission	2589
Physician , character of, as defendant in malpractice	67	as a party's admission	1064
conduct, as evidencing negligence or incompetence of	199, 200, 208	original in court records not produced	1215
mode of treatment by another, as a standard of care	461	statement in, to evidence pedigree	1495
qualified to be an expert witness	569, 687	see also JUDICIAL RECORD .	
hypothetical question to; see HYPOTHETICAL QUESTION .		Pledge ; see MORTGAGE .	
witness to value of services of patient's expressions of pain to	1718	Poison , evidence to show knowledge of	87
character for skill	1984	possession of, as indicating criminal design	238
amount of fee demandable as expert	2203	nature of, as shown by samples	439
privileged not to attend court	2206	symptoms, as indicating nature of	457
inspection of injured person by	2220	witness' experience as qualifying him	568
privilege for patient's communications to	2380	see also HOMICIDE .	
see also MALPRACTICE ; OPINION RULE ; POISON .		Poles , telegraph or telephone; see NEGLIGENCE ; HIGHWAY .	
Picture , of a person or place, to illustrate testimony	790	Police-officer obtaining a confession; see CONFESSION .	
Pier ; see PREMISES .		Policy of insurance ; see INSURANCE .	
Piracy ; see ROBBERY ; COPYRIGHT .		Poll-book ; see ELECTION .	
Pistol ; see WEAPON .		Population , as evidenced by census	1671
Place		judicially noticed	2577
value at another, as evidence of value	463	Possession of tools , as evidence of a crime	88, 238
character of a witness at another	929, 1615	of money, as evidence of loan or payment	89, 224
of birth, death, etc., as evidenced by family hearsay	1501	as evidence of larceny	154
judicially noticed	2575, 2581	as evidence of motive for crime, etc.	392
see also PREMISES .		of a document, as evidence of knowledge	260
		as an admission	1073

INDEX OF TOPICS.

Possession (<i>continued</i>).	Section	Power, physical, as evidence of	Section
of a document, by opponent, as excusing non-production	1199	an act	85
of receipts, etc., as evidence of payment	156	instances of physical, as evi- dence	220
of land, as evidenced by a lease or deed	157	Power of Attorney ; see AGENCY.	
under ancient document, as evidencing genuineness	2141	Power of Legislature , to make rules of evidence	7
of forged documents, as evi- dence of intent	309	Preamble of statute ; see RE- CITAL.	
of stolen goods, as evidence of larceny, etc.	152, 153	Pregnancy , events in, as evi- denced by birthmark	167
as evidence of intent	324	see also BASTARDY.	
accused's explanations	1143	Premises	
presumption from	2513	owner's knowledge of defect, evidenced by prior condition or injury	252
possessor's declarations of facts against interest	1458	repairs, as evidence of negli- gence	283
assessment-books as evidence of	1640	condition at another time or place, as evidence	437, 438
statements about boundary, by a possessor; see BOUNDARIES.		instances of condition or qual- ity, as evidence	451
reputation about	1587	marks on, as evidence of iden- tity	416
opinion testimony to	1960	similar injuries, as evidence of defect	458
by grantor, raising presump- tion of fraud in sale	2504	similar precautions, as evi- dence of safety	461
presumption of ownership from of payment from	2515 8251	photograph of, to illustrate tes- timony	790
of continuance of	382, 2530	inspection of, compellable at trial	1162, 2194, 2221
Adverse Possession		before trial	1162, 1862
ancient documents, as evi- dence of	157	presumption of defect, from accident	2509
knowledge of claim, as evi- denced by repute	255	Preparation , as evidence of crime	238
possession of part, as evi- dencing possession of whole	378	Preponderance of evidence	2498
oral admissions of title	1257	Prescription of title , by posses- sion; see POSSESSION.	
statements made during, as <i>res gestæ</i>	1778	of physician, as privileged	2383
as affecting presumption of ownership	1779	President , privilege of	2368-2372
Possibility of doing or happen- ing , as evidenced by instances .	446-461	Press Copies , as originals	1234
Posting in the mail ; see MAIL; POSTMARK.		Presumption ; see BURDEN OF PROOF.	
on a wall or fence, original not required	1214	conclusive; see CONCLUSIVE- NESS.	
Postmark , as evidence	151	Presumptive evidence , as mean- ing circumstantial evidence	25
presuming genuineness of	2152	Pretences, false ; see REPRESENTATIONS.	
Poverty , as evidence of non- payment	59	Price ; see SALES; VALUE.	
as evidence of motive for a crime or transaction	392	Price-current , as qualifying a witness to value	719
		as admissible in evidence	1704

INDEX OF TOPICS.

	Section
Priest , confession to	840
privilege for communications to	2394
see also MARRIAGE .	
Prima Facie Evidence , statutes making	7, 1354
sufficient to go to jury	2494
Primary Evidence ; see BEST EVIDENCE ; ORIGINAL DOCUMENT ; COPY .	
Principal , admissions of, against surety	1077
agent's admissions against	1078
undisclosed, shown by parol	2438
see also AGENT .	
Printed Copy of public document	
sundry documents	1684
reports of decisions	1684, 1703
statutes	1684
see also COPY .	
Printed Matter , as a duplicate	
original	1234, 1237
sample copies as evidence	440
proving genuineness of	
newspapers	2150
official statutes and reports	2151
see also BOOK ; MAIL ; NEWSPAPER .	
Prior and Subsequent ; see TIME .	
Prison , escape from, as evidence of guilt	276
Private statute, judicial notice of	2572
Privies in interest, admissions of; see ADMISSIONS .	
Privilege	
I. <i>From Attending</i>	
no privilege in general	2192
illness	2205
sex and occupation	2206
officers of government	2206, 2371
distance from place of trial	2207
subpœna	2199
expenses	2200
II. <i>From Testifying</i>	
no privilege in general	2192-2194
officers having compulsory power	2195
privilege personal to witness	2196
party may not object	2196
<i>privileged topics</i>	
irrelevant matters	2210
documents of title, etc.	2211
trade secrets	2212
customers' names	2212
official secrets	2375

	Section
Privilege (<i>continued</i>).	
theological opinions	2214
political votes	2215
disgracing facts	984, 985, 2216, 2255
bodily exposure	2216
party interested	2217
opponent compellable	2218
production of documents	2219
bodily exposure	2220
premises and chattels	2221
interested witness	2222
civil liability in general	2223
husband and wife; see MARITAL RELATIONSHIP .	
self-crimination; see SELF-CRIMINATION .	
<i>privileged communications</i>	
in general	2285
clerks, bankers, trustees, newspapers, etc.	2286
telegrams	2287
attorney and client; see ATTORNEY AND CLIENT .	
husband and wife; see MARITAL RELATIONSHIP .	
petit jurors	
communications	2346
impeaching a verdict	2348-2356
arbitrators	2358
grand jurors	
vote and opinion	2361
witness' testimony	2362
grounds for indictment	2364
number of votes	2364
official communications	2368-2376
government and informer	2374
physician and patient	2380-2391
priest and penitent	2394-2396
offer of compromise	1061
III. <i>Sundry Rules</i>	
as permitting proof by copy, for privileged document	1212
as excusing production of attesting witness	1317
as allowing use of deposition	1407
claim of, on cross-examination, as excluding the direct testimony	1391
Probable cause for prosecution or arrest, evidence of belief of	258
in malicious prosecution, burden of proof of	2539
judge or jury to determine	2554

INDEX OF TOPICS.

Probate ; see WILL ; JUDICIAL RECORD ; CERTIFIED COPY ; ATTESTING WITNESS .	Section	Prostitution , enticement for, character of complainant as evidence	Section 62
Proceedings , presumption of regularity of	2534	house of; see HOUSE OF ILL-FAME .	
Process ; see COMPULSORY PROCESS ; JUDICIAL RECORDS .		other offences as evidence of intent to entice for	349, 360
Production of evidence in general, failure to make, as showing a weak case . . .	285-291	Protest ; see NOTARY .	
of document or chattel		Prudence , opinion as to	1949
which party is bound to produce . .	2447	Public Corporation ; see CORPORATION .	
by opponent at trial	2219	Public Document	
by witness	2193	1. <i>Admissible to prove the facts stated therein</i>	
subpoena <i>duces tecum</i>	2200	general principle	1631
privilege against self-crimination	2264	whether conclusive, or preferred to other testimony . .	1335, 2427, 2453
of attorney and client	2307, 2318	official duty of maker	1632
of government officials	2373	deputies, <i>de facto</i> officers, etc. .	1633
before trial, on discovery	1858, 1859	publicity of document	1634
proof by copy; see ORIGINAL DOCUMENT .		officer's personal knowledge . .	1635
Profert , required in proving a document	1177, 1858	constitutionality of using as evidence	1398
see also PRODUCTION OF DOCUMENTS .		<i>registers and records</i>	
Profits , amount of receipt of; see CONTRACTS ; SALES ; VALUE .		sundry kinds	1639
Promise as excluding a confession; see CONFESSION .		assessment and electoral registers	1640
Proof , distinguished from admissibility	12	military and naval registers . .	1641
distinguished from relevancy . .	29	registers of marriage, birth, death	1642-1646
Proofs of loss , in insurance, as an admission	1073	certificates of marriage	1645
privilege waived by sending physician's certificate	2390	registers of title (ships, stock-brands, timber-marks) . . .	1647
Property , conveyance of, as evidence of a weak case	282	registers of conveyances	
sales of other, as evidence of value	462	deeds and mortgages	1648-1656
qualifications of a witness to value	567, 711	assignments of invention-patent	1657
presumption of ownership from possession of	2515	wills	1658
see also POSSESSION ; CUSTOM ; CONTRACT ; PREMISES ; OWNERSHIP .		government land-grants	1659
Prosecution , may show accused's bad character in rebuttal only	57, 58	judicial records	1660
malicious; see MALICIOUS PROSECUTION .		corporation records	1661
failure to institute, as evidence . .	284	legislative records	1662
may impeach eye-witnesses called by it	918	executive proclamations	1662
list of witnesses of, before trial . .	1850	<i>returns and reports</i>	
		sundry kinds	1664
		sheriff's returns and recitals . .	1664
		surveyor's returns	1665
		former testimony reported	
		judges' notes	1666
		magistrates' reports	1667
		bills of exceptions	1668
		stenographers' notes, etc. . . .	1669
		<i>inquisitions and reports</i>	
		domain, escheat, and title . . .	1670
		pedigree in heralds' books . . .	1670

INDEX OF TOPICS.

Public Document (<i>continued</i>).	Section	Publication (<i>continued</i>).	Section
lunacy	1671	of libel or slander; see DEFA-	
coroner's inquest of death	1671	MATION .	
census of population	1671	proving the fact of, without	
miscellaneous kinds	1672	producing document	1249
<i>certificates</i>		affidavit of	1710
miscellaneous kinds	1674	of testimony in newspaper, for-	
notary's protest	1675	bidden	1836
deed-acknowledgments; oaths	1676	see also PRINTED MATTER ; NOTICE ;	
certified copies	1677-1683	BOOK .	
printed copies	1684	Publicity of trial, as a security	
2. <i>Proving Contents and Execu-</i>		for truth	1834
<i>tion of Public Documents</i>		exceptions to the rule	1835
whether removable for use in		Publisher ; see PUBLICATION ;	
evidence	1186, 2182,	PRINTED MATTER ; COPY-	
	2183	RIGHT .	
production of original not re-		Pupil ; see SCHOOLMASTER .	
quired	1218-1222	Purchaser ; see GRANTEE ;	
provable by examined or		CREDITOR ; SALES .	
sworn copy	1273	Putting in the Case ; see Ex-	
by certified or office copy	1677-1683	AMINATION , III.	
certified copy preferred to			
others	1273		
by printed copy	1684		
any copy preferred to recol-			
lection	1267, 1268		
see also COPY ; CERTIFIED COPY .			
whether the whole must be			
proved			
lost or destroyed record	2107		
record accessible	2108		
sundry public records	2109		
judicial record	2110		
genuineness, how proved			
by seal	2161-2169		
by official custody	2158, 2159		
by certificate of attestation	1677, 2162		
privileged as State secrets	2368-2372		
see also CERTIFICATE ; EXECUTION ;			
JUDICIAL RECORD ; RECORDED			
CONVEYANCE ; NOTARY ; PAROL			
EVIDENCE RULE .			
Public Interest , matters of; see			
REPUTATION .			
Public Officer , impeaching his			
own certificate	529		
having power to compel testi-			
mony	2195		
privileged from testifying	2368-2372		
regularity of proceedings pre-			
sumed	2534		
judicially noticed	2577		
see also JUDICIAL RECORD ; PUBLIC			
DOCUMENT .			
Publication , in newspaper, as			
evidencing knowledge	255		

Q.

Qualifications of a witness; see	
WITNESS , I, <i>Qualifications</i> .	
Quality of a chattel, place,	
weapon, etc., as evidenced	
by its effects, etc.	437-461
as evidenced by sales or rentals	462
Quarrels ; see MOTIVE ; IN-	
TENT ; BIAS .	
Question to a Witness , in hypo-	
thetical form	672-684
in leading form	769-779
allowable only in discretion	770, 776
kinds of leading questions	771
exceptions to the rule	776
put to one's own witness	915
in misleading form	780
with intimidating or annoy-	
ing manner	781
repetition of	782
multiple examiners	783
by the judge	784, 2484
topics of, for impeachment or	
other purposes; see DIRECT	
EXAMINATION ; CROSS-EX-	
AMINATION .	
witness' prior knowledge of	788
continuous narration by wit-	
ness without	785
stating the purpose of	1871
as a foundation for impeach-	
ment	

INDEX OF TOPICS.

Question to a Witness (<i>cont'd</i>).	Section
by expressions of bias or corruption	953, 964
by self-contradiction	1025
by a writing	1259
by admissions of a party	1051
impeaching a witness sworn but not questioned	1893

B.

Race, evidenced by corporal	
traits	167, 1154
disqualifying a witness	516
impeaching a witness	936
evidenced	
by reputation	1605
by family hearsay	1502
corroboration required for	
Chinese	2066

see also ALIENS.

Railroad; see NEGLIGENCE;
EMPLOYEE; PREMISES; HIGH-
WAY; SPARKS; MACHINE;
CARRIER; RATES.

Rape, character of complainant	
as evidence	62
of plaintiff in indecent assault	75
other persons' intercourse as evidence of paternity	133
acts of unchastity, to show complainant's consent	199
other intercourse, as evidencing defendant's intent or motive	357, 398
infant or imbecile witness in	498, 508
conduct of complainant, to impeach credibility	987
restoring credit of complainant	1106
complainant's outcry or information, received	1134
details of complaint, admissible	1760
who is accomplice in	2060
uncorroborated complainant in marital privilege in	2061
	2239

Rates of charge by railroad, conclusiveness of official schedule . . . 1354

Ratification ; see AGENCY.

Rationality of the rules of evidence	9
---	----------

Re-Cross-Examination; see CROSS-EXAMINATION; EXAMINATION, III.

Re-Direct Examination; see Section
EXAMINATION, III; DIRECT
EXAMINATION.

Reading a prepared paper, by witness	787
a deposition to deponent before signing	805
skill of a witness in, impeachment of	991

Real Evidence (or Autoptic Proference)

defined	24
general principle and instances	1150–1152

color, resemblance, appearance,
etc., to show age, paternity,
etc. 1154

exhibition of body as privileged 1155

weapons, clothes, etc., in criminal cases 1157

corporal injuries, in civil cases . . . 1158
indecent exhibition 1159

experiments, insanity, etc. . . . 1160
physical inconvenience of pro-

duction	1161
view by jury	1162-1167

jury's view as evidence 1168
whether an inscribed chattel

must be produced 1182
of premises, chattels, etc., dis-

covery before trial	1862
not privileged	2220, 2221.

Reason for an act, hearsay state-

ment of	1729
Reasonable Doubt , proof beyond .	2497

Reasonableness
other persons' conduct, as evi-

dence of 461
information received, as evi-

dence of	1789
judge or jury to determine . . .	2553

see also KNOWLEDGE; NEGLIGENCE.
Rebuttal, of irrelevant evidence,

by other irrelevant evidence . . .	15
accused's bad character in . . .	58

scope of testimony in . . . 1869, 1873
Recall of a witness by opponent,

whether it prevents impeachment 911-913

to ask as to a self-contradiction. . 1036
see also EXAMINATION.

Receipt, of land-office receiver,
original required 1239

production of original, in prov-	
ing payment	1245

INDEX OF TOPICS.

Receipt (<i>continued</i>).	Section	Recollection (<i>continued</i>).	Section
admissible as statement against interest	1456	self-contradiction by failure of preference of copy of a document, to recollection of contents; see COPY .	1037, 1043
varied by parol	2432	failure of recollection of attesting witness	1302, 1315
presumption of payment	2518	refreshing recollection by report of prior testimony	1328
Receiver of stolen goods, knowledge as evidenced by repute	254	by seeing specimens of writings	2007
as evidenced by other possession	324	books of account used as memoranda of	1560
Recital in a deed, of another deed's contents	1257	Record , of stock-brand, as evidence	150
in a statute, whether conclusive whether admissible	1352	of business used by witness not having personal knowledge	666
in a sheriff's deed, whether conclusive	1354	of a predecessor, as qualifying a witness to handwriting	704
whether admissible	1664	of recollection of a witness; see RECOLLECTION .	
in an ancient deed, of boundary or lost deed	1573	of conviction of crime, to impeach a witness; see CONVICTION OF CRIME .	
of pedigree	1573	judicial; see JUDICIAL RECORD .	
in a will, as evidence of pedigree; see FAMILY HISTORY .		official, in general; see PUBLIC DOCUMENT .	
of consideration, varied by parol	2433	of conveyance; see RECORDED CONVEYANCE .	
Recollection		voluminous, proved by summary	1230, 1244
general principles	725-730	absence of an entry in, how proved	1230, 1244, 1678, 1957, 1978
"impression," "belief," etc.	727-729	Recorded Conveyance	
examining to grounds of recollection	730	record-book admissible, instead of copy of it	1186, 1655, 2373
<i>record of past recollection</i>	734-754	conveyance on file in public office	1219
history and general principles	734-739	production of original deed not required	1224-1227
must be written	744	preference for certified copy	1273
contemporaneous	745	copy of a copy	1274
accuracy sworn to	746, 747	mode of proving copy	1277
witness not the writer	748	production of attesting witness excused	1290, 1318
original	749, 750	record admissible to prove contents and execution deeds, etc., lawfully recorded	1648-1651
transactions by several persons (book-keeper and salesman, etc.)	751, 752	record in another jurisdiction	1652
showing to opponent	753	unauthorized record	1653
handing to jury	754	proof of other matters recorded	1654
<i>present recollection refreshed</i>	758-764	certified and sworn copies	1655
general principle	758		
witness not the writer	759		
original	760		
contemporaneous	761		
depositions used	761		
showing to opponent	762		
handing to jury	763		
use by cross-examiner	764		
<i>sundry rules</i>			
refreshing the memory of one's own witness by his prior self-contradiction	905		
cross-examination to test	995		
contradicting by showing failure of	1005, 1022		

INDEX OF TOPICS.

Recorded Conveyance (<i>cont'd</i>).	Section	Regular Entries	Section
whole of record must be copied	2109	exception to the Hearsay rule	1517
kinds of certified copies admissible	1677-1683	history and statutes	1518, 1519
certificate of acknowledgment, as evidence	1676	as an aid to recollection; see RECOLLECTION.	
assignment of invention-patent	1657	I. <i>Regular Entries in general</i>	1521-1533
will	1658	death, absence, etc., of entrant	1521
government land-grant	1659	kind of business	1523
copy of ancient deed recorded	2143	duty to superior	1524
presumption of delivery, notice, seal, etc.	2520	regularity	1525
Referee as witness	1912	contemporaneity	1526
Refreshment of Memory; see RECOLLECTION.		no motive to misrepresent	1527
Refusal, to submit to a test, as evidence of guilt	275	oral reports	1528
to escape, as evidence of innocence	276, 293	personal knowledge	1530
to produce witness or document, as evidence of a weak case	285-291	salesman and bookkeeper acting jointly	1530
Register, official, in general; see PUBLIC DOCUMENT.		form of entry	1531
Register of Deeds; see RECORDED CONVEYANCE.		impeaching credit	1531
Register of Land-Office; see LAND-OFFICE.		production of original	1532
Register of Marriage, Birth, or Death		II. <i>Parties' Account-Books</i>	
production of original required	1219, 1223	no clerk	1538
preferred as proof of birth	1335	cash payments	1539, 1549
admissible as a deceased person's regular entry	1523	goods delivered to third person	1540
as an official record	1642, 1646	special contracts	1541
certified copy of, by custodian	1682, 1683	kind of business	1542, 1547
sworn copy of, by custodian	1710	of book	1548, 1558
not required in bigamy	2088	of item	1543, 1549
copy of whole required	2109	contemporaneity	1550
presumed genuine, from official custody	2159	regularity	1547
identity shown by name	2529	honest appearance	1551
kept in a family, as evidence; see FAMILY HISTORY.		reputation for correctness	1552
Register of Ship, whether conclusive	1352	suppletory oath; cross-examination	1554
whether admissible	1641, 1647	use by or against surviving party	1554
Registration of Title or Deed, proved by copy	1239	personal knowledge	1555
whether conclusive	1352	party and salesman jointly acting	1555
whether admissible	1647	form of entry	1556
as a required formality	2456	impeaching the book	1557
as presuming delivery of deed	2520	using the entries as admissions	1557
no notice of prior deed	2520	production of original; ledger and day-book	1558
see also RECORDED CONVEYANCE.		effect of statutes	1560
		books of deceased clerk	1561
		Regularity of official proceedings presumed	2534
		Regulations, of department, judicial notice of	2572
		Relationship, hearsay statements, as evidence of; see FAMILY HISTORY.	
		Release, varied by parol	2432
		see also DOCUMENT.	
		Relevancy, distinguished from admissibility	12

INDEX OF TOPICS.

Relevancy (<i>continued</i>).	Section	Reputation (<i>continued</i>).	Section
general considerations affecting the rules of	27, 28	ancestry, legitimacy, birth, death, etc.	1605
distinguished from weight or proof	29	4. <i>Moral Character of Party or Witness</i>	
logical theory of	30-36	reputation distinguished from character	52, 920
of facts admitted conditionally on further evidence	14, 40, 1871	see also CHARACTER.	
no privilege for irrelevant matters	2210	as mitigating damages in defamation	209
Religious Belief , as disqualifying a witness	516, 518	of deceased in homicide, to evidence accused's belief	246
as influencing a confession	840	of employee, to evidence employer's knowledge	249
as impeaching a witness	935	of lunatic, insolvent, or partner, to evidence purchaser's knowledge	253-255
as requisite for an oath	1817	of arrested person, as evidencing probable cause	258
disclosure of, privileged	2214	qualifications of a witness to	691, 692
Renewal , agreement for, shown by parol	2436, 2445	witness to, cross-examined as to rumors	988, 1111
Repairs , of a machine or place, to evidence negligence	283	<i>prima facie</i> evidence of crime, under statute	1354
Repetition , of questions to a witness	782	constitutionality of using, as evidence	1398
of defamatory utterances; see DEFAMATION.		of honesty, required for a party's account-book	1552
Reply to letter by mail, as genuine	2152	place and extent of reputation	1608-1616
to telegram	2153	time of reputation	1617-1619
see also LETTER.		kind of character reputed (chastity, sanity, temperance, etc.)	1620, 1621
Report , of an official	1664-1672	witness' or party's character; see also CHARACTER.	
of a judicial decision		5. <i>Sundry Facts provable by Reputation</i>	
by officially printed copy	1684	solvency, wealth	1623
by private printed copy	1703	partnership	1624
of testimony, kinds of; see FORMER TESTIMONY.		incorporation	1625
prohibition of publication of	1836	miscellaneous facts	1626
of a clerk or bookkeeper; see REGULAR ENTRIES.		party's knowledge of a fact reputed	1789
see also PUBLIC DOCUMENT.		see also KNOWLEDGE.	
Representations , knowledge of falsity of, as evidenced by repute	256	Res Gestæ , other crimes admitted when a part of	218
as evidenced by other false representations	320	complaint in rape, as part of	1134, 1760
Reputation		in robbery or larceny	1142, 1762
1. <i>Land-boundaries and Land-customs</i>		declarations about private boundary	1563, 1571
matter must be ancient	1582	statements of mental or physical condition	1715-1740
kind of reputation	1583-1591	of the circumstances of an injury or affray	1745-1756
form of reputation	1592-1595	of intent or motive	1714-1740
2. <i>Events of General History</i>			
ancient matters of general interest	1597-1599		
3. <i>Marriage and other Facts of Family History</i>			
marriage	1602-1604		

INDEX OF TOPICS.

Res Gestæ (<i>continued</i>).	Section	S.	Section
charge made in travail by bas-		Safety of machine, premises,	
tard's mother	1764	etc., as evidenced by other	
statements about boundary	1764	instances	451, 461
declarations by an accused	1732, 1765	opinion as to	1949
exclamations in a mob or riot	1790	Sales , course of business in, as	
sundry applications	1757, 1796	evidence of a transaction	94, 372,
utterances a part of the issue or			377, 379
verbal acts; see HEARSAY			
RULE , III.		of liquor; see LIQUOR-SELL-	
general theory of doctrine	1745, 1768,	ING.	
	1796	of other property, as evidence	
history of phrase	1795	of value	463
Res ipsa loquitur	24, 2509	as qualifying a witness to	
Resemblance of child, as evi-		value	714
dence of paternity	166, 1154	as evidence of intent; see	
see also IDENTITY .		FRAUD ; FALSE REPRESENTATIONS ; FRAUDU-	
Residence , evidenced by prior		LENT TRANSFERS .	
residence	382	price, etc., as evidence of a	
presumed to continue	2530	motive	392
see also DOMICIL .		decrease of, as evidence of	
Resistance , as evidence of guilt	276	nuisance, etc.	462
Return		production of instrument, in	
of sheriff	1664, 1670	proof of fact of	1247
of surveyor	1665	buyer's utterances, used	
of sundry officers	1672	against seller's creditor	1779
Revocation , testator's utter-		intent of debtor in	1967
ances as evidence	1734, 1782	presumption of fraud applica-	
Reward , as impeaching a wit-		ble to	2504
ness	969	books of account, as evidence	
as excluding a confession	835	of; see REGULAR ENTRIES .	
Riot , other acts, as evidencing		warranty in, shown by parol	2434
intent	367	statute of frauds applied to	2454
see also MOB .		see also GRANTOR .	
Road ; see HIGHWAY .		Salesman , using entry to aid	
Robbery , possession of goods or		recollection; see RECOLLEC-	
money, as evidence of	153, 154,	TION ; REGULAR ENTRIES .	
	2513	Sample , as evidence of an entire	
other crimes, as evidencing in-		lot	439
tent	351	Sanity (or Insanity), conduct as	
motive for	392	evidence of	228-235
owner's complaint after, as <i>res</i>		hereditary, as evidence of	232
<i>gestæ</i>	1142, 1762	capacity of insane person to	
proof of identity in; see IDENTITY .		testify	492-497
Roentgen-ray photograph	795	witness' experience in or	
Roman Catholic as a witness;		knowledge of	568, 688
see RELIGIOUS BELIEF .		witness' insanity, in impeach-	
Rules of Court , judicially no-		ment	932
ticed	2578	inspection of insane person by	
Ruling upon objections	19	tribunal	1160
error of, as ground for new trial	21	insanity excusing absence of	
Rumors , on cross-examination of		an attesting witness	1316
a witness to reputation	988, 1111	of a deponent	1408
distinguished from reputation,		of a declarant of facts	
to prove character	1611	against interest	1456

INDEX OF TOPICS.

Sanity (<i>continued</i>).	Section
of a maker of regular entries	1521, 1561
insanity disqualifying dying declarant	1445
provable by reputation	1621
by inquisition of lunacy	1671
by declarations of testator	1738-1740
by opinion testimony	1933-1938
by inspection	2220
burden of proof of	2500, 2501
presumed to continue	2530
hypothetical question as to; see HYPOTHETICAL QUESTION .	
see also LUNATIC .	
Schoolmaster , evidence of standard of discipline of	461
Science , men of, as witnesses; see EXPERT WITNESS .	
instruments and tabulated data of, used by a witness	665, 795
books of, physician's testimony based on	688
used in evidence	1690-1700
judicially noticed	2566
Scintilla of evidence	2494
Scrip , of land grant; see DEED .	
Seal , official, as authenticating a document	
general principle	2161, 2162
seal of State	2163
of court or clerk	2164
of notary	2165
of sundry officers	2166
official signatures	2167
title to office	2168
attested copy under seal	1679, 1680, 1681
corporate seals	2169
history of, as making documents indisputable	2426
form of	2456
judicial notice of foreign	2566
Search , evidence obtained by	
illegal	2183
for lost document	1194
for attesting witness	1313
Seaworthiness , presumption of . .	2533
Secret of trade, as privileged . .	2212, 2374
of State	2375
of friendship	2285
see also PRIVILEGE .	
Security , agreement to hold deed as, shown by parol	2437
Sedition , other acts as evidencing intent	367
other persons' utterances, as a standard of loyalty	461

Sedition (<i>continued</i>).	Section
putting in the whole of an utterance	2097, 2115, 2119
see also DEFAMATION ; TREASON .	
Seduction , character of the woman as in issue or mitigating damages	75, 76, 77, 79
intercourse of third person, as evidence of paternity	133
acts of unchastity, as defeating prosecution or mitigating damages	205, 210
other intercourse, as evidencing intent or motive	360, 398
who is accomplice in	2060
uncorroborated complainant . . .	2061
marital privilege in	2239
proof beyond a reasonable doubt	2498
Self-contradiction , as impeaching a witness	
one's own witness	902-906
general theory	1017
collateral facts excluded	1020
material facts	1021
bias, knowledge, skill, etc. . . .	1022
preliminary question to witness	1025-1039
what is a self-contradiction . .	1040-1043
opinion	1041
silence, omission to claim or speak	1042
explaining away the inconsistency	1044
joining issue on the explanation	1046
putting in the whole	1045
distinguished from a party's admissions or confessions . .	821, 1051
Self-Crimination , privilege against	
history	2250
policy	2251
application to grand jury, legislature, etc.	2252
constitutional sanction	2252
distinguished from confession-rule	823, 850, 2266
kinds of facts protected	
civil liability	2254
infamy	2255
forfeiture	2256
penalty	2257
foreign crime	2258

INDEX OF TOPICS.

Self-Crimination (<i>continued</i>).	Section	Services Rendered (<i>continued</i>).	Section
third person's crime	2259	price of other, as evidence of	
facts tending to criminate	2260	value	463
facts furnishing a clue	2261	qualifications of a witness to	
form of disclosure protected		value	567, 711
testimony	2263	Servitude , as disqualifying a	
documents and chattels	2264	witness	516
bodily exposure	2265	Set-off , agreement for, shown by	
confessions	823, 850, 2266	parol	2436, 2445
opponent's proof of docu-		Settlement , offer of, as an ad-	
ment by copy	1207, 1209	mission	1061
mode and effect of making		Sewer ; see HIGHWAY.	
claim		Sex , as disqualifying a witness	517
cross-examination to char-		Sheriff , debtor's admissions used	
acter	2268	against	1077
judge's warning	2269	deed of, conclusiveness	1354
claim by party or counsel	2270	return of process	
judge determines claim	2271	conclusiveness	1347
inferences from claim	2272, 2273	admissibility	1664, 1670
waiver of privilege		as witness	1912
by contract	2275	Ship ; see VESSEL.	
by voluntary testimony	2276-2278	Ship , log-book of; see LOG-BOOK.	
criminality removed		Shipping-Register ; see REGIS-	
by acquittal or lapse of time	2279	TER.	
by pardon	2280	Shooting , as a crime; see HOM-	
by statutory amnesty	2281	ICIDE.	
testimony not to be used	2282	Shopbooks , parties'; see REG-	
Self-Defence , burden of proof of	2512	ULAR ENTRIES.	
see also HOMICIDE.		Shorthand ; see STENOGRAPHER.	
Sentence , increase of, by prior		Showers at a view by a jury	1167, 1802
convictions	196	Sidewalk ; see HIGHWAY.	
of conviction of crime, as		Sign , dying declaration by mak-	
affecting a witness; see CON-		ing	1445
VICTION OF CRIME.		testimony by making; see	
Separate Estate , wife as wit-		DEAF MUTE.	
ness to	614	Signature	
presumption of gift to or from	2526	modes of evidencing genuine-	
Separation of Witnesses		ness; see HANDWRITING.	
history, statutes	1837	forgery of; see FORGERY.	
probative effect	1838	of deponent to deposition	805
demandable as of right	1839	of attesting witness or maker	
mode of procedure	1840	of document	1320, 1511, 1513
persons to be included	1841	proof of, not always necessary	2134
disqualification for disobedi-		as a formality required	2456
ence	1842	by illiterate's mark; see ILLIT-	
party testifying first on his		ERATE.	
own side	1869	of official, as presuming genu-	
Servant ; see EMPLOYEE; SER-		ineness	2164, 2167
VICES.		time of	2520
Service of writ , proof of, with-		Silence , as an inconsistency im-	
out production	1249	peaching a witness	1041
Services Rendered , value as		as an admission by a party	1071, 1072
evidence of price agreed	392	as impeaching complainant in	
capacity or quality, as shown		rape	1134
by effects	460	in robbery	1142

INDEX OF TOPICS.

Similar Instances , of human conduct; see NEGLIGENCE; CHARACTER.			
of effects of a machine, weapon, place, etc., to evidence cause, condition, or quality	441-461		
Similar Statements by a witness; see WITNESS, III.			
Skill , as evidence of an act done	83, 87		
instances of, as evidence	199, 221, 461		
of a witness; see EXPERT WITNESS.			
opinion as to another person's	1949		
Slander ; see DEFAMATION.			
Slave , as a witness	516		
ancestry of, as evidenced by color	167		
see also RACE.			
Smoke ; see NUISANCE.			
Snow , as a highway defect; see HIGHWAY.			
as a kind of weather; see WEATHER.			
Sodomy , other offences, as evidencing intent	360		
Solvency , as evidence of payment	89		
false statements as to; see FALSE REPRESENTATIONS.			
as evidenced by prior condition	382		
by reputation	1623		
by opinion	1959		
see also DEBTOR; BANKRUPT; INSOLVENCY; PAYMENT.			
Sound , distance or quality of, as shown by instances	460		
Sovereign ; see KING; EXECUTIVE.			
Space ; see DISTANCE.			
Sparks from a locomotive, as evidence of negligence or cause	452		
presumption of negligence from	2509		
Specialty , discharged by parol	2426, 2455		
Specimen of handwriting; see HANDWRITING.			
Speed , expert qualifications of witness to	571		
opinion testimony to	1977		
Spoliation of evidence in general, as indicating guilt	278		
of documents, as evidence of contents	291		
Spoliation (<i>continued</i>).			
of execution	2132		
as creating a presumption	2524		
Spouse ; see MARITAL RELATIONSHIP; HUSBAND; WIFE.			
Spy , as impeached by his interest	969		
whether corroboration is needed . . .	2060		
Stains ; see BLOOD.			
Stamp , law requiring, whether <i>lex fori</i> is applicable	5, 6		
exclusion of documents lacking . . .	2184		
required formality of	2456		
Standard of handwriting; see HANDWRITING.			
State , statute of, when applicable	6		
seal of, presumed genuine	2163		
secrets of, privileged	2213, 2375		
judicial notice of foreign	2566		
conducting a prosecution; see PROSECUTION; DEFENDANT.			
see also FOREIGN LAW.			
State of Mind ; see BELIEF; INTENT; MOTIVE; KNOWLEDGE; MENTAL CONDITION.			
Statute , Federal or State, applicable in Federal trials	6		
mode of proof			
by official printed copy	1684		
by private printed copy	1703		
by expert, without copy	1271		
copy of whole required	2109		
enrolment, conclusiveness of	1350		
interpretation of	2478		
judicial notice of	2572		
constitutionality of; see CONSTITUTIONAL RULES.			
recital in; see RECITAL.			
see also LAW; FOREIGN LAW.			
Statutes , cited in this book			
on witness' qualifications	488, 524, 576, 577, 579, 602, 619		
on view by jury	1163		
on a witness' examination in writing	1326		
on attesting witnesses	1290, 1310, 1320		
on dying declarations	1430		
on statements of facts against interest	1455		
on statements of pedigree	1480		
on regular entries	1519		
on oaths	1828		

INDEX OF TOPICS.

Statutes (continued).		Section
on separation of witnesses		1837
on marital privilege	2240, 2245,	2334
on privilege against self-crimination	2252, 2281	
on privilege for communications to attorney	2292	
to physician	2380	
to priest	2395	
specific statutes; see the TABLE OF STATUTES CITED, <i>ante</i> , p. 3633.		
Statute of Frauds , whether <i>lex fori</i> is applicable	5	
provisions requiring numbers of witnesses	2049, 2050	
general policy of	2091	
requiring formality of writing	2454	
Statute of Limitations , other defamatory utterances barred by	403-406	
indorsement of payment, as removing the bar	1460, 1466	
annuls privilege against self-crimination	2279	
burden of proof of	2538	
see also TIME.		
Stenographer , notes of testimony taken by	1669	
see also RECOLLECTION.		
Stipulation ; see JUDICIAL ADMISSION.		
Stock ; see ANIMALS; BUSINESS; CORPORATION; VALUE.		
Stockholder , books of corporation used against	1074	
admissions of	1076	
Stolen Goods , possession of, as evidence of larceny, etc.	152, 153	
knowledge of receiver or possessor of, as evidenced by repute	254	
as evidenced by possession of other goods	324	
accused's explanation of possession	1143, 1777, 1781	
presumption from possession of	2513	
see also LARCENY.		
Street , defective; see HIGHWAY.		
Strength , as evidence of an act done	84, 225	
instances of conduct, to prove	220	
Strength (continued).		Section
of deceased, to evidence self-defence	246	
expert qualifications of witness to	571	
Strychnia ; see POISON.		
Subornation , as evidence of guilt	278	
other crimes as evidencing intent in	343	
as impeaching a witness	960-962	
Subpœna , history of	2190	
officers having power to issue	2195	
general practice	2199	
<i>duces tecum</i>	2200	
necessary for proving third person's detention of document	1212	
cross-examination of witness under	1894	
expenses	2201	
Subscribing Witness ; see ATTESTING WITNESS.		
Sue , agreement not to, shown by parol	2406, 2435, 2444	
Suffering , expressions of	1718	
Sufficiency of highway, cattle-guard, machine, etc., as shown by effects	461	
of a search; see SEARCH.		
of evidence, judge to determine	2551	
Suggestion to a witness, by leading questions	769-779	
by other improper modes	786-788	
Suicide , deceased's intention of, as evidencing innocence of an accused	143	
motive for	391, 394	
presumption of insanity from	2500	
presumed instead of accident	2510	
from taking morphine	2540	
Summary of voluminous records or accounts	1230, 1244	
Superstitious tests of guilt	9	
Suppletory Oath for books of account	1554	
Supporting a witness' credit; see WITNESS, III.		
Suppression of evidence, as indicating guilt	278	
Surety , principal's admissions used against	1077	
using principal debtor's statement against	1474	

INDEX OF TOPICS.

Surety (<i>continued</i>).	Section
parol agreement to hold only as	2438, 2443
Surgeon ; see PHYSICIAN .	
Surrebuttal , scope of testimony in	1874
Surrender to arrest, as evidence of innocence	293
Survey , as evidence of adverse possession of a whole tract	378
as illustrating testimony	791
not to be impeached	1346
whether conclusive	2427
as containing declaration or reputation of boundary; see BOUNDARIES .	
as an official document	1665
judicially noticed	2575
Surveyor , records of a predeces- sor, as qualifying a witness to handwriting	704
official, not required in proving boundaries	794
testimony not required	1339
opinion testimony to bound- ary; see BOUNDARIES .	
declarations about boundaries; see BOUNDARIES .	
official return of	1665
as regular entry; see REGU- LAR ENTRIES .	
Survivor disqualified as a wit- ness	578
use of account-books by or against	1554
testimony must be corrobo- rated	2065
Survivorship , presumption of	2532
Sustaining an objection	18
a witness' credit; see WITNESS , III.	
Swearing ; see OATH .	
Switch ; see PREMISES .	
Sworn Copy ; see COPY .	
System , of evidence, analyzed	3
of conduct, as evidencing a crime	304
 T.	
Table of weights, etc., used in evidence	1698, 1704, 1706
of mortality, used in evidence	1698, 2566
of interest, used in evidence	1672

Tally-book of voters; see ELEC- TION .	Section
Tax , payment of, as evidence of liquor-selling	238
fraud in, other acts as evi- dencing intent	341
books of assessment or collec- tion of; see ASSESSOR'S Books .	
privilege against disclosure of	2374
Tax-Collector , conclusiveness of deed of	1254
admissibility of recitals of	1664
Tax-List , production of original	1240
Teacher ; see SCHOOLMASTER .	
Telegram , delivery of, as evi- denced by dispatch of origi- nal	95
production of original	1223, 1236
received in reply, as genuine	2154
not privileged	2287
Telephone , testimony to conver- sations by	669
authenticating a conversation by	2155
Tenancy , production of lease, in proof of	1246
disputing landlord's title	1472
declarations made during pos- session	1778, 1779
Tendency , of a machine, weapon, place, etc., as evi- denced by its effects, etc.	437-461
Tender of witness' expenses	2201
Test , see EXPERIMENT .	
Testator , conduct as evidence of sanity	229
belief, as evidence of will's execution	271
statements of execution, con- tents, revocation, undue in- fluence, etc.	1734-1740
opinion testimony to legal ca- pacity of	1958
intent or mistake of; see PAROL EVIDENCE RULE, D.	
burden of proof of insanity	2500
of undue influence	2502
presumption of advancement by	2526
see also WILL ; SANITY .	
Testimonial evidence, defined	25
relative value of	26
general theory of	475
rules for admissibility of; see WITNESS .	

INDEX OF TOPICS.

Testimonio ; see DEED .		Time (<i>continued</i>).	
Testimony ; see WITNESS ; EVIDENCE ; EXPERT WITNESS ; FORMER TESTIMONY ; EXAMINATION ; QUESTIONS .	Section	of other spark-emissions	Section 456
Theological belief ; see RELIGIOUS BELIEF .		of values	463
Thing ; see CHATTEL ; PREMISES ; HIGHWAY ; ANIMALS ; WEAPON ; MACHINE .		of qualifications of witness	483, 493, 583
Think ; see BELIEF .		of objection to a witness' qualification	486, 586
Third person , crime of, as evidencing accused's innocence	139	of seeing specimens of handwriting	697, 707
character of, as evidence of his act	68	of memorandum in aid of recollection	745, 761
threats of	140	length of, for a witness' examination	783
letter of, as evidencing testator's sanity	228	of character of a witness	928
flight of, as evidence of guilt	276	of condition of an object	1154
fraud of, as evidence of a weak case	280	as presuming loss of document	1196
admissions of ; see ADMISSIONS .		of notice to produce an original	1208
Threatening Letters ; see EXTORTION .		of plural depositions	1379
Threats of an accused, as evidence of doing the act	105	of birth, death, etc., proved by family hearsay	1501
of a deceased, as evidence of self-defence	110, 247	of certifying a copy	1677
as excluding a confession ; see CONFESSION .		of recording a deed	1649
of a third person, as evidencing innocence of the accused	140	of hearsay expressions of pain	1718
Timber , marks on, as evidence of ownership	150, 2152	of <i>res gestæ</i> utterances	1750, 1776
register of, as evidence	1647	identified by a person's utterances	1791
Time of possession of money, as evidence of payment	89	opinion evidence to	1977
of threats of an accused	108	of putting in testimony	1867-1900
of intercourse in bastardy	133	of execution of ancient document	2137
of possession of stolen goods	152	of execution of deed, proved by parol	2410
of health, strength, etc.	225	lapse of, presuming payment	2517
of sanity	233	of execution of document	2520
of intoxication	235	of alteration of document, presumed	2525
of defect in highway	252	of death, not presumed	2531
of possession, coverture, debt, etc.	382	of survival, not presumed	2532
of intercourse in sexual offences	398	what is a reasonable, judge or jury to determine	2553
of other defamatory utterances	403-406	judicially noticed	2581
of utterances, as evidencing identity	416	Title , by adverse possession ; see POSSESSION .	
of other injuries or effects, as evidencing cause	437-461	documents of ; see DOCUMENT ; RECORDED CONVEYANCE ; DEED .	
of other weather-conditions	438	registration of ; see REGISTRATION OF TITLE .	
of work done, or things seen or heard, as shown by other instances	460	in ejectment, affidavit denying common source of	1385
		disclaimer of, as a fact against interest	1458
		proved by reputation	1587
		assessment-books as evidence of	1641
		official register of	1647

INDEX OF TOPICS.

Title (<i>continued</i>).	Section	Trial (<i>continued</i>).	Section
inquisition of, by the sheriff . . .	1670	new trial, motion for, to confirm an exception . . .	20
abstract of; see ABSTRACT .		material error of ruling, as ground for . . .	21
deeds of, privilege for . . .	2211	demeanor during, as evidence of guilt . . .	274
presumption of, from possession . . .	2515	publicity of, as a security for truth . . .	1834
from lost grant . . .	2522	exclusion of spectators . . .	1835
to office, presumption of . . .	2535	prohibition of printed reports . . .	1836
admissions of; see ADMISSIONS ; see also OWNERSHIP .		separation of witnesses during . . .	1837
Tombstone , as evidence of pedigree; see FAMILY HISTORY .		by inspection . . .	2555
Tools , possession of, as evidence of a crime . . .	88, 238, 318	see also INSPECTION ; WITNESS ; PLEADING .	
see also MACHINE .		Trover , notice to produce document converted . . .	1205
Traces as evidence of criminal's identity . . .	148, 149	proof of conversion, without producing original . . .	1249
Tracks ; see FOOTPRINTS ; PREMISES .		Trust , agreement to hold property in, shown by parol . . .	2437
Trade , secret of, as privileged . . .	2212, 2374	Trust-Combination , proved by repute . . .	1626
see also CUSTOM ; USAGE .		Trustee , admissions of . . .	1076
Trade Journal ; see NEWSPAPER .		communications to, not privileged . . .	2286
Transcript of stenographic notes of testimony; see FORMER TESTIMONY .		Truth of defamatory words; see DEFAMATION .	
Transfers , in fraud of creditors, mode of evidencing intent . . .	333	Turntable ; see PREMISES .	
admissions of debtor or creditor . . .	1082	Typewriting , manifold copies by, as originals . . .	1234
Translation , required for alien's testimony . . .	811	proving genuineness of . . .	2149
see also INTERPRETER .			
Travail , complaint in, by bastard's mother . . .	1141		
Traveller ; see HIGHWAY .			
Treason , other acts of, as evidencing intent . . .	367		
confession of, as dispensing with two witnesses . . .	818		
accused's expressions of loyalty . . .	1732		
list of witnesses before trial . . .	1850		
two witnesses to overt act . . .	2036		
Treatise , scientific, used in evidence . . .	1690-1700		
Treaty , judicial notice of . . .	2573		
proof by copy; see PUBLIC DOCUMENT .			
Tree , family, as evidence of pedigree; see FAMILY HISTORY .			
Trespass , by battery, evidence of intent in . . .	364		
to property, evidence of intent in . . .	367		
evidence of malice in . . .	397		
Trial , at common law in Federal court, rules for . . .	6		

INDEX OF TOPICS.

	Section		Section
Unskilfulness ; see SKILL ; NEGLIGENCE .		Venerable disease , as evidence of adultery	168
Usage , among conveyancers, proved by repute	1625	Veracity , character for; see CHARACTER .	
as proved by opinion	1954	Verbal Act ; see HEARSAY RULE , III.	
by one witness	2053	Verdict , in another cause, as reputation	1593
varying the terms of an agreement	2440	not to be impeached by jurors	2348
interpreting a document	2462, 2464	direction of a	2495
see also CUSTOM ; HABIT .		see also JUDICIAL RECORD .	
Use of machinery, premises, etc., as evidence of safety, etc.	461	Vessel , loss of, as evidenced by lack of news	158, 2531
Usury , impeaching an instrument for	529	safety of, custom of other owners, as evidence	461
shown by parol evidence	2414	presumption of unseaworthiness of	2533
terms of a contract of; see CONTRACT .		log-book of; see LOG-BOOK .	
Utterance of other forged documents; see FORGERY .		Viciousness , of an animal, evidence of owner's knowledge of	251
of libel or slander; see DEFAMATION .		see also ANIMAL .	
as identifying a time or place	416	View by Jury , general principle	1162
see also HEARSAY RULE , III.		allowable on any issue	1163
		trial Court's discretion	1164
		by part of jury	1165
		unauthorized view	1166
		showers	1167
		view as evidence	1168
		evidence not to be taken at defendant's presence at	1802 1803
		Violence of deceased; see HOMICIDE	248
		Voice , as identified by utterance	222
		as identifying a person	660
		by opinion testimony	1977
		Void , parol evidence to show a transaction	2406, 2423
		Voir Dire , for ascertaining a witness' qualifications	485, 497, 508, 560, 583
		admissions of a document's contents on	1258
		right of cross-examination on examining into religious belief on	1384, 2550 1820
		Vote , refusing to receive, evidence of intent in	367
		fraudulently casting, evidence of intent in	367
		declarations concerning, by a voter	1712
		disclosure of, privileged elector	2215
		juror	2346, 2361
		member of Legislature	2375
		see also BALLOT .	

INDEX OF TOPICS.

W.		
	Section	
Wager of law, in the history of		
rules of evidence	575	
Wagon; see VEHICLE.		
Waiver of inadmissibility, by		
offering other inadmissible		
evidence	15	
of objection	18	
of right of confronting accusers	1398, 1415,	
	2592	
of privilege, not to testify		
against husband or wife	2242, 2340	
against self-crimination	2275	
of attorney and client	2327	
of physician and patient	2388	
of motion to direct verdict	2496	
of proof; see JUDICIAL AD-		
MISSION.		
of right to absent witness'		
testimony	2595	
Warrant of land-entry, original		
required	1239	
see also JUDICIAL RECORD;		
LAND OFFICE.		
Warranty, distinguished from		
an admission	1056	
shown by parol	2434	
Water, other instances of effect		
of, as evidence	451	
Wealth, provable by reputation		
by assessors' books	1623	
	1640	
Weapon, deceased's carrying of		
a, as evidencing self-defence . . .	246	
as evidence of identity	413	
other instances of its effects, as		
evidence	451	
exhibition to the jury	1157	
Weather, as shown by condi-		
tions at other times or places . . .	438	
record of conditions of	1523, 1639	
Weight, of evidence, distin-		
guished from relevancy	12, 29	
of circumstantial evidence	26	
of confessions	861, 866	
of testimony wilfully false	1008	
no rules of law for	2034	
Weights, fraudulent, other acts		
evidencing intent	341	
Whisky, judicially noticed	2582	
Whole of an Utterance, put in		
evidence		
general principle	2094	
I. <i>Compulsory Completeness</i>		
precise words required		
conversations, etc.	2097	
Whole of an Utterance (cont'd).		
former testimony	2098	
all parts required		
conversations, etc.	2099	
confessions	2100	
whole of a writing required		
depositions, etc.	2103	
separate writings	2104	
lost deed or contract	2105	
abstract of title	2106	
lost will	2106	
public records	2107-2109	
judicial records	2110	
bill and answer in chancery . . .	2111	
II. <i>Optional Completeness</i>		
remainder may be put in	2113	
conversations, admissions,		
confessions, etc.	2115	
sundry writings	2116	
charge and charge state-		
ments	2117	
account-books	2118	
separate utterances	2119	
letters of a correspondence . . .	2120	
answer in chancery made		
evidence	2121-2124	
opponent's inspection mak-		
ing the whole admissible	2125	
self-contradiction	1045, 2098	
dying declaration	1448	
Widow, as a witness; see MARI-		
TAL RELATIONSHIP.		
Wife, notice to, as evidencing		
husband's knowledge	261	
testimony of, as disqualified or		
privileged; see MARITAL		
RELATIONSHIP.		
communications by or to, as		
privileged; see MARITAL		
RELATIONSHIP.		
admissions of, against hus-		
band	1078, 1086,	
	2232	
acknowledgment of execution		
of deed, conclusive	1347	
statements of, to evidence ped-		
igree; see FAMILY HISTORY.		
expressions of feelings towards		
husband	1730	
presumption of gift by or to . . .	2526	
of accomplice, to corroborate		
him	2059	
presumption of coercion by		
husband	2514	
see also CRIMINAL CONVERSATION;		
HUSBAND; MARRIAGE.		

INDEX OF TOPICS.

Will, attestation of, whether <i>lex fori</i> is applicable to	Section	Witness	Section
Will, forgery of, character of third person as evidence	68	I. Qualifications and Disqualifications.	
skill in drafting, as evidence of authorship	87	general theory	475
testamentary plans, as evidence of execution or contents	112	time	483
execution of, as evidenced by testator's belief	271	burden of proof	484
spoliation of, as evidence of contents	291	mode of proof	485
production of original; see ORIGINAL DOCUMENT.		time of objection	486
kinds of copy admissible; see COPY; CERTIFIED COPY.		judge determines	487
calling the attesting witness; see ATTESTING WITNESS.		statutory enactments	488
undue influence evidenced by other instances	338	Federal rules	6
using testimony given at preliminary probate	1417	<i>insanity</i> , etc.	492-501
record of probate, to prove execution	1658	deaf-mutes	498
certified copy of	1681	intoxication	499
testator's statements of contents, execution, revocation, undue influence, etc.	1734-1740, 1782	disease, etc.	500
recital in, as evidence of pedigree; see FAMILY HISTORY.		blindness	
interpretation of; see PAROL EVIDENCE RULE, D.		<i>infancy</i>	505-509
proof of, by two witnesses		<i>alienage</i> , race, color	516
personalty	2048	<i>sex</i>	517
realty	2049	<i>religion</i>	518
nuncupative wills	2050	theological belief; see OATH.	
holographic wills	2051	<i>infamy</i> (conviction of crime)	
revocations, alterations, etc.	2051	as a disqualification	519-524
contents of lost will	2052, 2106	kind of crime	520
testimonial evidence required	2090	judgment of crime	521, 522
made in a single document	2452	pardon, reversal, etc.	523
proof of, by age of document	2137-2146	statutory changes	524
publication of	2411	<i>turpitude self-confessed</i> , as a disqualification	525-531
reading over to testator	2421	accomplice	526
intent or mistake of testator; see PAROL EVIDENCE RULE, D.		perjurer	527
lost will, clear proof of	2498	attesting-witness	528
burden of proof of	2500, 2502	repudiating one's own instrument	530
presumption of revocation of	2523	<i>experience</i> as a qualification (expert capacity)	555-571
see also TESTATOR; DOCUMENT; EXECUTION; SANITY.		general principles	555-562
Wires; see NEGLIGENCE; PREMISES; HIGHWAY; MACHINE.		foreign law	564-566
		value	567
		medical and chemical topics	568, 569
		sanity	568, 569
		handwriting and paper money	570
		sundry topics of expert testimony	571
		opinion in general; see OPINION.	
		<i>interest</i> as a disqualification	575-587
		history	575
		interest in general	576
		civil parties	577
		survivor against deceased, lunatic, etc.	578
		accused	579
		co-indictees and co-defendants	580
		testimony to one's own intent	581

INDEX OF TOPICS.

Witness (continued).	Section
attesting-witness of a will . . .	582
time of interest; voir dire . . .	583
burden of proof	584
mode of proof	585
time of objection	586
judge determines	587
<i>marital relationship as a dis-</i>	
qualification	600-620
history	600
policy; statutes	601, 602
general principles	603, 604
mistress, bigamous marriage . .	605
for whom is the spouse dis-	
qualified	606-610
exceptions based on neces-	
sity	612
exceptions based on statutes .	613-617
statutory abolition	619, 620
<i>knowledge as a qualification . . .</i>	<i>650-721</i>
knowledge as requiring ob-	
servation	650
distinction between experi-	
ence and knowledge . . .	558, 651
knowledge of a class of	
things	653
burden of proof of knowl-	
edge	654
witness specifying grounds	
of knowledge	655
personal observation required .	656
knowledge amounting to a	
belief or impression . . .	658
knowledge based on insuf-	
ficient data	659
identity, age, etc.	660
state of mind	661
scientific improbabilities . . .	662
speculative injuries	663
that a thing would have	
been observed	664
scientific instruments or tables .	665
subordinates' records or scien-	
tific books	665
one's own age	667
another person's name	667
interpreted conversations . . .	668
telephone conversations	669
hypothetical questions	672-684
party's admissions	1053
medical matters (sanity, dis-	
ease, etc.)	687-690
foreign law	690
reputation	691, 692
handwriting	693-709
by seeing the act of writing	694-698

Witness (continued).	Section
by seeing genuine docu-	
ments	699-708
by expert comparison	709
value	711-721
general principles	711-713
land	714
services	715
personalty	716
sundry rules	717-721
dying declarant	1445
keeper of books of ac-	
count	1530, 1555
officer making public docu-	
ment	163
notary	1635
<i>recollection; see RECOLLEC-</i>	
<i>TION.</i>	
II. Examination	
mode of interrogation in	
general	768-788
leading questions	769-779
misleading questions	780
annoying questions	781
repetition of questions . . .	782
multiple examiners	783
length of examination	783
judge's questions	784
narration without questions .	785
non-responsive answers . . .	785
improper suggestions	786
prepared deposition	787
answering by reference . . .	788
prior conference with at-	
torney	788
non-verbal testimony	789-797
gesture, etc.	789
models, maps, diagrams . . .	791
photographs	792-797
written testimony	
sundry modes	799-801
depositions	802-806
see also DEPOSITIONS.	
absent witness' testimony . . .	807
see also JUDICIAL ADMIS-	
SIONS.	
interpreted testimony	811, 812
aliens, deaf-mutes, per-	
sons ill or inaudible, in-	
terpreters, translations . .	811
confessions; see CONFESSIONS.	
testimony under duress . . .	815
<i>direct examination; see Ex-</i>	
<i>AMINATION, III.</i>	
<i>cross-examination, in general;</i>	
<i>see CROSS-EXAMINATION.</i>	

INDEX OF TOPICS.

Witness (continued).	Section
of one's own witness; see IMPEACHMENT.	
to show bias or corruption; see IMPEACHMENT.	
to contents of a document; see ORIGINAL DOCUMENT.	
to one's own case; see EX- AMINATION, III.	
refusal to answer on; see PRIVILEGE.	
III. <i>Impeachment and Discredit</i> ; see IMPEACHMENT.	
IV. <i>Restoring Credit</i>	
general principles	1100
good character in support	1104-1110
discrediting the impeaching witness	1111
explaining away a self-con- tradiction	1044, 2115
a contradiction	1007
explaining away the bad rep- utation	1112
explaining away the miscon- duct	1116
explaining away the bias, etc.	1119
corroboration by similar con- sistent statements	1122-1144
witnesses in general	1122-1132
contradiction of	1005
party's admissions	1133
rape complainant	1134-1140
bastard's mother in travail	1141
owner of goods robbed	1142
possessor of stolen goods	1143
accused in general	1144
utterances identifying a time or place	416
supporting a contradicted witness	1007
an attesting witness	1514
V. <i>Witnesses required to be called before others</i>	
attesting witness; see ATTEST- ING WITNESS.	
magistrate's report of testimony	1326, 1349
sundry witnesses	
maker of document, sur- veyor, etc.	1339
official certificates	1345-1353
VI. <i>Separation of Witnesses</i> ; see SEPARATION OF WITNESSES.	
VII. <i>Number of Witnesses</i>	
excessive number may be re- jected	

Witness (continued).	Section
experts	1908
character witnesses	1908
other witnesses	1908
<i>required number</i>	
treason	2036
perjury	2040
sundry crimes	2044
divorce	2046
chancery bill	2047
will of personality	2048
of realty	2049
nuncupative will	2050
holographic will	2051
revocation, alteration, etc.	2051
contents of lost will	2052
usage or custom	2053
miscellaneous civil cases	2054
single witness need not be be- lieved	2034
eye-witnesses of a crime	2079
<i>corpus delicti</i>	2081
VIII. <i>Kinds of Qualified Wit- nesses excluded or required to be corroborated for special reasons</i>	
judge	1909
juror	1910
counsel or attorney	1911
referee, arbitrator, sheriff	1912
opinion witness; see OPINION RULE.	
accomplice	2056
prosecutrix in rape, bastardy, etc.	2061
parents bastardizing issue	2063
surviving claimant against de- ceased	2065
children	2066
Chinese	2066
confessions	
respondent in divorce	2067
accused	2070
<i>corpus delicti</i>	2072, 2081
marriage in fact	2082
bigamy	2085
admissions	2086
owner in larceny	2089
wills, contracts, etc.	2090
statute of frauds	2091
IX. <i>Securing Attendance and Testimony</i>	
compulsory process	
history	2190
constitutional guarantee	2191
duty to give testimony	2192

INDEX OF TOPICS.

Witness (continued).	Section	Witness (continued).	Section
production of documents . . .	2193	mitted to avoid postpone- ment	815
inspection of premises, chat- tels, body	2194	duress of, as not excluding tes- timony	815
officers having power to compel . . .	2195	to contents of a document; see ORIGINAL DOCUMENT.	
persons exempt from process . . .	2368-2372	to a copy of a document; see COPY.	
ability to suit or arrest	2195	discovery of names of wit- nesses; see DISCOVERY.	
notice and summons	2199	list of witnesses before trial . . .	1850
subpoena <i>duces tecum</i>	2200	indorsement of witnesses' names on indictment	1850
tender of expenses	2201, 2202	to execution, showing docu- ment to opponent	1861
expert's fees	2203	Women qualified as witnesses . . .	517
ability to attend	2204	exempt from attendance	2206
illness	2205	Words , interpretation of; see PAROL EVIDENCE RULE, D.	
merchants' books	2205	meaning of judicially noticed . . .	2582
sex and occupation	2206	as verbal acts; see HEARSAY RULE, III.	
officials	2206, 2371	defamatory; see DEFAMATION.	
official records	2373	Work , capacity of, as evidenced by instances	460
distance from trial	2204	see also SERVICES.	
process upon the Executive . . .	2368-2372	Workman ; see EMPLOYEE.	
X. Privileged Testimony; see PRIVILEGE.		Wound ; see CORPORAL IN- JURY; WEAPON.	
XI. Sundry Topics		Writ , proof of service of, with- out production	1249
rules for witnesses in Federal courts	6	see also JUDICIAL RECORD.	
testimonial evidence, defined . . .	25, 26, 475	Writing ; see HANDWRITING; DOCUMENT.	
accused as witness	61		
intimidation of, as evidence of guilt of party	278		
failure to produce, as evidence of a weak case	285-292		
subornation of, other attempts as evidence of intent	342		
testimony of another, as a basis; see HYPOTHETICAL QUESTION			
attesting witness; see ATTEST- ING WITNESS.			
absent witness' testimony ad-	807		
		X.	
		X-ray photograph	795

